POSTCONVICTION REMEDIES NOTE

A Biannual Review of Significant Postconviction Review Decisions

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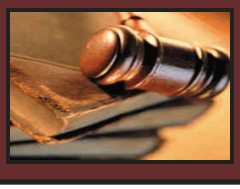

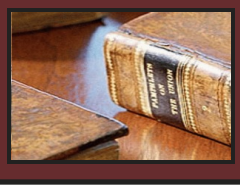


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"The safety of the people shall be the highest law." — Marcus Tullius Cicero

RECENT FEDERAL DECISIONS

JURISDICTION AND SIMILAR MATTERS

Chapter 5 of *Postconviction Remedies*
Chapter 1 of *Federal Habeas Manual*
Chapter Five of *Introduction to Habeas Corpus*

***Synopsis*: Petitioner could not, under saving clause of 28 U.S.C. § 2255 governing motions to vacate sentence, bring a 28 U.S.C. § 2241 habeas petition to challenge his enhanced sentence based on intervening change in statutory interpretation.**

Sanders v. M. Joseph, 72 F.4th 822 (7th Cir. 2023)

Petitioner, convicted of firearm offenses, exhausted his direct appeal and § 2255 collateral relief motion. Subsequently, he filed a § 2241 habeas petition challenging his sentence, relying on *Mathis v. U.S.*, 579 U.S. 500, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), a Supreme Court case decided after his initial § 2255 motion. Petitioner sought authority under *In re Davenport*, 147 F.3d 605 (7th Cir. 1998), which held that § 2255 is "inadequate or ineffective"—and § 2241 is therefore available—when the limits on successive § 2255 motions bar relief and the petitioner's claim is based on a new interpretation of a criminal statute that was previously foreclosed by circuit precedent.

POSTCONVICTION REMEDIES

(2024 ed. release July 2024)

Postconviction Remedies is an exhaustive two-volume treatise, spanning over 3,000 pages, that provides a comprehensive analysis of federal habeas corpus and § 2255 motions.

Distinguishing itself from the *Federal Habeas Manual*, this treatise offers a broader and more detailed exploration. It not only delves into the procedural aspects of federal postconviction remedies but also extensively covers commonly raised substantive claims. These include, among many others, ineffective assistance of counsel, sufficiency of evidence, instructional errors, state evidentiary rulings, suppression of evidence, substitution of counsel, prosecutorial misconduct, speedy trial rights, and judicial bias. Extensive case citations support each legal proposition discussed.

The author has been cited by the U.S. Supreme Court in cases such as *Brown v. Davenport*, 596 U.S. 118 (2022); *Wilson v. Sellers*, 584 U.S. 122 (2018); and *Davila v. Davis*, 582 U.S. 521 (2017), as well as over 600 lower federal courts.

But the Supreme Court in *Jones v. Hendrix*, 599 U.S. 465, 143 S.Ct. 1857, 216 L.Ed.2d 471 (2023), rejected *Davenport*'s interpretation of the saving clause, stating:

> Section 2255(h) specifies the two limited conditions in which Congress has permitted federal prisoners to bring second or successive collateral attacks on their sentences. The inability of a prisoner with a statutory claim to satisfy those conditions does not mean that he can bring his claim in a habeas petition under the saving clause. It means that he cannot bring it at all. Congress has chosen finality over error correction in his case.

Id. at ___, 143 S.Ct. at 1869.

The Seventh Circuit determined that, in light of *Jones*, petitioner was precluded from asserting his statutory claim in a § 2241 habeas petition. *Sanders v. M. Joseph*, 72 F.4th 822, 824-25 (7th Cir. 2023).

Further research: *Introduction to Habeas Corpus*, Chapter Five (2022 ed.); *Postconviction Remedies*, § 5:7 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 1:29 (Thomson Reuters 2023 ed.).

HECK DOCTRINE

Chapter 11 of *Postconviction Remedies*
Chapter 2 of *Federal Habeas Manual*
Chapter Four of *Introduction to Habeas Corpus*

***Synopsis*: Petitioner's 42 U.S.C. § 1983 action, in which he alleged that the director of a prison's faith-based dorm program and prison chaplain wrongfully withheld his program completion information from the parole board, was barred by *Heck*.**

Collins v. Dall. Leadership Found., 77 F.4th 327 (5th Cir. 2023)

Plaintiff, a former prisoner, filed a 42 U.S.C. § 1983 action, alleging that the director of his former state prison's faith-based dorm program conspired with a prison chaplain to retaliate against him for filing a complaint under the Prison Rape Elimination Act. He claimed they withheld his program completion information from the parole board, thus violating his due process rights. Citing *Wilkinson v. Dotson*, 544 U.S. 74, 83, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), plaintiff argued that *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), did not bar his claim because it did not challenge the result but focused on the procedures of the parole proceedings.

In *Dotson*, the Supreme Court explained that claims of alleged due process violations during

LOGIC PUZZLE

IMAGINE A ROW OF 100 CLOSED DOORS. A PERSON TAKES MULTIPLE WALKS, TOGGLING THE DOORS IN A UNIQUE PATTERN EACH TIME.

DURING THE FIRST STROLL, EVERY DOOR IS TOGGLED.

IN THE SECOND WALK, ONLY EVERY SECOND DOOR IS TOGGLED - THAT'S THE 2ND, 4TH, 6TH, AND SO ON.

THE PATTERN CONTINUES, WITH EACH SUBSEQUENT WALK TOGGLING DOORS BASED ON FACTORS LIKE THE WALK NUMBER. FOR INSTANCE, DURING THE THIRD WALK, THE PERSON TOGGLES EVERY THIRD DOOR (3RD, 6TH, 9TH, AND SO FORTH).

NOW, FAST FORWARD TO THE 100TH WALK, WHERE THE PERSON SPECIFICALLY TOGGLES ONLY THE 100TH DOOR.

HERE'S THE CHALLENGE: WHICH DOORS ARE LEFT OPEN AT THE END OF THIS PECULIAR PROCESSION?

ANSWER ON PAGE 12.

parole proceedings were not barred under the rule laid out in *Heck* because an attack on the constitutionality of the parole proceeding's procedures would not "necessarily have meant immediate release or a shorter period of incarceration; the prisoners attacked only the wrong procedures, not the wrong result." *Dotson*, 544 U.S. at 78-80, 125 S.Ct. 1242 (alteration adopted) (internal quotation marks and citation omitted).

However, the Fifth Circuit disagreed, determining that plaintiff was not contesting the parole procedures; instead, he asserted that the parole board's decision was flawed due to the consideration of inaccurate parole documents, allegedly introduced by the director and prison chaplain. The essence of plaintiff's claim was that, but for the paperwork error, he would have been released, seeking damages for his continued confinement. This claim, challenging a "wrong result," was explicitly prohibited by *Dotson*. Plaintiff sought money damages based on his non-release after the 2021 parole hearing, implying the invalidity of his post-hearing confinement, and thus, *Heck* barred the claim. *Collins v. Dall. Leadership Found.*, 77 F.4th 327, 330-31 (5th Cir. 2023).

Further research: *Introduction to Habeas Corpus*, Chapter Four (2022 ed.); *Postconviction Remedies*, § 11:14 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 2:17 (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*: A state prisoner cannot circumvent the limitations of 28 U.S.C. § 2254(d) by introducing new evidence that significantly transforms an already adjudicated claim in state court proceedings; in any event, petitioner's inclusion of a new participation aspect in the ineffective assistance claim did not fundamentally alter the ineffective assistance claim previously litigated in state proceedings.**

Collins v. Dall. Leadership Found., 77 F.4th 327 (5th Cir. 2023)

The limitations under § 2254(d) for federal habeas review apply to claims "adjudicated on the merits in State court proceedings," defined as "an asserted federal basis for relief from a state court's judgment of conviction" *Gonzalez v. Crosby*, 545 U.S. 524, 530, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005).

When the support for a petitioner's federal claim evolves across state and federal proceedings, determining the applicability of § 2254(d)'s relitigation bar becomes challenging. *Nelson v. Lumpkin*, 72 F.4th 649, 658 (5th Cir. 2023). A court must consider whether the evolved claim presented in federal court is in fact a new claim altogether, and thus excluded from § 2254(d)'s relitigation bar, or simply the old one already adjudicated in state court, in which case § 2254(d)'s relitigation bar does apply. The Supreme Court has not established a clear delineation between new claims and those adjudicated on the merits, leaving this issue unresolved. *Cullen v. Pinholster*, 563 U.S. 170, 186 n.10, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

Relying principally on *Lewis v. Thaler*, 701 F.3d 783 (5th Cir. 2012), petitioner argued that when a claim raised in a federal habeas petition fundamentally alters a claim raised in the state habeas petition—such as by presenting new, material factual allegations that place the claim in a significantly different legal posture—it is not "adjudicated on the merits in State court proceedings" and is therefore not subject to § 2254 (d)'s restrictions. But the Fifth Circuit disagreed, clarifying that *Lewis* addressed the admissibility of expert mitigation evidence in federal proceedings,

and *Pinholster* rejected the notion that a federal court can consider evidence for the first time on habeas review unless it merely supports an adjudicated claim:

> [The State] asserts that some of the evidence adduced in the federal evidentiary hearing fundamentally changed Pinholster's claim so as to render it effectively unadjudicated. Pinholster disagrees and argues that the evidence adduced in the evidentiary hearing simply supports his alleged claim.
>
> We need not resolve this dispute because, even accepting Pinholster's position, he is not entitled to federal habeas relief. Pinholster has failed to show that the California Supreme Court unreasonably applied clearly established federal law on the record before that court, which brings our analysis to an end. Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, we are precluded from considering it.

Pinholster, 563 U.S. at 188 n.11 (internal citations omitted).

The *Pinholster* Court explained that the exhaustion requirement of § 2254(b) is a reinforcement of, rather than an escape hatch from, the rule that a federal habeas court's review is limited to the state court record:

> Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*.

Pinholster, 563 U.S. at 182.

While the Supreme Court acknowledged that state prisoners may sometimes submit new evidence in federal court, "it also tacitly counseled against circumventing the requirements of § 2254 (d) and (e) in order to bring in the new evidence." *Lewis*, 701 F.3d at 791. Thus, petitioner was wrong in arguing that a state prisoner "could avoid § 2254 (d)'s limitations by presenting new evidence that fundamentally altered a claim already adjudicated in state court proceedings." *Nelson*, 72 F.4th at 658.

In any event, the Fifth Circuit determined that the new participation aspect of the ineffective assistance claim did not fundamentally alter petitioner's litigated claim in state proceedings. Petitioner asserted a single ineffective assistance of counsel claim related to trial counsel's sentencing performance in both state and federal habeas proceedings. The sole distinction between the claim adjudicated in state court and the federal presentation was petitioner's identification of additional instances of trial counsel's alleged deficient performance at sentencing in the federal claim. The court concluded that this difference was insufficient to fundamentally alter the ineffective assistance claim, emphasizing that a state prisoner cannot aggregate instances of ineffective assistance to satisfy *Strickland* requirements and then disaggregate them to create new, unadjudicated claims to circumvent § 2254(d)'s limitations. *Nelson*, 72 F.4th at 659-60.

Petitioner resisted this conclusion in asserting that it would yield absurd outcomes, suggesting that, under the same reasoning, a *Brady* claim alleging the prosecution's suppression of exculpatory forensic evidence would be deemed "adjudicated on the merits" if the prisoner initially raised a *Brady* claim concerning suppressed favorable eyewitness testimony in state court. However, the court rejected this argument, stating

that petitioner "confounds the distinct natures of *Strickland* and *Brady* claims." *Nelson*, 72 F.4th at 660.

The court clarified that a *Brady* claim is specific to particular suppressed material evidence, while a *Strickland* claim pertains to a specific stage of a proceeding. Thus, the court maintained that its analysis did not yield absurd results but instead aligned with the requirements of § 2254(d). *Id.* (citations omitted).

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, §§ 23:16, 29:43 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 3:64, 9C:33 (Thomson Reuters 2023 ed.).

***Synopsis*: State court reasonably determined that prisoner's constitutional rights to confront witnesses, to due process, and to impartial jury were not violated by jury's experiment during deliberations, in which jurors used a knife, which had been admitted into evidence, to unscrew the screws on a jury-room cabinet.**

Fields v. Jordan, 86 F.4th 218 (6th Cir. 2023) (en banc)

Petitioner, charged with capital murder, contested the jury's experiment during deliberations, involving a knife submitted as evidence. The experiment aimed to assess the feasibility of the prosecution's theory about petitioner using a knife to remove a storm window. Despite petitioner's argument that this experiment compromised his right to an impartial jury verdict, the state court dismissed the claim, upholding the conviction and death sentence. Subsequently, petitioner pursued federal habeas relief.

In an en banc ruling, the Sixth Circuit rejected petitioner's claims, emphasizing the Supreme Court's lack of precedent on the admissibility of juror experiments during deliberations, especially in instances deemed unconstitutional. Petitioner alternatively contended that the experiment breached his Sixth Amendment right to confrontation, his Sixth Amendment right to a jury trial, or his Fourteenth Amendment right to due process, highlighting the ambiguity resulting from the absence of precedent on jury experiments. The dearth of guidance on this matter created uncertainty about how the Supreme Court would distinguish between permissible and impermissible experiments under these constitutional guarantees. *Fields v. Jordan*, 86 F.4th 218, 230-31 (6th Cir. 2023) (en banc), *overruling Fields v. Jordan*, 54 F.4th 871 (6th Cir. 2022).

In support of his Confrontation Clause argument, petitioner invoked *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) (per curiam), a decision involving a bailiff's out-of-court statements. In *Parker*, the bailiff privately conveyed to jurors that the defendant was guilty and that the appellate court would fix any errors in a guilty verdict. The Supreme Court deemed these statements a violation of the Confrontation Clause, treating the bailiff as a "witness" making testimonial statements beyond the defendant's confrontation. *Id.* at 363-65, 87 S.Ct. 468. However, petitioner failed to demonstrate how *Parker* was applicable to the jury experiment in his case, especially how it "clearly" controlled. Unlike *Parker*, petitioner's claim did not involve out-of-court statements by "witnesses"; instead, he asserted that the jury utilized unadmitted tangible objects (a cabinet and screws) to test the knife. The Sixth Circuit noted that no Supreme Court decision has suggested the application of the Confrontation Clause to physical evidence, with many lower courts holding that the clause does not extend to such nontestimonial evidence. *Fields*, 86 F.4th at 233.

The Sixth Circuit then examined Supreme Court precedent regarding the Sixth Amendment right to a "trial by an impartial jury." Petitioner relied on two decisions, *Irvin v. Dowd*, 366 U.S. 717,

721-28, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Turner v. Louisiana*, 379 U.S. 466, 471-74, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), which affirmed that the general jury-trial right includes a specific protection against juror bias. *Irvin* involved a defendant facing extensive media coverage, making it impossible to find unbiased jurors, while *Turner* dealt with a case where the prosecution heavily relied on the testimony of two deputy sheriffs, leading to an intimate association with jurors and potential bias.

However, the Sixth Circuit concluded once again that petitioner failed to sufficiently demonstrate why these precedents, addressing the Sixth Amendment right against jury bias, "clearly" applied to the jury experiment in his specific case. Notably, petitioner did not argue that his jurors were biased against him, nor did he claim they had formed an opinion about his guilt before trial, as in *Irvin*. Additionally, he did not assert an "intimate association" with prosecution witnesses, as in *Turner*. The court remarked, "Indeed, we fail to see how [petitioner's] jury-experiment claim even implicates the specific jury-trial requirement that *Irvin* and *Turner* enforced: the requirement of an 'impartial' jury." *Fields*, 86 F.4th at 234.

Finally, the Sixth Circuit examined the Supreme Court's precedent on the Due Process Clause, which prohibits a state from depriving defendants of life or liberty without due process of law. The court acknowledged the limited operation of this general text in criminal contexts due to the Bill of Rights' express guarantees, citing *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). The court emphasized that, for due process to apply, the alleged practices must "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 445, 112 S.Ct. 2572.

Nonetheless, the Sixth Circuit, in its third ruling, maintained that petitioner failed to demonstrate a clear application of any due-process decisions to the jury experiment in his case. "He identifies no specific due-process precedent on jury experiments. And the Court's generic due-process test (which examines our country's 'fundamental' 'principles') lacks the required specificity to 'supply a ground for relief' under AEDPA." *Fields*, 86 F.4th at 235 (quoting *Brown v. Davenport*, 596 U.S. 118, 136, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022)).

Despite petitioner's contention that *Irvin*, *Turner*, and *Parker* clearly established a constitutional right for the jury to determine guilt or innocence based solely on trial evidence, the Sixth Circuit, for the third time, ruled that petitioner failed to demonstrate a clear application of these due-process decisions to the jury experiment in his case. The court pointed out that petitioner wrongly treated a "general proposition" as clearly established law and framed relevant cases at a high level of generality, overlooking their specific holdings. The court concluded, "None of these cases addresses, 'even remotely, the specific question presented by this case.' " *Fields*, 86 F.4th at 235 (quoting *Lopez v. Smith*, 574 U.S. 1, 6, 135 S.Ct. 1, 190 L.Ed.2d 1 (2014) (per curiam)).

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, § 29:37 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:41 (Thomson Reuters 2023 ed.).

***Synopsis*: District court did not abuse its discretion in denying petitioner's motion for an evidentiary hearing, despite the state habeas court having rejected his request for discovery on the claim.**

Sandoval v. Mendoza, 81 F.4th 461 (5th Cir. 2023)

Petitioner contended that the district court erred in denying his motion for an evidentiary hearing, asserting that the state court's denial of discovery deprived him of due process, rendering his claims

unadjudicated on the merits. Relying on Fourth Circuit precedent, petitioner argued that a state court's refusal to allow further development of the factual record precludes deference under § 2254(d), as judgment on an incomplete record is not an adjudication on the merits. *See Winston v. Kelly,* 592 F.3d 535, 555-56 (4th Cir. 2010).

However, the Fifth Circuit disagreed with the Fourth Circuit's perspective, maintaining that a full and fair hearing is not a prerequisite for applying § 2254(e)(1)'s presumption of correctness or § 2254 (d)'s standards of review. *Sandoval v. Mendoza*, 81 F.4th 461, 472 (5th Cir. 2023) (citing *Boyer v. Vannoy*, 863 F.3d 428, 446 (5th Cir. 2017), and *Valdez v. Cockrell*, 274 F.3d 941, 951 (5th Cir. 2001)). Despite the absence of evidence relevant to petitioner's claims in the record, due to the state court's denial of discovery, the state court's rejection was based on the merits, not procedural grounds. The denial, though lacking the benefit of additional material evidence, amounted to an adjudication on the merits.

The Fifth Circuit referenced a prior ruling, *Broadnax v. Lumpkin*, 987 F.3d 400, 409 (5th Cir. 2021), which highlighted that even when a petitioner's habeas counsel raised an issue in state court ineffectively, the petitioner was precluded from introducing new evidence in federal court due to *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), as the original claim had been fully adjudicated on the merits in state court. Consequently, as petitioner's claims were adjudicated on the merits in state court, the district court's denial of an evidentiary hearing was within its discretion and not an abuse thereof.

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, §§ 22:23, 28:5, 29:43 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 3:20, 3:94 (Thomson Reuters 2023 ed.).

***Synopsis*: State did not waive its argument that the state court's determination characterizing defense counsel's omission of exculpatory evidence in the first-degree murder trial as "strategy" constituted a factual finding, despite not raising this argument until its motion to stay pending appeal.**

Neal v. Vannoy, 78 F.4th 775 (5th Cir. 2023)

The district court granted petitioner relief on his claim of being denied effective assistance of counsel. The district court analyzed the claim under § 2254(d)(1). The state contended that the district court erred by disregarding the state postconviction court's factual determination that trial counsel acted strategically, asserting that the state court record lacked clear and convincing evidence to overcome the statutory presumption of correctness under § 2254(e)(1). Petitioner argued that the state had waived this argument, as it was first raised in its motion to stay pending appeal.

The parties disputed the applicability of *Brumfield v. Cain*, 576 U.S. 305, 135 S.Ct. 2269, 192 L.Ed.2d 356 (2015). The court in *Brumfield* held that the state had waived the issue of review under § 2254(e)(1) because it was not raised in the state's opposition to certiorari and first appeared in the state's merits brief after certiorari had been granted. *Id.* at 322-23, 135 S.Ct. 2269. Petitioner contended that the state similarly waived its argument by not raising it in the district court.

However, the Fifth Circuit sided with the state, asserting that the relitigation bar of § 2254(e)(1) could not be waived. The court's precedent in *Langley v. Prince*, 926 F.3d 145, 162 (5th Cir. 2019) (en banc), supported this conclusion, emphasizing that the § 2254(d) relitigation bar cannot be waived. Additionally, the court clarified that under AEDPA, a party cannot waive, concede, or abandon the applicable standard of review. *Neal v. Vannoy*, 78 F.4th 775, 785 (5th Cir. 2023) (citing *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir.

2015), *abrogated on other grounds by Ayestas v. Davis*, 584 U.S. ___, 138 S. Ct. 1080, 200 L.Ed.2d 376 (2018)). "As a prominent treatise explains, '[i]t is generally understood that the deferential review standards under § 2254(d) and (e)(1) may not be waived by the government.'" *Neal*, 78 F.4th at 785 (quoting Brian R. Means, *Federal Habeas Manual* § 3:97 (2022)). Therefore, the state had not waived its argument that "strategy" is a factual finding subject to § 2254(d)(2) and (e)(1).

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, § 29:52 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:97 (Thomson Reuters 2023 ed.).

***Synopsis*: Determination that the trial court's utilization of an uncounseled misdemeanor, which led to a sentence of time served, to enhance petitioner's sentence did not infringe upon his right to counsel was consistent with established precedent and did not violate clearly established law.**

Gaona v. Brown, 68 F.4th 1043 (6th Cir. 2023)

Petitioner contended that the state court improperly enhanced his sentence based on a prior uncounseled state misdemeanor conviction, arguing that it was unconstitutional under the Sixth Amendment. Although no Supreme Court case directly addressed the issue, petitioner asserted that the state court's decision unreasonably applied the general standard from Supreme Court precedent, requiring counsel if a prisoner is sentenced to imprisonment.

The Sixth Circuit stated that "[i]n order to determine whether Petitioner is correct that the state court unreasonably applied a general principle emanating from Supreme Court decisions in this area, we must determine what the relevant general principle is." *Gaona v. Brown*, 68 F.4th 1043, 1047 (6th Cir. 2023). The court began by reviewing the major decisions that petitioner cited in order to more clearly define the contours of the principle he claims the state court misapplied. First, in *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), the Court held that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." In *Scott v. Illinois*, 440 U.S. 367, 374, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), the Court confirmed *Argersinger*'s holding that "no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Next, in *Nichols v. U.S.*, 511 U.S. 738, 749, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), the Court held that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." Finally, in *Alabama v. Shelton*, 535 U.S. 654, 674, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002), the Court held that a suspended sentence constitutes actual imprisonment, such that one may not be imposed unless the defendant was accorded counsel.

The Sixth Circuit observed that the general principle to be gleaned from these cases appeared to be that an uncounseled conviction invalid under *Argersinger/Scott* may not be used to enhance a sentence for a subsequent offense. "In turn, an uncounseled conviction is invalid under *Argersinger/Scott* when it results in 'actual imprisonment.'" *Gaona*, 68 F.4th at 1048. And *Shelton* provides that a suspended sentence constitutes "actual imprisonment," even though the defendant receiving such a sentence may never serve time in prison.

Petitioner contended, essentially, that his time-served sentence unequivocally fell within the definition of "actual imprisonment," making the uncounseled conviction unconstitutional under *Argersinger/Scott* and the reliance on it for sentence

enhancement unconstitutional under *Nichols*. The Sixth Circuit, however, determined that the standards outlined in *Argersinger*, *Scott*, and *Nichols* were too broad to deem the state court's application unreasonable.

Initially, the Supreme Court did not provide a specific definition for the term "actual imprisonment" in the cases referenced by petitioner. While the Sixth Circuit acknowledged the apparent logic in considering a time-served sentence as "actual imprisonment" due to the recipient spending real time in prison, the court also identified language in the key cases that countered this interpretation. As stated in *Gaona*, 68 F.4th at 1049, statements in these cases implied that the Court's concern lay with imprisonment or deprivation of liberty resulting from the uncounseled conviction. "At several points, statements in the cases imply that the Court is concerned with imprisonment or deprivation of liberty imposed as a *result* of the uncounseled *conviction*." *Gaona*, 68 F.4th at 1049.

Furthermore, petitioner argued that a time-served sentence raised the same concerns outlined in *Argersinger*. However, the court determined that the concerns associated with a time-served sentence were not unmistakably identical to those of a regular prison sentence. Consequently, it was not deemed unreasonable for the state court to conclude that *Argersinger/Scott/Nichols* did not apply directly to petitioner's case. *Gaona*, 68 F.4th at 1050. The court also rejected petitioner's comparison to suspended sentences, asserting that "suspended sentences are more different from time -served sentences than they are similar." *Id.*

Second, the issue of whether a time-served sentence qualifies as actual imprisonment, thereby requiring the presence of counsel, has led to a divergence of opinions among the limited number of courts that have considered it. While decisions from lower courts may not set a definitive precedent within the AEDPA context, the absence of consensus among these courts indicates that the state court's application of the *Argersinger/Scott/Nichols* principle was not unreasonable. *Gaona*, 68 F.4th at 1051.

Finally, petitioner made the policy argument that he should have been entitled to the assistance of counsel. The court determined that this argument was more suitable for direct appeal, where the court would not be bound by AEDPA's clearly established standard. "Here, in this context, it simply has no relevance." *Gaona*, 68 F.4th at 1052 (citing *Hawkins v. Alabama*, 318 F.3d 1302, 1308 (11th Cir. 2003) ("While this policy argument might seem to have some debatable force, we can readily say that its conclusion is not compelled by [the relevant Supreme Court precedent].")).

In summary, the term "actual imprisonment" lacks a defined interpretation in current Supreme Court case law. Determining whether a time-served sentence qualifies as actual imprisonment would not be an application of an established general principle but rather an extension of one. *Gaona*, 68 F.4th at 1052-53. "This, the Supreme Court has made clear, is not proper in the AEDPA context." *Id.* at 1053.

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, §§ 29:41, 29:50 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 3:38, 3:41 (Thomson Reuters 2023 ed.).

***Synopsis*: State reviewing court's determination that trial court's decision to permit petitioner to be shackled during his testimony did not violate his constitutional right to present a complete defense was reasonable.**

Shirley v. Tegels, 61 F.4th 542 (7th Cir. 2023)

During the trial, petitioner was confined to a wheelchair with his legs shackled, and measures

were taken to ensure that the jury did not observe the restraints. Petitioner contended on direct appeal that the shackling impeded his right to actively engage in his defense by restricting his ability to leave the witness stand for purposes such as pointing out exhibits or providing demonstrations. However, relief on this issue was denied by the state court on the merits.

Petitioner reiterated this claim during federal habeas review but did not find success. The Seventh Circuit asserted that there was no clear Supreme Court precedent directly addressing whether placing a criminal defendant in concealed physical restraints unconstitutionally hinders the defendant's ability to present a complete defense at trial. The cases cited by petitioner did not establish guidelines for when, how, or whether shackling interferes with a defendant's capacity to present a comprehensive defense. Specifically, these cases focused on the exclusion of evidence and did not delve into the interaction between physical restraints and a defendant's participation in their own defense. *Shirley v. Tegels*, 61 F.4th 542, 546 (7th Cir. 2023).

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, § 29:50 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:41 (Thomson Reuters 2023 ed.).

***Synopsis*: Determination that petitioner was not deprived of effective assistance due to counsel's failure to contest the sufficiency of evidence was not in conflict with the principles outlined in *Strickland*.**

Sumpter v. Kansas, 61 F.4th 729 (10th Cir. 2023)

Petitioner contended in state court that his attorney provided ineffective assistance by failing to challenge the sufficiency of the evidence leading to his conviction. The state court denied the claim on the merits in a reasoned decision.

Upon seeking federal habeas relief, petitioner argued that the state court's decision did not merit deference under AEDPA because it was "contrary to" the *Strickland* standard. Specifically, he asserted that the state court improperly applied a sufficiency of evidence standard instead of *Strickland*'s reasonable probability standard for prejudice. Petitioner cited a passage from the state court's decision, stating, "Because the trial evidence was sufficient for the jury's verdict, [petitioner] could have suffered no prejudice from his lawyer's handling of the charge and conviction." The district court agreed and proceeded to review the sufficiency of evidence claim de novo without AEDPA deference.

The Tenth Circuit reversed, emphasizing that the state court, from the outset of its opinion, unambiguously identified *Strickland* as the controlling authority and correctly applied its framework, specifically the *Strickland* prejudice standard. The court further noted that the state court accurately identified and detailed the *Strickland* standard, articulated petitioner's burden, and ultimately concluded that petitioner "cannot point to actual legal prejudice consistent with the *Strickland* test flowing from the consolidated trial as compared to separate trials." *Sumpter v. Kansas*, 61 F.4th 729, 743-44 (10th Cir. 2023).

The Tenth Circuit determined that when considering the state court's analysis and the ultimate outcome, it was evident that the court comprehended and adjudicated the issue of ineffective assistance in accordance with the correct *Strickland* framework. *Sumpter*, 61 F.4th at 743-44.

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, § 29:37 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:51 (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*: In a matter of first impression, petitioner's motion for postconviction DNA testing was deemed to be an "application for State post-conviction or other collateral review," meeting the requirement to toll the one-year limitations period governing a federal habeas petition.**

Kares v. Morrison, 77 F.4th 411 (6th Cir. 2023)

While considered dicta, the Supreme Court in *Wall v. Kholi*, 562 U.S. 545, 556 n.4, 131 S.Ct. 1278, 179 L.Ed.2d 252 (2011), expressed skepticism about classifying motions for postconviction discovery as a form of collateral review: "A motion to reduce sentence is unlike a motion for postconviction discovery or a motion for appointment of counsel, which generally are not direct requests for judicial review of a judgment and do not provide a state court with authority to order relief from a judgment."

Most circuits that have addressed this matter have concluded that postconviction motions for discovery or DNA testing do not constitute forms of collateral or postconviction review. *See Woodward v. Cline*, 693 F.3d 1289, 1293 (10th Cir. 2012) (motion under Kansas statute permitting biological testing not an application for collateral review that tolls AEDPA's statute of limitations); *Brown v. Sec'y for Dept. of Corr.*, 530 F.3d 1335, 1338 (11th Cir. 2008) (Florida rule permitting postconviction DNA testing did not toll AEDPA's limitations period because it did not provide a review mechanism); *Price v. Pierce*, 617 F.3d 947, 952-53 (7th Cir. 2010) (Illinois statute permitting postconviction forensic testing not a collateral review mechanism and, therefore, did not toll AEDPA's limitations period); *Ramirez v. Yates*, 571 F.3d 993, 999-1000 (9th Cir. 2009) (postconviction discovery motions did not toll AEDPA limitations period because they did not challenge conviction); *Hodge v. Greiner*, 269 F.3d 104, 107 (2d Cir. 2001) (postconviction motion for discovery under New York law did not challenge conviction and therefore did not toll AEDPA's limitations period). The Fifth Circuit, applying Texas law, stands as the lone exception, determining that a motion for postconviction DNA testing qualifies as a collateral review motion. *See Hutson v. Quarterman*, 508 F.3d 236, 237 (5th Cir. 2007).

The Sixth Circuit reasoned that the statute in the Fifth Circuit case was the most analogous to the Michigan statute. In contrast to statutes in other circuits, Texas' statute outlines procedures for reviewing the underlying judgment upon receiving postconviction DNA testing results. Similarly, the Michigan statute mandates a hearing when DNA testing indicates that the defendant is not the source of the identified biological material. Thus, the Sixth Circuit held that a DNA petition, appropriately submitted under Michigan law, is a motion for collateral or other postconviction review for purposes of AEDPA's statute of limitations. *Kares v. Morrison*, 77 F.4th 411, 419-21 (6th Cir. 2023).

As the Supreme Court noted in *Wall*, "'collateral review' of a judgment or claim means a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process." 562 U.S. at 553, 131 S.Ct. 1278. The Michigan statute necessitates a reexamination of the underlying judgment, requiring the reviewing court, upon receiving test results, to assess various factors, including the source of biological material and the handling of evidence. In light of these findings, the Sixth Circuit concluded that a DNA petition, properly submitted under Michigan law, qualifies as a motion for collateral or other postconviction review for purposes of AEDPA's statute of limitations. *Kares*, 77 F.4th at 421-22.

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, § 29:37 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 9A:74 (Thomson Reuters 2023 ed.).

***Synopsis*: Petitioner's reliance on counsel's erroneous advice did not qualify as extraordinary circumstance that warranted equitable tolling of the AEDPA limitations period.**

Connor v. Reagle, 82 F.4th 542 (7th Cir. 2023)

Petitioner followed the advice of his postconviction counsel, who recommended delaying the filing of his federal habeas petition until the United States Supreme Court ruled on the certiorari petition filed by counsel at the end of state postconviction proceedings. Counsel told petitioner that the certiorari petition would pause the AEDPA clock on his time to seek habeas relief. However, contrary to this advice, the one-year period for filing the habeas petition continued to run during the pendency of the certiorari petition. Petitioner, relying on this inaccurate guidance, suffered adverse consequences. He contended that the counsel's erroneous advice on the deadline for his federal habeas petition warranted equitable tolling of the one-year deadline.

The Seventh Circuit, however, rejected petitioner's argument. The court held that petitioner bore responsibility for the actions and oversights of his counsel, including any mistakes made. The court characterized counsel's errors as "garden variety" attorney negligence and deemed it insufficient to justify equitable tolling. *Connor v. Reagle*, 82 F.4th 542, 552 (7th Cir. 2023).

The court was unpersuaded by petitioner's argument that the *Martinez-Trevino* framework for procedural default applied here. *See Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *Trevino v. Thaler*, 569 U.S. 413, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). Those cases recognized a limited exception to procedural default for a substantial claim of trial-counsel ineffectiveness which, as a matter of state law, could be raised no sooner than a postconviction proceeding but was not raised in such a proceeding owing to the ineffectiveness of a petitioner's postconviction counsel. Petitioner argued that he had a meritorious claim that his trial attorneys were ineffective for failing to raise a constitutional speedy trial claim which, absent a modification of the equitable tolling doctrine akin to the procedural default exception recognized in *Martinez* and *Trevino*, could

Solution to logic puzzle from page 2.

A door is toggled in an ith walk if i divide door number. For example, door number 45 is toggled in the 1st, 3rd, 5th, 9th,15th, and 45th walks.

The door is switched back to an initial stage for every pair of divisors. For example, 45 is toggled 6 times for 3 pairs (5, 9), (15, 3), and (1, 45).

It looks like all doors would become closed at the end. But there are door numbers that would open, for example, in 16, the divisors are (1,2,4,8,16) and as the pair(4,4) contributes only one divisor making the number of divisors odd, it would become open at the end. Similarly, all other perfect squares like 4, 9,…, and 100 would become open. Now, for prime numbers like 2,3,5,7… the divisors are (1, that number) and it is a pair, so they will remain closed at the end. And for all other numbers divisors are always in pairs, e.g. 15 = (1,15),(3,5), they will also remain closed.

So the answer is 1, 4, 9, 16, 25, 36, 49, 64, 81 and 100.

not be heard by a federal court due to postconviction counsel's negligent advice about the habeas deadline.

The court, however, held that it had previously ruled out invocation of the *Martinez-Trevino* framework in the equitable tolling context in *Lombardo v. U.S.*, 860 F.3d 547, 561 (7th Cir. 2017). In *Lombardo*, the petitioner, who was seeking relief under 28 U.S.C. § 2255, argued that his federal convictions and life sentence were the product of his trial counsel's ineffectiveness. The attorney representing him in the § 2255 proceeding had miscalculated the deadline for the § 2255 motion and had filed it late. The court concluded that counsel's negligence did not constitute an extraordinary circumstance justifying equitable tolling of the filing deadline. 860 F.3d at 552-55. Looking to the *Martinez-Trevino* framework, the petitioner in *Lombardo*, like petitioner here, urged the court to create a special exception to the statute of limitations for trial-counsel ineffectiveness claims that would recognize § 2255 counsel's ineffectiveness as an extraordinary circumstance supporting equitable tolling.

The *Lombardo* court rejected the petitioner's invitation to do so, reasoning that it would be contrary to the Supreme Court's decisions in *Holland v. Florida*, 560 U.S. 631, 648-49, 130 S.Ct. 2549, 2562, 177 L.Ed.2d 130 (2010), and *Lawrence v. Florida*, 549 U.S. 327, 332, 127 S.Ct. 1079, 1083, 166 L.Ed.2d 924 (2007), both of which made clear that simple negligence in calculating a filing deadline is not an extraordinary circumstance warranting tolling. *Lombardo*, 860 F.3d at 557-58. The court in *Lombardo* added that "importing *Martinez*'s framework into the equitable tolling context would greatly erode the statute of limitations," in that it would potentially enable both represented and unrepresented petitioners whose trial-counsel ineffectiveness claims had sufficient merit, and who had otherwise exercised reasonable diligence in pursuing those claims, to characterize mistakes with respect to the statute of limitations as "extraordinary." *Lombardo*, 860 F.3d at 559-60.

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, § 25:39 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 9A:90 (Thomson Reuters 2023 ed.).

***Synopsis*: As a matter of first impression, within the context of a gateway claim asserting actual innocence, a federal habeas court must presume the correctness of the state court's factual findings.**

Cosey v. Lillry, 62 F.4th 74 (2d Cir. 2023)

Petitioner entered a guilty plea for second-degree murder and conspiracy. During sentencing, petitioner unsuccessfully attempted to withdraw the plea. Subsequently, petitioner filed an admittedly untimely petition, contending that his claims fell outside the one-year statute of limitations imposed by AEDPA, 28 U.S.C. § 2244(d)(1). He argued that he qualified for the actual innocence exception.

Under *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), petitioners claiming actual innocence face a time limit, unless new evidence establishes that "it is more likely than not that no reasonable juror would have convicted" them. *McQuiggin v. Perkins*, 569 U.S. 383, 395, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013) (citing *Schlup*, 513 U.S. at 329, 115 S.Ct. 851). The actual innocence exception, allowing pursuit of constitutional claims despite a procedural bar, is applicable upon a "credible showing of actual innocence." *McQuiggin*, 569 U.S. at 392, 133 S.Ct. 1924. However, the actual innocence claim, also referred to as a *Schlup* claim, does not constitute a constitutional claim itself. Instead, it functions as a gateway through which a habeas petitioner must pass to present an otherwise time-barred constitutional claim for consideration on its merits.

As a matter of first impression, the Second Circuit held:

> [I]n the context of a gateway claim of actual innocence under *Schlup*, a federal habeas court must presume that a state court's factual findings are correct, rebuttable only upon a showing of clear and convincing evidence of error. We also join the Fourth Circuit in holding that where, as here, "the state court conducted an evidentiary hearing and explained its reasoning with some care, it should be particularly difficult to establish clear and convincing evidence of error on the state court's part. This is especially so when the court resolved issues like witness credibility, which are factual determinations for purposes of Section 2254(e)(1)."

Cosey v. Lillry, 62 F.4th 74, 82-83 (2d Cir. 2023) (quoting *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010)); *accord Goldblum v. Klem*, 510 F.3d 204, 221 n.13 (3d Cir. 2007); *Reed v. Stephens*, 739 F.3d 753, 772 n.8 (5th Cir. 2014); *Storey v. Roper*, 603 F.3d 507, 524 (8th Cir. 2010); *Fontenot v. Crow*, 4 F.4th 982, 1018, 1034-35 (10th Cir. 2021).

Judge Park authored a concurring opinion emphasizing that a freestanding actual innocence claim is precluded from being entertained in a second or successive habeas petition. *Cosey*, 62 F.4th at 87 (Park, J., concurring). "Such a petition requires not only clear and convincing evidence of actual innocence, but also another constitutional violation." *Id.*. Judge Park observed that "[e]very court of appeals to have considered this question has held that if freestanding innocence claims exist at all, they cannot be brought in cases governed by section 2244(b)(2)." *Id.* at 88 (citing *Case v. Hatch*, 731 F.3d 1015, 1036-37 (10th Cir. 2013); *In re Davis*, 565 F.3d 810, 823-23 (11th Cir. 2009); *Gimenez v. Ochoa*, 821 F.3d 1136, 1143 (9th Cir. 2016)).

Further research: *Introduction to Habeas Corpus*, Chapter Eleven (2022 ed.); *Postconviction Remedies*, § 25:9 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 9A:146 (Thomson Reuters 2023 ed.).

EXHAUSTION

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

***Synopsis*: District court not required to sua sponte consider alternatives to dismissal when presented with habeas petition that contains both exhausted and unexhausted claims, or to inform petitioner of the alternatives to dismissal.**

McBride v. Skipper, 76 F.4th 509 (6th Cir. 2023)

Petitioner filed a mixed federal habeas petition, encompassing both exhausted and unexhausted claims. Despite asserting, without success, that all claims were exhausted, the district court dismissed the entire petition without prejudice and declined to issue a certificate of appealability. Instead of opting to refile the petition sans the unexhausted claim or revisiting state court, petitioner sought reconsideration. In this motion, petitioner argued for the first time that the exhausted claims should proceed under the precedent of *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). The district court, however, rejected the motion for reconsideration. By that time, AEDPA's one-year statute of limitations on petitioner's habeas petition had expired. Petitioner timely appealed, and the Sixth Circuit granted an application for a certificate of appealability.

Historically, courts were required to "dismiss habeas petitions containing both unexhausted and exhausted claims," as articulated in *Rose v. Lundy*, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). But in 1996, the AEDPA introduced a one-year statute of limitations on habeas corpus petitions, and the interplay between the statute of limitations and *Lundy*'s dismissal requirement created difficulties for petitioners. Notably, the filing of a federal habeas petition does not toll the statute of limitations, as clarified in *Duncan v. Walker*, 533 U.S. 167, 181-82, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). Consequently, if a district court judge dismissed a mixed petition on exhaustion grounds close to the one-year deadline, there was a risk that the petitioner's claims would never receive federal court consideration.

In the landmark case *Rhines*, 544 U.S. 269, 125 S.Ct. 1528, the Supreme Court identified two alternatives to dismissal. First, district courts may stay and hold in abeyance a petitioner's claims. Second, if the petitioner requests a stay-and-abeyance but the court deems it inappropriate, the court "should allow the petitioner to delete the unexhausted claims and proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief." *Id.* at 278, 125 S.Ct. 1528.

Following the *Rhines* decision, the Sixth Circuit outlined four courses of action for district courts facing a mixed petition: (1) dismissal of the mixed petition in its entirety, (2) staying the petition and holding it in abeyance while the petitioner returns to state court to raise unexhausted claims, (3) permitting the petitioner to dismiss the unexhausted claims and proceed with the exhausted claims, or (4) disregarding the exhaustion requirement altogether and denying the petition on its merits if none of the petitioner's claims have merit, as established in *Harris v. Lafler*, 553 F.3d 1028, 1032-33 (6th Cir. 2009).

Petitioner contended that the district court was obligated to consider alternatives to dismissal, even without a specific request. However, the Sixth Circuit disagreed, asserting that the district court is not required to independently raise alternatives. In this context, the court held that a district court does "not need to raise alternatives to dismissal on its own volition. We do not require district courts to make arguments that petitioners—even pro se

Today I Learned . . .

TIL that Earth is closer to the Sun during (northern) winter, not summer. The seasons are caused by Earth's tilted axis, not the distance from sun.

TIL that San Francisco's Market Street subway runs on Reagan-era floppy disks.

TIL that Nikola Tesla, the inventor and engineer, had a photographic memory and could memorize entire books.

TIL the "Boss key" was a fairly common feature in early PC games to make it

(Continued from page 15)

petitioners—fail to make." *McBride v. Skipper*, 76 F.4th 509, 514 (6th Cir. 2023). This sentiment was echoed in *Robbins v. Carey*, 481 F.3d 1143, 1148 (9th Cir. 2007), which affirmed that "district courts are not required to consider sua sponte the stay-and-abeyance procedure."

Further research: *Introduction to Habeas Corpus*, Chapter Ten (2022 ed.); *Postconviction Remedies*, § 23:22 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 9C:69 (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's claims of ineffective assistance of trial counsel, raised after the Court of Appeals' limited remand for the appointment of conflict-free federal habeas counsel, was not deemed a second-or-successive application, thus not necessitating authorization from the Court of Appeals.**

Sandoval v. Mendoza, 81 F.4th 461 (5th Cir. 2023)

Petitioner was initially convicted of a capital offense and sentenced to death, with Lydia Brandt serving as the state habeas counsel. Despite Brandt's efforts, the state courts denied relief, leading to her authorization to represent petitioner in federal habeas corpus proceedings. However, the district court rejected the petition, prompting an appeal. *Sandoval v. Mendoza*, 81 F.4th 461, 467 (5th Cir. 2023).

During the appeal, the U.S. Supreme Court, in *Trevino v. Thaler,* 569 U.S. 413, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), established that a federal court could review an ineffective assistance of trial counsel (IATC) claim defaulted in a Texas postconviction proceeding if state habeas counsel was constitutionally ineffective and the claim had some merit.

Due to Brandt's dual representation in both state and federal habeas proceedings, petitioner sought the appointment of conflict-free federal habeas counsel. The Fifth Circuit remanded the case to the district court to appoint supplemental counsel and evaluate whether petitioner could

establish cause for the procedural default of any IATC claims pursuant to *Trevino*. *Sandoval*, 81 F.4th at 467.

New habeas counsel was appointed, introducing two new IATC claims in a supplemental petition. Although petitioner admitted procedural default, he argued that he could overcome it under *Trevino*, contending that state habeas counsel's failure to raise the claims amounted to ineffective assistance of counsel. The district court denied relief, leading to another appeal. *Sandoval*, 81 F.4th at 467.

The State asserted that the circuit court lacked jurisdiction over the IATC claims in the supplemental petition, arguing that the circuit court's remand did not vacate the district court's final judgment, thereby preventing petitioner from amending his initial application under 28 U.S.C. § 2244(b).

Drawing an analogy to *Balbuena v. Sullivan*, 980 F.3d 619 (9th Cir. 2020), and other decisions, the State contended that petitioner's case was similar. In *Balbuena*, the Ninth Circuit remanded for an indicative ruling under Federal Rule of Civil Procedure 12.1(b) on the petitioner's Federal Rule of Civil Procedure 60(b) motion regarding a new claim that his confession was improperly obtained. *Id.* at 627, 638. The district court denied the motion but stayed proceedings and allowed him to return to state court to exhaust the new claim. *Id.* at 627-28. The petitioner lost in state court, then returned to district court to file a renewed Rule 60(b) motion. *Id.* at 628. The district court held that adding the new claim was a successive habeas application. *Id.* at 635. The Ninth Circuit agreed, rejecting the petitioner's argument that his habeas application was "pending" for the purposes of § 2244 because its denial was still on appeal when he filed his Rule 60(b) motion in the district court. *Id.* at 636-37. The court held that once the district court made a final ruling and the appeal had commenced, the § 2254 application was no longer pending.

However, the Fifth Circuit deemed *Balbuena* to be procedurally distinct. The limited remand under Rule 12.1(b) ordered by the *Balbuena* court, specifically designed for an indicative ruling, does not disrupt the finality of the district court's judgment. *Balbuena,* 980 F.3d at 638. Moreover, it does not permit the district court to delve into the merits or entertain motions under Rule 15. *Id.* Instead, in accordance with Rule 12, the district court articulates its prospective ruling on the Rule 60(b)

Today I Learned . . .

appear to superiors and coworkers that employees were doing their job when they were actually playing video games.

TIL that Mary Anderson invented the first operational windshield wiper but never profited from the invention as her patent expired before it became widely used in the auto industry.

TIL rabbit starvation is when the body takes in too much protein with not enough fat and carbohydrate. When excessive amounts are consumed, it can put the body at risk for increased levels of ammonia in the blood. Protein poisoning can be fatal because of these increased levels.

motion (or its equivalent) if jurisdiction is later reinstated. Fed.R.App.P. 12.1, advisory committee notes to 2009 amendment. The appellate court retains jurisdiction over the entire matter. *Sandoval*, 81 F.4th at 469-70.

In this instance, the Fifth Circuit did not remand for an indicative ruling. Similarly, the circuit court retained only partial jurisdiction, specifically "jurisdiction in the remainder of the case." *Sandoval*, 81 F.4th at 470. Consequently, it restored jurisdiction to the district court, empowering it to address any new IATC claims if petitioner could surmount the procedural default attributed to ineffective state habeas counsel. As a result, the court concurred with petitioner's argument that the present case was procedurally distinct from *Balbuena* and other cases cited by the State from different circuits. *See Phillips v. U.S.*, 668 F.3d 433, 435 (7th Cir. 2012); *Beaty v. Schriro*, 554 F.3d 780, 783 n.1 (9th Cir. 2009); *Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007); *Williams v. Norris*, 461 F.3d 999, 1003 (8th Cir. 2006); *U.S. v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006); *U.S. v. Terrell*, 141 F. App'x 849, 852 (11th Cir. 2005).

The Fifth Circuit also concurred with petitioner that the mandate was to reopen litigation in the district court. Although the remand had limitations, its scope was defined to encompass IATC claims potentially defaulted by a conflicted state habeas counsel, as recognized under *Trevino*. Nevertheless, once litigation was effectively reopened on the merits for those specific claims, § 2242 permitted an amended filing: an application "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. The pertinent civil rule governing amended and supplemental pleadings is Federal Rule of Civil Procedure 15. One commentator has interpreted Rule 15 to mean that "[o]nce [a] case has been remanded, [a] lower court [may] permit new issues to be presented by an amended pleading that is consistent with the judgment of the appellate court." 6 Wright & Miller et al., *Federal Practice & Procedure* § 1489 (3d ed. 2022). Notably, the district court entered a new final judgment when it completed its remand duties. *Sandoval*, 81 F.4th at 470.

The parties implored the Fifth Circuit to address the broader question of whether a habeas filing is considered second-or-successive when proceedings on the initial application are still in progress. The State advocated for adopting the stance taken by several circuits, contending that, once a district court's judgment is final, a filing containing a habeas claim should be deemed a successive application, even if the petitioner's appeal is pending. On the contrary, petitioner urged the court to embrace the opposite approach, asserting that such a position would be at odds with Supreme Court precedents, including *Slack v. McDaniel*, 529 U.S. 473, 487-88, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), *Banister v. Davis*, 590 U.S. ___, 140 S.Ct. 1698, 207 L.Ed.2d 58 (2020), and *Gonzalez v. Crosby*, 545 U.S. 524, 532, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). Petitioner argued that the court should follow the approaches taken in *U.S. v. Santarelli*, 929 F.3d 95, 105-06 (3d Cir. 2019) and *Whab v. U.S.*, 408 F.3d 116, 118-19 (2d Cir. 2005), which posit that a subsequent habeas application is not deemed successive as long as an appeal is ongoing. However, the court opted not to address this broader question in the present case due to the unusual timing of petitioner's case, which did not necessitate such a decision. Instead, the Fifth Circuit limited its holding to the specific and narrow facts of the case at hand. *Sandoval*, 81 F.4th at 470-71.

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, § 27:9 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 11:41 (Thomson Reuters 2023 ed.).

***Synopsis*: Petitioner's Rule 60(b)(6) motion, seeking relief from the judgment denying his federal habeas petition, effectively constituted an unauthorized second or successive habeas petition, as it centered on the contention that his prior counsel inadequately presented his claims and he should be allowed to reintroduce them through new legal representation.**

*Bixby v. St*erling, 86 F.4th 1059 (4th Cir. 2023)

Petitioner, convicted of murder and sentenced to death, was assigned two attorneys to file a federal habeas corpus petition on his behalf. However, the submitted petition was perfunctory, merely incorporating claims from the state court and introducing a new claim based on an alleged violation of the Americans with Disabilities Act. The district court granted the government's motion for summary judgment, denying relief.

A new attorney was later appointed to represent petitioner during the appeal. While the appeal was pending, petitioner's new counsel filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure in the district court. Counsel argued that petitioner did not receive "meaningful, ethical representation" from his initial § 2254 counsel, justifying relief under Rule 60(b)(6). Petitioner claimed that his initial § 2254 counsel effectively abandoned him by submitting a defective petition that failed to raise potentially valid direct appeal claims or present other arguments for relief.

Despite being labeled as a Rule 60(b) motion, the district court denied the motion, determining that, in substance, it constituted an unauthorized successive habeas petition over which it lacked jurisdiction. Petitioner subsequently appealed this decision.

A brief review of governing principles is warranted at this juncture. Applicants are allowed to submit a single § 2254 petition in a timely manner without the need for prior authorization. However, after this initial filing, introducing additional claims in a "second or successive habeas corpus application under section 2254" is prohibited unless these claims meet specific substantive criteria, and petitioner has obtained a Certificate of Appealability (COA) from the relevant court of appeals. 28 U.S.C. § 2244.

While AEDPA specifically governs a petitioner's habeas petition, Rule 60 governs civil actions of all kinds, permitting relief from a district court's judgment or order under certain circumstances. Subsection (b) of that rule delineates five specified grounds for relief ranging from mistake to fraud. *See* Fed. R. Civ. P. 60(b)(1)-(5). A sixth catch-all provision permits district courts to grant relief for "any other reason that justifies" it. Fed. R. Civ. P. 60(b)(6).

Petitioners sometimes attempt to use Rule 60(b) as a means to present new claims or arguments in favor of habeas relief that were not presented in their initial federal habeas petition. And some petitioners can satisfy Rule 60(b)'s criteria for when a judgment can be reopened even though they cannot satisfy § 2244's restrictions on when a second or successive habeas petition can be filed. The Supreme Court in *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005), considered the interplay between AEDPA's limits on second or successive federal habeas petitions and Rule 60(b) relief. The Court cautioned that Rule 60(b)(6) motions could not be used as a vehicle for circumventing the requirements for

securing relief under AEDPA, *id.* at 532, 125 S.Ct. 2641, and that Rule 60(b)(6)'s requisite "extraordinary circumstances" would "rarely occur in the habeas context," *id.* at 535, 125 S.Ct. 2641.

The Court in *Gonzalez* recognized that artfully worded Rule 60(b) motions would require courts to look behind both the title and the text to the motion's objective to determine whether it aimed to end-run AEDPA. For that reason, the Court instructed that a district court's first task when presented with a Rule 60(b) motion in a habeas case is to consider whether the filing "is in substance a successive habeas petition and [thus] should be treated accordingly." *Id.* at 531, 125 S.Ct. 2641. To aid in this process, the Supreme Court provided multiple examples of when a filing labeled as a " Rule 60(b) motion" would substantively be a "habeas corpus application" or "at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' " AEDPA. *Id.* The Court observed that some Rule 60(b) motions may attack the district court's prior reasoning or attempt to add "one or more 'claims.'" *Id.* at 530-31, 125 S.Ct. 2641. Or they might indirectly attempt to do the same by asserting that due to an attorney or party's "excusable neglect," the initial "habeas petition had omitted a claim of constitutional error, and seek leave to present that claim." *Id.* at 531, 125 S.Ct. 2641. Likewise, Rule 60 (b) movants may argue that a post-judgment change in law warrants relief so as to present that newly available claim. *Id.* In each of these scenarios, the Supreme Court recognized that the motions sounded substantively in habeas because they "attack[ed] the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id.* at 532, 125 S.Ct. 2641 (footnote omitted). The Supreme Court instructed that filings of this ilk cannot proceed under the mantle of a Rule 60(b) motion and instead must be subjected to AEDPA's requirements. *Id.*

The Supreme Court contrasted disguised habeas petitions with "true" Rule 60(b) motions in the habeas context. A "true" Rule 60(b) motion would not attack the resolution of a prior § 2254 petition on the merits. Instead, a "true" Rule 60(b) motion would challenge "some defect in the integrity of the federal habeas proceedings." *Id.* at 532, 125 S.Ct. 2641. As examples, the Court cited a motion that asserts that "a previous ruling which precluded a merits determination was in error," such as a district court's denial of habeas relief for "failure to exhaust, procedural default, or statute-of-limitations bar," *id.* at 532 n.4, 125 S.Ct. 2641, or "fraud," *id.* at 532 n.5, 125 S.Ct. 2641. It observed that "true" Rule 60(b) motions would not "assert, or reassert, claims of error in the movant's state conviction," and that a motion "challeng[ing] only the District Court's failure to reach the merits" could be considered without running afoul of AEDPA. *Id.* at 538, 125 S.Ct. 2641; *see also Bixby v. Sterling*, 86 F.4th 1059, 1070 (4th Cir. 2023) ("A true Rule 60(b) motion in the habeas context will not ask for a second adjudication on the initial claims or a first adjudication of new substantive claims, but rather will ask the court to remove barriers that had earlier precluded an adjudication on the merits of the initial claims."). In further parsing this distinction, the Supreme Court observed that "an attack based on the movant's own conduct[ ] or his habeas counsel's omissions ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5, 125 S.Ct. 2641 (internal citation omitted).

In this instance, petitioner argued that, in contrast to the general principle that claims based on attorney deficiencies do not cast doubt on the

integrity of initial habeas proceedings, *Gonzalez* allowed for cases like his involving particularly egregious errors by counsel. He emphasized that his initial § 2254 counsel overlooked potentially valid claims, presenting mostly copied-and-pasted material without addressing crucial legal issues within the AEDPA framework. He contended that, as a result, these deficiencies constituted a procedural defect in the original proceedings, impeding the district court from assessing the merits of his relief claim. Consequently, he asserted that his motion was a genuine Rule 60(b) motion challenging the integrity of the federal habeas proceeding, and therefore fell within the jurisdiction of the district court.

The Fourth Circuit disagreed. The substance of petitioner's Rule 60(b) motion indicated a desire to " 'revisit the federal court's denial *on the merits* of a claim for relief,' " a scenario explicitly discouraged by *Gonzalez* as being akin to a successive habeas petition. *Bixby*, 86 F.4th at 1068 (quoting *Gonzalez*, 545 U.S. at 534, 125 S.Ct. 2641). The court asserted that petitioner's motion squarely fell within *Gonzalez*'s heartland, subjecting it to AEDPA's restrictions. *Bixby*, 86 F.4th at 1068. "A true Rule 60(b) motion in the habeas context will not ask for a second adjudication on the initial claims or a first adjudication of new substantive claims, but rather will ask the court to remove barriers that had earlier precluded an adjudication on the merits of the initial claims." *Id.* at 1070.

In *Gonzalez*, the Supreme Court speculated as a theoretical matter that Rule 60(b) may be available in the habeas context in a very rare set of undefined circumstances when the district court had previously reached a merits determination. For example, the Supreme Court recognized fraud as a potential defect in the integrity of the federal habeas proceedings. 545 U.S. at 532 n.5, 125 S.Ct. 2641. Specifically, it discussed a scenario where a witness puts forth a fraudulent basis for refusing to appear at the federal habeas proceeding, and the district court enters an initial judgment on the merits then presented to it. So, granting the Rule 60 (b) motion upon a showing of fraud would result in a new, but permissible, merits determination, but it would not implicate § 2244's limits on second or successive habeas petitions. "First, the motion itself would relate to a 'nonmerits aspect of the first habeas proceeding' and, second, the relief sought would be 'confine[d] ... to [reopening] the first federal habeas petition' for a new merits determination absent the fraud rather than altering the substantive claims that the district court was asked to consider as part of its review." *Bixby*, 86 F.4th at 1070 (quoting *Gonzalez*, 545 U.S. at 534, 125 S.Ct. 2641).

But for petitioner, this needed consistency with AEDPA wasn't there. Petitioner said that bad representation in his first § 2254 habeas petition was a flaw in the integrity of the federal habeas proceeding that could be seen. "[Petitioner's] argument about the poor quality of his initial § 2254 counsel's performance cannot be untethered from his core objective of changing the contents of his first federal habeas petition (by bolstering arguments and adding new claims) and ultimately seeking a different disposition on the merits determination from that of the first habeas petition. As such, the substance of his motion squarely implicates § 2244's limits on second or successive habeas petitions in a way that *Gonzalez*'s conception of a 'true' Rule 60(b) motion does not." *Bixby*, 86 F.4th at 1070-71. "*Gonzalez* recognized that Rule 60 (b) motions like [petitioner's], which ultimately are based on 'habeas counsel's omissions' in the original § 2254 proceedings, 'ordinarily do[ ] not go to the integrity of the proceedings, but in effect ask [ ] for a second chance to have the merits determined favorably.' " *Id.* (quoting *Gonzalez*, 545 at 532 n.5, 125 S.Ct. 2641 (citation omitted)); *see also Coleman v. Stephens*, 768 F.3d 367, 371-72 (5th Cir. 2014) (per curiam) (distinguishing a Rule 60(b)

motion argument that counsel was ineffective in failing to find and present evidence to support claims in an initial habeas petition (which would "sound[ ] in substance" and thus not be a true Rule 60(b) motion) from an argument that "the court or prosecution prevented [counsel] from presenting such evidence" (which might present a procedural claim cognizable in a Rule 60(b) motion)).

Despite the absence of new arguments or claims in favor of § 2254 relief in the Rule 60(b) motion, the Fourth Circuit maintained that the Supreme Court's concern about circumventing AEDPA remained, emphasizing that the end result was impermissible whether the petitioner used Rule 60(b) as a means for future filings or directly in the motion itself. *Bixby*, 86 F.4th at 1068. This position aligned with decisions in other circuits, which emphasized that seeking to reopen proceedings for the purpose of adding new claims was tantamount to presenting a successive claim. *Id.*; *accord Edwards v. Davis*, 865 F.3d 197, 204-05 (5th Cir. 2017) (per curiam) (Rule 60(b) motion, which claimed that federal habeas counsel abandoned his client by failing to bring additional claims in a § 2254 petition that was denied on the merits, was not a true Rule 60(b) motion because it sought "to reopen the proceedings for the purpose of adding new claims," which "is the definition of a successive claim"); *Post v. Bradshaw*, 422 F.3d 419, 424 (6th Cir. 2005) ("It makes no difference that the motion itself ... purports to raise a defect in the integrity of the habeas proceedings, namely his [federal habeas] counsel's failure—after obtaining leave to pursue discovery—actually to undertake that discovery; all that matters is that [petitioner] is 'seek[ing] vindication of' or 'advanc[ing]' a claim by taking steps that lead inexorably to a merits-based attack on the prior dismissal of his habeas petition." (alterations in original)).

The Fourth Circuit also expressed concern that petitioner's proposed Rule 60(b) motion might run afoul of AEDPA in another way. AEDPA makes it clear that claims of ineffectiveness or incompetence of counsel during federal or state postconviction collateral proceedings cannot be used as a reason for relief in a proceeding under § 2254. 28 U.S.C. § 2254(i). Even though petitioner did not explicitly present a freestanding claim based on the ineffectiveness of his initial § 2254 counsel, the court noted that his argument for "other relief" within his § 2254 proceedings raised potential conflicts with AEDPA, asserting that where such conflicts arise, AEDPA controls. However, since the court disposed of petitioner's claims under other AEDPA provisions, it deemed it unnecessary to further delve into this potential independent bar. *Bixby*, 86 F.4th at 1069 n.6.

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

***Synopsis*: District court's dismissal of petitioner's first § 2255 motion, for its failure to raise cognizable claims, constituted an adjudication "on the merits," rendering any claims in the second § 2255 motion that could have been addressed during the initial filing as second and successive.**

Tong v. U.S., 81 F.4th 1022 (9th Cir. 2023)

Thank you to Julie Hokans for her invaluable assistance.

Petitioner, proceeding pro se, submitted a motion under 28 U.S.C. § 2255 contesting a restitution order incorporated into her federal sentence, contending that her trial counsel was ineffective for not arguing against the overstatement of the victims' loss amount and the failure to credit her for payments made post-trial but pre-sentencing. The district court dismissed the motion without leave to amend, asserting that challenges to restitution were not cognizable in a § 2255 motion. Subsequently, petitioner filed a second § 2255 motion introducing new grounds for relief, including claims of ineffective assistance from both trial and habeas counsel.

The Ninth Circuit initially acknowledged that according to *Goodrum v. Busby*, 824 F.3d 1188, 1194 (9th Cir. 2016), if a petitioner's first petition is dismissed on technical procedural grounds without addressing the merits, any subsequent petition is not considered second or successive. Conversely, if a petitioner's initial filing is dismissed due to a "permanent and incurable bar to federal review," the dismissal is deemed "on the merits," resulting in any subsequent filing being considered second or successive, as illustrated in *McNabb v. v. Yates*, 576 F.3d 1028, 1029-30 (9th Cir. 2009) (internal quotation marks omitted).

For instance, in cases where a court dismisses a § 2254 petition on grounds of state procedural default, any subsequent petition is subject to the second-or-successive bar, as established in *Howard v. Lewis*, 905 F.2d 1318, 1322 (9th Cir. 1990). *Howard* clarifies that while dismissal for procedural default does not decide the merits of the underlying claims in the colloquial sense, it does conclusively determine on the merits that the underlying claims will not be considered by a federal court. This determination is considered "on the merits" for the purposes of the successive petition doctrine. *Id.*; *see also Graham v. Costello*, 299 F.3d 129, 133 (2d Cir. 2002) ("distinction between petitions that are denied 'on the merits' and those that are not does not depend on whether the federal court actually determined the merits of the underlying claims but rather on whether the prior denial of the petition *conclusively determined* that the claims presented could not establish a ground for federal habeas relief") (emphasis added).

Applying these principles, the Ninth Circuit determined in *Tong v. U.S.*, 81 F.4th 1022 (9th Cir. 2023), that petitioner's initial § 2255 motion was dismissed "on the merits" for the second-or-successive bar, as her restitution challenge, framed as ineffective assistance of counsel, was deemed non-cognizable under § 2255 since it pertained to a defendant not in custody seeking release. *Id.* (citing *U.S. v. Thiele*, 314 F.3d 399, 401-02 (9th Cir. 2002)). While the district court did not decide the merits of the underlying claims, it nonetheless determined that these claims would not be considered, thereby adjudicating the motion "on the merits" for purposes of the second or successive rule.

But the Ninth Circuit determined that an additional restriction on the second-and-successive bar applied to a specific aspect of petitioner's second § 2255 motion: a habeas filing is deemed "second or successive only if it raises claims that were or could have been adjudicated on the merits in the first petition." As clarified in *McNabb*, 576 F.3d at 1029, petitioner alleged in her second § 2255 motion that her habeas counsel provided ineffective assistance by neglecting to raise various grounds for relief in her initial § 2255 motion. Since this particular claim could not have been addressed on the merits in the first § 2255 motion, it did not meet the criteria for being second or successive. The Ninth Circuit consequently transferred this specific aspect of petitioner's second § 2255 motion, emphasizing that, in the assessment of applications for a second or successive habeas petition, the court refrains from evaluating the cognizability of that petition. *Tong*, 81 F.4th at 1026

(citing *Clayton v. Biter*, 868 F.3d 840, 846 (9th Cir. 2017) ("The government also argues that alternatively, we should deny Clayton's application for permission to file a second or successive petition because his claim is not cognizable. We reject this argument, and conclude that cognizability plays no role in our adjudication of such an application, and that it is the province of the district court to consider cognizability of a habeas petition.")).

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, §§ 27:11, 27:17 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 11:51, 11:74, 11:85 (Thomson Reuters 2023 ed.).

***Synopsis*: Petitioner's due process claims, centered on changes in professional standards regarding the reliability of bite mark evidence, were ripe at the time of the initial habeas filing, thereby rendering lack of ripeness an inadequate justification for the court of appeals panel to waive gatekeeping requirements for filing a second or successive habeas petition.**

In re Hill, 81 F.4th 560 (6th Cir. 2023) (en banc)

Petitioner asserted two claims in his second federal habeas petition, grounded in new bite mark evidence, contending that events occurring decades after his initial federal habeas petition in 1996 had transpired. Specifically, he argued that his claim arose between 2013 and 2016, during which the scientific community discredited the bite mark evidence presented at his trial, and the American Board of Forensic Odontology (ABFO) accordingly revised its guidelines. Notably, prior to these revisions, the prosecution's expert bitemark testimony adhered to the acceptable limits set by the ABFO and endorsed by odontologists.

Despite the district court deeming the second federal petition second or successive and subsequently transferring the case to the Sixth Circuit, a panel concluded that petitioner was exempt from meeting gatekeeping provisions. According to the panel, his petition, although second in time, did not qualify as successive, thereby obviating the need for the Court of Appeals' authorization to file.

A petition, although second in time, isn't "second or successive" where the second petition contains a claim—whether presented or not in the first petition—that would have been unripe at the time of the filing of the first petition. *Panetti v. Quarterman*, 551 U.S. 930, 943, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007).

However, the Sixth Circuit en banc rejected petitioner's argument that his claims were previously unripe, asserting that a challenge to bite mark evidence had always been available to him. The court stated, "[A] challenge to the bitemark evidence has always been available to Hill. So any claim as to the bitemark evidence's unreliability was ripe at the time of his first habeas petition. In other words, 'the events giving rise' to Hill's claim—the introduction of bitemark testimony at trial—had already occurred when Hill filed his first petition." *In re Hill*, 81 F.4th 560, 570 (6th Cir. 2023) (en banc) (citing *In re Wogenstahl*, 902 F.3d 621, 625-28 (6th Cir. 2018) (petitioner could not bypass the gatekeeping provisions of § 2244(b)(2) for new *Brady* claim simply by presenting new evidence undermining testimony the government put on at trial; the predicates underlying petitioner's current claims—the government introducing testimony at trial—"had already occurred when he filed his petition")).

The court noted that other circuits have assumed that claims based on newly existing evidence are "second or successive," and they have

evaluated whether such claims meet the gatekeeping provisions of § 2244(b)(2)(B). *See Rhodes v. Smith*, 950 F.3d 1032, 1036 (8th Cir. 2020) (holding that "two peer-reviewed articles published" years after trial did not meet the gatekeeping provisions of § 2244(b)(2)); *Feather v. U.S.*, 18 F.4th 982, 985 (8th Cir. 2021) (rejecting a successive petition where the petitioner argued that "changes in forensic medical science" meant that "the government relied on 'fundamentally defective' evidence that was 'inconsistent with sound scientific methods'"); *see also Case v. Hatch*, 731 F.3d 1015, 1038 (10th Cir. 2013) (categorically not allowing newly existing evidence to meet the gatekeeping provisions).

The Sixth Circuit did not address whether new evidence unavailable at trial could satisfy the gatekeeping provision of § 2244(b)(2)(B). This question was deferred for the panel to address in the initial instance and potentially for the district court to consider. *Hill,* 81 F.4th at 572.

In a concurring opinion, Judge Thapar wrote courts must start complying with AEDPA's requirement that panels must act within 30 days. *Hill,* 81 F.4th at 573 (Thapar, J., concurring) (citing 28 U.S.C.A. § 2244(b)(3)(D)).

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, §§ 27:4, 27:7, 27:11, 27:17 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 11:22, 11:27, 11:74, 11:88 (Thomson Reuters 2023 ed.).

***Synopsis*: Petitioner's claims for due process and equal protection violations and claim for ineffective assistance of counsel were not ripe until his application for resentencing was denied, and thus, petitioner's habeas petitions were not second or successive.**

Brown v. Atchley, 76 F.4th 862 (9th Cir. 2023)

Petitioner filed several federal habeas petitions contesting the state court's rejection of his application for resentencing under California Penal Code § 1170.95, and while the district court dismissed the petition as second or successive, the Ninth Circuit reversed.

Despite the fact that second or successive petitions are generally prohibited, not every petition filed after an initial petition has been adjudicated is considered second or successive. The Supreme Court has identified two instances in which a second-in-time petition is not subject to the rules governing second or successive petitions.

First, in *Magwood v. Patterson*, 61 U.S. 320, 332, 130 S.Ct. 2788, 177 L.Ed.2d 592, the Supreme Court explained that the limitations imposed by § 2244(b) applied only to habeas petitions that relate to a specific "judgment of a State court" under § 2254(b)(1). Because "the phrase 'second or successive' must be interpreted with respect to the judgment challenged," *id.* at 333, 130 S.Ct. 2788, a habeas petition is second or successive only if it challenges the same judgment as the prior petition, *see id.* at 339, 130 S.Ct. 2788. *Magwood* applied this rule and concluded that because the petitioner's new sentence, imposed after a resentencing proceeding, qualified as a new judgment, his "first application challenging that new judgment" was not "second or successive." *Id.* at 331, 130 S.Ct. 2788.

Second, even if a petitioner's second petition is challenging the same judgment as an earlier petition, it is not second or successive if it raises a claim "brought in an application filed when the claim is first ripe." *Panetti v. Quarterman*, 551 U.S. 930, 947, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007). The Supreme Court has clarified that a petitioner does not violate the abuse of the writ doctrine when introducing a new claim in a successive

petition that could not have been raised in a prior petition. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998).

The Supreme Court applied these principles in *Panetti*, 551 U.S. at 944, 127 S.Ct. 2842, to hold that although the petitioner's second petition was second or successive on its face because it challenged the same judgment as the first petition, "Congress did not intend the provisions of AEDPA ... to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency [to be executed claim] filed as soon as that claim is ripe." *Id.* at 945, 127 S.Ct. 2842.

Following *Panetti*, the Ninth Circuit applied the judge-made rule that a petition filed when a claim first becomes ripe is not second or successive in a range of cases beyond the context of incompetency to be executed claims. In *U.S. v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) (per curiam), for example, the court explained that generally "[p]risoners may file second-in-time petitions based on events that do not occur until a first petition is concluded," and such petitions are not second or successive because a claim does not become ripe until the facts that give rise to the constitutional claim first arise. *Id.* To illustrate this principle, the *Buenrostro* court stated that a "prisoner whose conviction and sentence were tested long ago may still file petitions relating to denial of parole, revocation of a suspended sentence, and the like because such claims were not ripe for adjudication at the conclusion of the prisoner's first federal habeas proceeding." *Id.* (collecting cases).

Other circuits have reached a similar conclusion, affirming that claims that could not have been raised in a petitioner's initial habeas petition because the alleged violations forming the basis of the claims had not yet transpired are not subject to the gatekeeping requirements of § 2244 (b). *See U.S. v. Orozco-Ramirez*, 211 F.3d 862, 869 (5th Cir. 2000) (claim relating to counsel's ineffective assistance on an out-of-time appeal could not have been raised in the first appeal); *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010) (ex post facto claim resulting from amendments to state parole law was unripe until the amendments were enacted); *U.S. v. Obeid*, 707 F.3d 898, 903 (7th Cir. 2013) (equal protection challenge was unripe until the government breached its promise to treat the petitioner and a co-conspirator equally with respect to a motion for a sentence reduction); *Morgan v. Javois*, 744 F.3d 535, 538 (8th Cir. 2013) ("challenge to a state-court decision regarding the legality of an insanity acquittee's continued confinement is unripe until that decision is rendered"); *In re Weathersby*, 717 F.3d 1108, 1110-11 (10th Cir. 2013) (per curiam) (petitioner's habeas claim to correct a sentencing enhancement based on a state conviction was not ripe until the state vacated that conviction).

Here, the Ninth Circuit concluded that petitioner's due process, ineffective assistance of counsel, and equal protection claims did not become ripe until his application for state court resentencing was denied in March 2019, well after the district court denied his first and dismissed his second habeas petitions. In his third petition, petitioner alleged a due process violation resulting from his continued confinement after the denial of his application for resentencing. Because his application for resentencing was denied in March 2019, his claim did not ripen until after that date, when he remained confined. In his fourth petition, petitioner alleged that his attorney rendered ineffective assistance by failing to prepare properly for the hearing on his application for resentencing. Because petitioner needed to show both deficient performance and prejudice in order to raise an ineffective assistance of counsel claim, his claim did not arise until after his application was denied in

March 2019. Finally, petitioner's equal protection claim (also in his fourth habeas petition) was based on his claim that in denying his resentencing application, the state court treated him differently from other prisoners who were resentenced. Again, the facts underlying this claim did not arise until his resentencing application was denied in March 2019. *Brown v. Atchley*, 76 F.4th 862, 872-73 (9th Cir. 2023).

As petitioner's due process, equal protection, and ineffective assistance of counsel claims were not ripe during the denial of his first federal habeas petition by the district court or the dismissal of his second habeas petition, he could not have raised these claims in the initial or subsequent petitions. Consequently, his failure to do so did not amount to an abuse of the writ, rendering the third and fourth habeas petitions not second or successive under § 2244(b).

The court did not address the parties' argument, based on *Magwood*, regarding whether the state court's denial of petitioner's application for resentencing constituted a new judgment for § 2254 purposes. However, Judge Ikura, in her concurring opinion, clarified that the third and fourth federal habeas petitions challenged an order denying petitioner's eligibility for relief under § 1170.95. According to state law, a prima facie determination of eligibility for resentencing under § 1170.95 does not constitute a new judgment. Therefore, the federal petitions were not challenging a "new judgment" as in *Magwood*; instead, they were contesting a post-judgment order and seeking resentencing, involving the vacatur of the original sentence. Judge Ikuta concluded that the seemingly conflicting result in *Clayton v. Biter*, 868 F.3d 840 (9th Cir. 2017), was not controlling, as subsequent state case law clarified that an order addressing prima facie eligibility for relief from a sentence is only a post-judgment order and not a new judgment. *Brown*, 76 F.4th at 874-77 (9th Cir. 2023) (Ikuta, J., concurring).

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, § 27:11 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 11:74 (Thomson Reuters 2023 ed.).

INEFFECTIVE ASSISTANCE OF COUNSEL

Chapter 35 of *Postconviction Remedies*

***Synopsis*: Trial counsel provided ineffective assistance for neglecting to make a particular argument, even though the argument's potential novelty was acknowledged, as the groundwork for it had been foreshadowed by numerous decisions available at the time the argument could have been presented.**

Coleman v. U.S., 79 F.4th 822 (7th Cir. 2023)

In a 2-1 decision, the Seventh Circuit held that defense counsel's performance was deficient by not challenging the government's utilization of petitioner's prior state convictions to enhance the federal sentence. The circuit court reasoned that counsel could have contended that the prior convictions did not categorically qualify as "felony drug offenses" under federal sentencing laws, highlighting the divergence between the state and federal definitions of "cocaine."

The circuit court acknowledged "the general principle that '[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law,' " *Coleman v. U.S.*, 79 F.4th 822, 831 (7th Cir. 2023) (quoting *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993)), and that "the reasonableness of counsel's performance must be assessed 'in the context of the law' at the time.' " *Coleman*, 79 F.4th

at 831 (quoting *Harris v. U.S.*, 13 F.4th 623, 629 (7th Cir. 2021) (internal quotation marks omitted)).

However, the circuit court further stated, " 'there are some circumstances where [defense counsel] may be obliged to make, or at least to evaluate, an argument that is sufficiently foreshadowed in existing case law.' " *Coleman*, 79 F.4th at 831 (quoting *Bridges v. U.S.*, 991 F.3d 793, 804 (7th Cir. 2021) (citations omitted)). Despite conceding the novelty of the argument at the time, the court reasoned that the groundwork for such an argument was foreshadowed by numerous decisions issued before petitioner was sentenced. These decisions, which applied a categorical approach to predicate offenses in different contexts, formed the basis for the argument's viability. Importantly, the court highlighted the absence of adverse precedent explicitly precluding the legitimacy of such a challenge. *Coleman*, 9 F.4th at 828.

In a dissenting opinion, Judge Easterbrook argued that only with the benefit of hindsight could a court assert that, at the time of petitioner's sentencing in 2014, "every reasonable lawyer would have investigated the possibility that a state law's unusual reference to positional isomers of cocaine would eliminate the use of a cocaine conviction in a federal recidivist prosecution." The Seventh Circuit did not establish this principle until 2020, determining that the Illinois law's definition of "cocaine" meant that such convictions in Illinois did not contribute to federal recidivist sentencing. Furthermore, it was not until 2018 that any court of appeals reached the conclusion later endorsed by the Seventh Circuit in 2020.

Judge Easterbrook emphasized that as of 2014, neither any court of appeals nor any federal district court had ruled that a state-law reference to positional isomers disqualifies a cocaine conviction for federal purposes. While the legal "tools" employed in the Seventh Circuit's 2020 decision, such as the "categorical approach" established in *Taylor v. U.S.*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and its successors, as well as the texts of the state and federal statutes, were available in 2014, Judge Easterbrook contended that having these tools did not automatically render every legal inquiry and argument foreseeable. He pointed out that lawyers typically focus their research on lines with support in judicial decisions, and in 2014, an argument regarding positional isomers had no such support. *Coleman*, 79 F.4th at 833-34 (Easterbrook, J., dissenting).

Further research: *Postconviction Remedies*, § 35:4 (Thomson Reuters 2023 ed.).

***Synopsis*: No clearly established Supreme Court precedent required state court to employ a process-based test to assess whether petitioner suffered prejudice due to counsel's inadequacy, ultimately resulting in a waiver of the state jury -sentencing right.**

Honie v. Powell, 58 F.4th 1173 (10th Cir. 2023)

Petitioner faced murder charges and chose to waive the state statutory right to jury sentencing in favor of the trial judge's decision. Subsequent to a jury conviction for murder, the trial judge imposed a death sentence. During a later state postconviction review, petitioner asserted that a week before the trial, he had requested his trial counsel to withdraw the waiver, but counsel deemed it too late. Petitioner alleged deficient performance by trial counsel, citing inadequate explanation of the right to jury sentencing and failure to comply with his directive to retract the waiver. *Honie v. Powell*, 58 F.4th 1173, 1178-79 (10th Cir. 2023) (maj. opinion).

Controlling Supreme Court Precedent

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court held that in the context of a claim of ineffective assistance of counsel, "the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. 2052. To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. In the context of that case, the Court held that the defendant was required to prove that the *result* of the sentencing of the proceeding would have been different if not but-for counsel's deficient performance. In short, the *Strickland* Court adopted a **substantive-outcome** based standard for prejudice. *Honie*, 58 F.4th at 1189.

A year after *Strickland*, the Court decided *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). There, the defendant's counsel allegedly misadvised him about the length of his statutorily required parole term. *Id.* at 55, 106 S.Ct. 366. The defendant asked the court to "reduce his sentence to a term of years that would result in his becoming eligible for parole in conformance with his original expectations." *Id.*

The *Hill* Court began by holding "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58, 106 S.Ct. 366. But in applying *Strickland*'s general standard on prejudice in the plea setting, the Court departed from *Strickland*'s own application of its general prejudice standard as requiring a substantive-outcome test (a test asking whether the guilt or sentencing determination would have differed absent any deficient performance) for the mitigation-evidence claim. Instead, in *Hill*, the Court applied a **process-based** prejudice test—which allowed the defendant to prevail on a showing of "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S.Ct. 366; *Honie*, 58 F.4th at 1190.

Fifteen years later, in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), the Court addressed an ineffective-assistance-of-counsel claim that was based on counsel's failure to file a notice of appeal without the defendant's consent. As in *Hill*, the Court ruled that *Strickland*'s general two-pronged standard for ineffective-assistance claims applied. With regard to prejudice, the Court, as it did in *Hill*, applied a **process-based** prejudice standard. It held that "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484, 120 S.Ct. 1029. In extending the process-based prejudice test to this new setting, the Court compared a defendant's plea and appeal decisions this way: "Like the decision whether to appeal, the decision whether to plead guilty (i.e., waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled." *Id.*

Twelve years later, the Court decided *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). In that case, the parties stipulated that counsel had performed deficiently by advising the defendant not to accept a plea offer. After a trial, the defendant received a harsher sentence than the prosecutor had offered. As with its earlier cases, the Court applied *Strickland*'s two-pronged general standard for ineffective-assistance-of-counsel claims. The issue lay in deciding "how to *apply Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial." *Id.* at 163, 132 S.Ct. 1376 (emphasis added).

To show prejudice in this circumstance, the *Lafler* Court required the defendant to "show that

but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 164, 132 S.Ct. 1376. Though the defendant had received a fair trial, the Court emphasized that the Sixth Amendment's guarantee "applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." *Id.* at 165, 132 S.Ct. 1376. In finding a reasonable probability that the defendant and the trial court would have accepted the offered plea, the Court noted that the defendant's ultimate sentence was "3 & half[ ] times greater" than he would have received under the offered plea agreement. *Id.* at 174, 132 S.Ct. 1376.

The Present Case

When assessing petitioner's claim, the state supreme court referenced the overarching standard articulated in *Strickland*, under which to establish prejudice, the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S.Ct. 2052. In applying this standard to petitioner's argument regarding prejudice, the state supreme court construed "the result of the proceeding" to specifically mean the outcome of the sentencing proceeding. Consequently, the state supreme court concluded that petitioner could only establish prejudice if it could be demonstrated that the trial judge would have concluded that the balance of aggravating and mitigating circumstances did not warrant death in the absence of counsel's deficient performance. The court concluded that petitioner did not make this showing.

On federal habeas review, petitioner argued that the state court's application of *Strickland*'s *substantive -outcome* test for prejudice was "contrary to" Supreme Court precedent. He argued that more-recent Supreme Court cases required the state supreme court to instead use the *process-based* test as done in *Hill*, *Flores-Ortega*, and *Lafler*. If the *Hill* line of cases were deemed applicable, petitioner would be obligated to demonstrate a reasonable probability that, but for counsel's errors, he would have opted for jury sentencing.

The central issue revolved around the interpretation of *Strickland*'s "result of the proceeding" requirement in the present case. The Tenth Circuit noted that, depending on the context, Supreme Court cases offered two potential interpretations: (1) the substantive outcome of the case, such as the death sentence imposed, or (2) the procedural outcome of the decision, involving whether petitioner would have chosen jury sentencing with competent counsel.

The Tenth Circuit ruled that in cases like petitioner's, which challenge the state court's selection between the two applications of *Strickland*'s general standard for prejudice, petitioner must establish a second level of clearly established law mandating the approach he advocates. Specifically, petitioner needed to identify a Supreme Court holding *requiring* courts, when applying *Strickland*, to use a process-based test to evaluate whether counsel's deficient performance leading to a state jury-sentencing waiver was prejudicial. In essence, the viability of petitioner's claim hinged on whether *Hill*, *Flores-Ortega*, and *Lafler* mandated the application of the process-based prejudice standard to waivers of jury sentencing. The Tenth Circuit held that none of these cases supported such a proposition. *Honie*, 58 F.4th at 1194.

The court concluded that the holding in *Hill* "is a narrow one about pleas," *Flores-Ortega* narrowly applies to appeals, and *Lafler* is a narrow one about declined plea offers. In other words, the holdings in *Hill*, *Flores-Ortega*, and *Lafler* were confined to specific claims—they governed pleas and appeals and did not address waivers of state-statutory rights to jury sentencing in capital cases. The court rejected petitioner's expansive interpretation that these cases established a broader principle applying a process-based prejudice standard whenever counsel's deficient performance resulted in the forfeiture of a fundamental right reserved to the defendant, suuh as the right to jury sentencing in a capital case. *Honie*, 58 F.4th at 1194-95.

Ultimately, the Tenth Circuit concluded that because the Supreme Court had not explicitly held that the process-based prejudice standard governed jury-sentencing waivers in capital cases, it could not be asserted that the state court unreasonably applied *Strickland* in applying the outcome prejudice test. *Honie*, 58 F.4th at 1198.

Further research: *Postconviction Remedies*, § 35:4 (Thomson Reuters 2023 ed.).

***Synopsis*: Petitioner failed to exhaust his *Cronic* claim and, in any event, he did not establish a complete denial of meaningful assistance or that the alleged denial occurred during a "critical stage" of his proceedings.**

Russell v. Denmark, 68 F.4th 252 (5th Cir. 2023)

Petitioner, convicted of aggravated assault and being a felon in possession of a weapon, filed a federal habeas petition asserting ineffective-assistance claims, which the district court subsequently granted.

The initial question at hand concerned whether petitioner asserted his ineffective-assistance claim in the state courts under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), or *U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), with the crucial distinction being that a *Strickland* claim requires proving prejudice, while prejudice is presumed under *Cronic*. Despite petitioner's state petition lacking clarity, the Fifth Circuit, interpreting the pro se filing liberally, concluded that it alleged a *Strickland* claim, not *Cronic*. Therefore, petitioner had not exhausted his *Cronic* claim, and according to the court, "that should have ended the [district] court's analysis, full stop." *Russell*, 68 F.4th at 271.

Even if petitioner had exhausted his *Cronic* claim, it was not eligible for relief as the record did not demonstrate that petitioner was entirely deprived of any meaningful assistance. The public defenders who initially represented him actively participated in key stages, including the preliminary hearing and arraignment; filed discovery motions on his behalf; and engaged in apparent plea bargaining. Although these efforts were considered perfunctory, and the record lacked evidence that counsel fulfilled its duty to conduct reasonable investigations for trial preparation, the actions of counsel, even if deemed inadequate or ineffectual, did not meet the threshold of a complete denial of counsel required to establish a *Cronic* violation. *Russell*, 68 F.4th at 271.

Even assuming petitioner was effectively denied counsel, such denial must have occurred during a "critical stage" of his proceedings. While the district court broadly concluded that the period between the appointment of counsel and the start of the trial is a "critical stage" for Sixth Amendment purposes, the Fifth Circuit rejected this broad characterization. The court held that neither the Supreme Court nor the circuit court had ever held "that the *entire* pretrial period is a critical stage." *Russell v. Denmark*, 68 F.4th 252, 271 (5th Cir. 2023).

Instead, the Supreme Court's precedents suggest a consideration of specific events as "critical stages," advocating for a more granular approach compared to the blanket designation made by the district court. *Russell*, 68 F.4th at 272. If the district court's conclusion was accurate, deeming the entire pretrial period as a "critical stage" in the *Cronic* analysis, then specific pretrial milestones identified in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (psychiatric interview was a critical stage), *U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (post-indictment line-up was a critical stage), and *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963) (per curiam) (preliminary hearing was a critical stage), would have been subsumed in an overarching "pretrial" stage. The fact that these specific events were not demonstrated to be part of an overarching pretrial stage highlighted the overreach of the district court's decision. *Russell*, 68 F.4th at 272.

Further research: *Postconviction Remedies*, §§ 35:23, 35:25 (Thomson Reuters 2023 ed.).

***Synopsis*: Petitioner was not prejudiced under *Strickland* when his appellate counsel neglected to present an argument that might have succeeded during his appeal but would be unsuccessful under current state law.**

Guzman v. Sec'y, Dept. of Corr., 73 F.4th 1251 (11th Cir. 2023)

At the time of petitioner's trial, state law required that an instruction on manslaughter include an explanation that justifiable and excusable homicide were excluded from the crime. The instruction was not given at trial and appellate counsel failed to raise the argument on direct appeal.

The Eleventh Circuit held that petitioner was not prejudiced by appellate counsel's failure to challenge the omitted excusable homicide instruction, given an intervening change in Florida law. While petitioner's habeas petition was pending, the Florida Supreme Court had overruled its precedent requiring the excusable homicide instruction. Therefore, petitioner was not deprived of any substantive or procedural right to which the law entitled him in the present. *Guzman v. Sec'y, Dept. of Corr.*, 73 F.4th 1251, 1256 (11th Cir. 2023) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)).

The Eleventh Circuit dismissed petitioner's contentions, refuting his argument that *Fretwell* exclusively applied to claims of ineffective assistance of counsel at the trial level and did not extend to the appellate stage. The court emphasized that *Fretwell*'s essence lay in the analysis of prejudice rather than the procedural context. *Guzman*, 73 F.4th at 1256-57; *accord Bunkley v. Meachum*, 68 F.3d 1518, 1521-22 (2d Cir. 1995); *U.S. v. Baker*, 719 F.3d 313, 321 (4th Cir. 2013); *Schaetzle v. Cockrell*, 343 F.3d 440, 448 (5th Cir. 2003); *Evans v. Hudson*, 575 F.3d 560, 566 & n.2 (6th Cir. 2009).

Furthermore, the Eleventh Circuit rejected petitioner's assertion that AEDPA either overturned or modified *Fretwell*. According to petitioner, language in 28 U.S.C. § 2254(d) mandates federal courts, reviewing habeas petitions, to consider the law at the time of the state decision rather than the present law, as *Fretwell* requires. The court countered that AEDPA does not confer new habeas powers to federal courts; rather, it restricts their authority. The court emphasized that AEDPA's limitations do not establish a new right to grant habeas petitions by freezing the law at some point in the past. *Guzman*, 73 F.4th at 1257.

Further research: *Postconviction Remedies*, § 35:4 (Thomson Reuters 2023 ed.).

***Synopsis*: Trial counsel performed deficiently in failing to argue that petitioner could not burglarize his own home.**

Leeds v. Russell, 75 F.4th 1009 (9th Cir. 2023)

Petitioner sought habeas relief, contending that his trial attorney was ineffective for not arguing that, under Nevada law, he could not burglarize his own home. The Ninth Circuit granted relief, reasoning that although the Nevada Supreme Court did not definitively establish this principle until eight years after petitioner's conviction, since Nevada's burglary statute was open to two interpretations, competent counsel should have advocated for the interpretation preventing the client from facing a felony-murder charge. The court emphasized that the arguments supporting this interpretation were available to counsel before the Nevada Supreme Court's final ruling, and it did not require hindsight to recognize the strength of this approach. Petitioner's "counsel was 'obliged to make, or at least to evaluate, an argument that [wa]s sufficiently foreshadowed in existing case law.'" *Leeds v. Russell*, 75 F.4th 1009, 1020 (9th Cir. 2023) (quoting *Bridges v. U.S.*, 991 F.3d 793, 804 (7th Cir. 2021)). Because competent counsel could have reasonably interpreted Nevada law to mean that a person could not burglarize his own home, as ultimately concluded by the Nevada Supreme Court, the court held that it was expected for counsel to make that argument. *Leeds*, 75 F.4th at 1019.

Further research: *Postconviction Remedies*, § 35:4 n.53 (Thomson Reuters 2023 ed.).

***Synopsis*: Petitioner failed to establish an ineffective assistance of counsel claim based on trial counsel's conflict of interest; the strength of government's case and the weakness of possible defenses, rather than trial counsel's conflict of interest, shaped counsel's advice that petitioner plead guilty.**

Burkhart v. U.S., 27 F.4th 1289 (11th Cir. 2022)

The CEO implicated in a fraud and money laundering conspiracy, who pleaded guilty, subsequently filed a § 2255 motion, contending that the law firm's undeniable conflict of interest, representing both him and a victim, led to deficient representation; the central question revolved around whether this conflict adversely impacted petitioner's legal representation.

The Sixth Amendment guarantees criminal defendants not only the right to effective assistance of counsel but also the correlative right to representation free from conflicts of interest, as outlined in *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), provides the framework for petitioner's claim, requiring a demonstration of an actual conflict of interest (acknowledged here) and a further establishment that the conflict adversely affected the lawyer's performance. *Id.* at 348, 100 S.Ct. 1708. An adverse effect can be demonstrated by showing that, but for the attorney's actual conflict of interest, there is a reasonable likelihood that counsel's performance somehow would have been different. *U.S. v. Coscia*, 4 F.4th 454, 475 (7th Cir. 2021). "Put another way, the defendant must show specific instances where his attorney could have, and would have, done something different." *Burkhart v. U.S.*, 27 F.4th 1289, 1295 (11th Cir. 2022) (cleaned up). "This something different must be a plausible alternative to the strategy actually pursued at trial, though it need not be a 'winning' strategy." *Id.* (internal quotation marks omitted).

The Eleventh Circuit rejected petitioner's argument that the requirement to show a plausible alternative strategy only applied to cases where an attorney represents two criminal defendants in the same trial and emphasized that a defendant must demonstrate both the ability and willingness of counsel to pursue an alternative strategy, which inherently carries a plausibility requirement. *Burkhart*, 27 F.4th at 1296.

Furthermore, since petitioner resolved the case through a plea, the court's scrutiny gained additional nuance, with a focus on demonstrating an adverse effect on the plea decision. "To show an adverse effect on the plea decision, 'a petitioner who pleaded guilty upon the advice of an attorney with a conflict of interest is not required to demonstrate that he would have decided against pleading guilty had he been represented by a conflict-free attorney.' " *Burkhart*, 27 F.4th at 1296 (quoting *Hall*, 371 F.3d 969, 974 (7th Cir. 2004)). "Likewise, a petitioner does not 'need to establish that a conflict-free attorney would have advised against pleading guilty.' " *Hall v. U.S.*, 371 F.3d at 974 (quoting *Thomas v. Foltz*, 818 F.2d 476, 483 (6th Cir. 1987)). "The proper focus is instead on 'whether the defense counsel's conflict affected his actions and the defendant's decision to plead guilty, not whether another attorney without conflict would have made the same recommendation.' " *Burkhart*, 27 F.4th at 1296 (quoting *Hall*, 371 F.3d at 974 (citing *Thomas*, 818 F.2d at 483)).

In this case, petitioner raised multiple claims alleging the denial of effective assistance of counsel due to the acknowledged conflict of interest, but the asserted deficiencies were found to be inconsistent with the record; petitioner's law firm demonstrated diligence and care in defending him, leading the circuit court to affirm the denial of petitioner's § 2255 motion. *Burkhart*, 27 F.4th at 1294.

Further research: *Postconviction Remedies*, § 35:32 (Thomson Reuters 2023 ed.).

BRADY SUPPRESSION OF EVIDENCE

Chapter 36 of *Postconviction Remedies*

Synopsis: **Failure of the Commonwealth to disclose a police report indicating that a witness had initially claimed he had been shot after receiving threats from petitioner's friends did not constitute a violation of *Brady*.**

Watkins v. Medeiros, 36 F.4th 373 (1st Cir. 2022)

Petitioner faced murder charges, with Vern Rudolph being the Commonwealth's primary identification witness, supported by other witnesses who corroborated key aspects of Rudolph's testimony. Early in the shooting investigation, both Rudolph and his brother were considered suspects.

During direct examination, Rudolph was questioned about his arrest for selling cocaine in a school zone, unlawfully possessing a firearm, his guilty plea, and the subsequent three-year prison sentence. He disclosed the benefit promised by the prosecutor in exchange for his testimony—a letter assuring that he wouldn't serve the second half of his sentence due to his cooperation against petitioner.

In cross-examination, the defense aimed to challenge Rudolph's testimony's veracity, impeach his credibility, and undermine his identification of petitioner as the shooter. Defense counsel emphasized Rudolph's deal with the Commonwealth in the closing argument, highlighting the incentives for Rudolph to lie, including the promise of an agreement to get out of jail on the drug and gun possession charges.

Among various *Brady* claims, petitioner argued that the police wrongfully withheld a crucial police report. This report revealed that Rudolph initially claimed to have been shot by an unknown assailant

after receiving threats from petitioner's friends but later admitted to accidentally shooting himself.

Petitioner asserted that introducing the police report would allow the jury to infer that Rudolph received an undisclosed benefit from the Commonwealth, avoiding prosecution for unlawful possession of a firearm and lying to a police officer. Petitioner argued that this report demonstrated a pattern of Rudolph implicating petitioner and seeking rewards for his testimony, which he couldn't establish at trial.

However, the First Circuit found these arguments unpersuasive, holding that petitioner failed to demonstrate prejudice under *Brady*. The court ruled that even if the suggested inference was plausible, the failure to produce the report was not prejudicial because it was cumulative. The court pointed out stronger evidence introduced at trial regarding a considerable benefit promised to Rudolph by the Commonwealth—specifically, the reduction of his imprisonment term on drug and gun possession charges. *Watkins v. Medeiros*, 36 F.4th 373, 387 (1st Cir. 2022).

The court also rejected the inference of an undisclosed deal, stating that petitioner provided no evidence that Rudolph and the Commonwealth discussed any deal related to the finger-shot incident. The court emphasized that petitioner's failure to present evidence of such discussions undermined the argument. *Watkins*, 36 F.4th at 387.

Furthermore, the court dismissed the dissent's claim that petitioner was denied the opportunity to cross-examine Rudolph to demonstrate a tendency to fabricate stories involving petitioner. The court noted that the defense counsel effectively cross-examined Rudolph about his and his brother's involvement in the shooting, allowing the jury to infer Rudolph's potential motives and question his credibility. *Watkins*, 36 F.4th at 387.

Finally, the court emphasized that petitioner didn't introduce evidence in state court showing that competent counsel would have chosen to use the police report. The court highlighted that, objectively, the police report was weaker than other evidence available to counsel, which was strategically not used during the trial. *Watkins*, 36 F.4th at 388.

Further research: *Postconviction Remedies*, § 36:17 nn. 27, 28 (Thomson Reuters 2022 ed.).

SPEEDY TRIAL RIGHTS

Chapter 38 of *Postconviction Remedies*

***Synopsis*: A 50-month delay in bringing petitioner to trial on charges related to an armed home invasion, despite his 10 months of pretrial incarceration and six months of restrictive house arrest not being extensively oppressive, was deemed a violation of petitioner's Sixth Amendment speedy trial rights; the looming indictment affected his employment opportunities, he invoked his speedy trial rights twice early in the case, and witness hostility hindered effective cross-examination while allowing the Commonwealth to read his police interview into the record.**

Kennedy v. Supt. Dallas SCI, 50 F.4th 377 (3d Cir. 2022)

Applying the four factors, as outlined in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Third Circuit agreed with petitioner that a 50-month delay in bringing him to trial for charges related to an armed home invasion following his arrest violated his Sixth Amendment speedy trial rights. *Kennedy v. Superintendent Dallas SCI*, 50 F.4th 377 (3d Cir. 2022).

Regarding the first *Barker* factor, the court determined that the nearly 50-month delay—from petitioner's arrest to the start of jury selection—was

sufficiently long to warrant further examination of the remaining factors. *Kennedy*, 50 F.4th at 382.

The second *Barker* factor, assessing the extent to which the defendant asserted their speedy trial right and attributing blame for the delay, favored petitioner. The court largely concurred with the agreed-upon 40-month/10-month apportionment of delay between the government and petitioner, noting that the majority of the delay fell into the neutral category caused by negligence and court congestion. *Kennedy*, 50 F.4th at 383.

The third *Barker* factor, considering the extent to which a defendant asserted their speedy trial right, encompassing the frequency and force of such assertions, favored the government. Petitioner invoked his speedy trial rights twice—once approximately four months after his arrest and again nearly six months after his arrest. However, during the subsequent nearly 44 months, a period when petitioner transitioned from pretrial detention to home arrest, he refrained from further invoking his right to a speedy trial, "suggesting that his appetite for proceeding to trial had been dulled by his release from detention." *Kennedy*, 50 F.4th at 383 -84.

The fourth *Barker* factor, which focuses on prejudice to the defendant and is considered one of the most critical factors, favored petitioner. The initial type of harm examined is oppressive pretrial incarceration. While petitioner acknowledged that his 10 months of pretrial detention followed by six months of house arrest were not extensively lengthy or oppressive to warrant a finding of prejudice, the court concurred with petitioner's argument that these periods of pretrial incarceration and restrictive housing should still bear weight in the evaluation of other prejudice factors. *Kennedy*, 50 F.4th at 384.

The second type of harm, involving the anxiety and concern of the accused, leaned "slightly" in petitioner's favor. He expressed that the impending indictment interfered with his employment, limiting opportunities in the Marine Corps and ultimately preventing him from reenlisting. *Kennedy*, 50 F.4th at 384-85.

The third and most severe form of prejudice, impairment of the defense at trial, also favored petitioner. The court determined that the government had not overcome the presumptive prejudice resulting from a four-year delay, despite the strength of its own case. Additionally, petitioner highlighted prejudice beyond the presumptive kind, including harm stemming from loss of employment, anxiety, and incarceration. When considering this evidence alongside the presumptive prejudice, it tilted the fourth *Barker* factor in favor of petitioner. As a result, the court concluded that, overall, the assessment of the four factors led to the determination that petitioner's speedy trial rights were violated. *Kennedy*, 50 F.4th at 385-86.

Further research: *Postconviction Remedies*, §§ 38:5-38:12 (Thomson Reuters 2022 ed.).

***Synopsis*: District court lacked authority to expand, *sua sponte*, petitioner's habeas claim alleging ineffective assistance of appellate counsel based on a single fact—counsel's failure to file a petition for rehearing in the state's intermediate appellate court, as a prerequisite to further review in the state's highest court.**

Folkes v. Nelsen, 34 F.4th 258 (4th Cir. 2022)

In his § 2254 petition, petitioner claimed ineffective assistance of appellate counsel solely based on the failure to file a petition for rehearing in the South Carolina Court of Appeals. However, the district court, instead of addressing this claim, *sua sponte* granted relief on different grounds, including defense counsel's failure to inform petitioner of the appellate decision, failure to

consult on further appellate opportunities, and the provision of inaccurate information in a form letter.

The Fourth Circuit held that the district court erred by considering and granting relief based on a factual ground different from the one initially presented in petitioner's § 2254 petition, emphasizing the requirement under AEDPA and the Rules Governing Section 2254 Cases for petitioners to specify all grounds for relief and state the facts supporting each ground. *Folkes v. Nelsen*, 34 F.4th 258, 262, 267 (4th Cir. 2022).

The court emphasized that a petitioner is responsible for identifying the allegedly deficient performance, and a court acting beyond the claims presented in the petition crosses the line between jurist and advocate, bypassing AEDPA's framework. The court further clarified that the act of not filing a petition for rehearing is distinct from other conduct expanded by the district court for review, and federal courts are not responsible for identifying the factual basis for a petitioner's claims, as demonstrated in petitioner's § 2254 petition. *Folkes*, 34 F.4th at 269, 271.

The district court identified no basis in law or fact for its conclusion that an ineffective-assistance-of-counsel claim based solely on the failure to file a petition for rehearing necessarily encompasses additional conduct that occurs from the time the court of appeals issued its decision to the remittitur. Notwithstanding any additional duties appellate counsel may have had, none of those were the solitary duty put before the district court in petitioner's § 2254 petition. Here, the act of not filing a petition for rehearing is distinct from the other conduct the district court expanded its review to encompass and relied on to grant relief. *Folkes*, 34 F.4th at 271.

Further research: *Federal Habeas Manual*, §§ 8:3, 8:7 (Thomson Reuters 2023 ed.).

"If Moses had gone to Harvard Law School and spent three years working on the Hill, he would have written the Ten Commandments with three exceptions and a saving clause."

— Charles Morgan

Briefly stated . . .

JURISDICTION AND SIMILAR ISSUES

The Tenth Circuit held that the plaintiff's no-contest plea to charges of aggravated flight and assault upon peace officer—based on her decision to accelerate her vehicle while officers were near—was not necessarily inconsistent with her claim that officers used excessive force when they shot her in back after she no longer posed a threat to them, and thus *Heck* did not bar the plaintiff's § 1983 action against officers. *Torres v. Madrid*, 60 F.4th 596, 601 (10th Cir. 2023); *see Postconviction Remedies*, § 11:11 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 2:14 (Thomson Reuters 2023 ed.).

The Third Circuit held as a matter of first impression that a Certificate of Appealability (COA) is necessary when a federal prisoner secures relief through a 28 U.S.C. § 2255 motion and endeavors to contest the district court's selection of remedy. *Clark v. U.S.*, 76 F.4th 206, 211 (3d Cir. 2023) ("But Clark does not raise any sentence-specific challenges in his appeal—that is, he does not argue that his new criminal sentence is statutorily, constitutionally, or otherwise erroneous. Instead, he challenges only the District Court's choice not to grant a full resentencing."); *accord U.S. v. Cody*, 998 F.3d 912, 913 (11th Cir. 2021). The Fourth and Sixth Circuits, however, have reached a different conclusion. *U.S. v. Hadden*, 475 F.3d 652, 664 (4th Cir. 2007) (a prisoner who receives a corrected sentence may "challenge[] the relief granted—i.e., whether the relief was 'appropriate' under § 2255" without a COA); *Ajan v. U.S.*, 731 F.3d 629, 631 (6th Cir. 2013) (same); *see Federal Habeas Manual*, § 12:75 (Thomson Reuters 2023 ed.).

The Sixth Circuit held that petitioner could not obtain relief on his § 2255 motion to vacate even if his conviction for conspiracy to travel in interstate commerce with intent to commit murder, for which petitioner received a life sentence, would not affect the length of his prison term, as he would still be serving two concurrent life sentences for his other offenses, and relief from the $100 special assessment he had to pay for each offense did not affect his right to be released from custody. *Amaya v. U.S.*, 71 F.4th 487, 489-90 (6th 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 challenge to the execution of a sentence, a parole revocation of a *state* prisoner, is properly brought under 28 U.S.C. § 2241. *Galbraith v. Hooper*, 85 F.4th 273, 279 (5th Cir. 2023) (citing Brian R. Means, *Federal Habeas Manual*, § 1:29, at 47 (2023) (discussing federal prisoners)); *see also Reed v. McKune*, 298 F.3d 946, 953 (10th Cir. 2002) (state prisoner who sought injunctive relief to compel parole board officials to release him on parole had to proceed via habeas corpus petition under § 2241 as opposed to 42 U.S.C. § 1983); *but see Peoples v. Chapman*, 393 F.3d 1352, 1353 (11th Cir. 2004) (per curiam) (petition challenging parole revocation "properly brought under § 2241 but it was governed by and subject to the rules and restrictions found in § 2254"); *Shelby v. Bartlett*, 391 F.3d 1061, 1063-64 (9th Cir. 2004) (§ 2244's one-year limitation period "applies to all habeas petitions filed by persons in 'custody pursuant to the judgment of a State court,' 28 U.S.C. § 2244(d)(1), even if the petition challenges an administrative decision rather than a state court judgment."); *Cook v. New York State Div. of Parole*, 321 F.3d 274, 275-76 (2d Cir. 2003) ("We agree with the district court that a state prisoner challenging his or

her parole revocation must file under section 2254 and that the time bar imposed by section 2244(d)(1) applies to such an application."); *Crouch v. Norris*, 251 F.3d 720 (8th Cir.2001) (§ 2254 applied to § 2241 petition challenging denial of parole); *Coady v. Vaugh*, 251 F.3d 480 (3d Cir. 2001) (§ 2241 petition challenging denial of parole treated as § 2254 petition); *see Postconviction Remedies*, § 5:2 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 1:34 (Thomson Reuters 2023 ed.).

The Sixth Circuit ruled that Michigan's mandatory lifetime electronic monitoring (LEM) did not constitute placing petitioner, a convicted sex offender, "in custody" for the purposes of the federal habeas statute. This decision held, despite the continuous tracking of his movements through a chargeable ankle bracelet since his release from prison and the ongoing monitoring for the rest of his life, which required daily charging and constant internet connectivity. The court determined that LEM requirements did not grant the government direct control over the offender's movements, and any restrictions on his mobility were considered incidental rather than direct. *Corridore v. Washington*, 71 F.4th 491, 497-98 (6th Cir. 2023); *see Postconviction Remedies*, § 7:12 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 1:22 (Thomson Reuters 2023 ed.).

The Fourth Circuit ruled that petitioner's Rule 60(b) motion, seeking relief from the district court's judgment denying his federal habeas petition as untimely, did not allege that the district court made a "mistake" under Rule 60(b)(1). Instead, petitioner contended that his failure to timely file the habeas petition should have been excused due to his mental health history. Importantly, the denial of the habeas petition was not based on the issue of petitioner's mental health history, as evidence of his mental disability was submitted for the first time in the motion for relief. Consequently, the court construed his motion as falling under Rule 60(b)(6). *Justus v. Clarke*, 78 F.4th 97, 108 (4th Cir. 2023); *see Federal Habeas Manual*, § 12:8 (Thomson Reuters 2023 ed.).

The Fifth Circuit held that "challenges to the validity of any confinement or to particulars affecting its duration fall within the 'core' of habeas corpus and are barred under this line of precedent; '[b]y contrast, constitutional claims that merely challenge the conditions of prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core and may be brought pursuant to § 1983 in the first instance.' " *Hicks v. LaBlanc*, 81 F.4th 497, 509 (5th Cir. 2023) (rejecting defendants' contention that *Heck* bars any § 1983 claim that is also cognizable in habeas at the time it accrues, and holding that "*Preiser* and its progeny do not implicate the claims here because they are specifically *beyond* the 'core' of habeas, as Hicks' claims challenge his overdetention, and by its terms do not implicate the fact or duration of his confinement"); *see Postconviction Remedies*, § 5:7 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 1:29 (Thomson Reuters 2023 ed.).

The Second Circuit held that the enforceability of a collateral-attack waiver turns on whether petitioner's plea was knowing and voluntary, not the nature of any subsequent legal developments, including changes in the law. The court stated that it was not required to decide whether a collateral-attack waiver would be unenforceable in the event of a "complete miscarriage of justice." *Davis v. U.S.*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). Unlike the petitioner in *Davis*, who argued that his conviction for draft evasion was based on "an act that the law d[id] not make criminal," *id.*, petitioners here admitted to having engaged in an armed robbery of a drug dealer in which the victim

was gunned down, and their conduct was prohibited by a number of criminal statutes, none of which was affected by the Supreme Court's intervening precedents and each of which would have supported a conviction. *Cook v. U.S.*, 84 F.4th 118, 124, 125 n.4 (2d Cir. 2023); *see Postconviction Remedies*, § 6:19 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 1:63 (Thomson Reuters 2023 ed.).

The Ninth Circuit held that abstention under *Younger v. Harris*, 401 U.S. 37, 46, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), was not justified in 42 U.S.C. § 1983 action brought by a death row inmate, seeking a declaratory judgment that the government's failure to appoint postconviction habeas relief counsel violated his procedural due process rights, where the only ongoing state proceeding was the habeas petition initiated by the inmate, and his objective was to facilitate the progression of that proceeding rather than impede it. *Redd v. Guerreo*, 84 F.4th 874, 889-90 (9th Cir. 2023); *see Postconviction Remedies*, § 10:3 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 1:111 (Thomson Reuters 2023 ed.).

HECK BAR

The Seventh Circuit determined that the plaintiff's 42 U.S.C. § 1983 civil rights action against Illinois Department of Corrections officials and prison was partially barred by *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The court held that the plaintiff's claim challenging the process leading to the revocation of his supervised release before leaving prison violated due process, calling into question the validity of a state criminal sentence, and thus was barred by *Heck*. Additionally, the claim that Department officials anticipatorily revoked his supervised release without evidence of actual violations was also barred by *Heck*. However, claims related to constitutional violations arising from Department officials' conduct after the state's Prisoner Review Board revoked supervised release were not barred by *Heck*. The same conclusion applied to the claim that officials failed to investigate potential post-prison host sites or address grievances, resulting in extra prison time instead of supervised release. *Courtney v. Butler*, 66 F.4th 1043, 1050-54 (7th Cir. 2023); *see Postconviction Remedies*, § 11:14 (Thomson Reuters 2022 ed.); *Federal Habeas Manual*, § 2:17 (Thomson Reuters 2022 ed.).

The Fifth Circuit held that the *Heck* doctrine did not preclude the former state prisoner's § 1983 action, wherein he alleged that supervisory prison officials violated his due process right by detaining him beyond the expiration of his prison sentence, as the challenge focused on the execution of his release rather than the validity of his sentence; success in the action would not invalidate his conviction or its associated sentence. *Hicks v. LaBlanc*, 81 F.4th 497, 506-07 (5th Cir. 2023); *see Postconviction Remedies*, § 11:2 (Thomson Reuters 2022 ed.); *Federal Habeas Manual*, § 2:1 (Thomson Reuters 2022 ed.).

The Ninth Circuit concluded that *Heck* did not bar a former state prisoner's § 1983 suit. In his action, the prisoner alleged that state officials violated his due process and equal protection rights by failing to deduct education credits he earned from his sentence. Importantly, the prisoner did not challenge his underlying sentence, and he had actively made complaints and taken other efforts to rectify the situation while in custody. Moreover, his sentence ended just two months after he earned the credits, and his parole expired less than three months later, leaving him with very little time to obtain habeas

relief. *Galanti v. Nevada Dept. of Corr.*, 65 F.4th 1152, 1156 (9th Cir. 2023) (distinguishing *Guerrero v. Gates*, 442 F.3d 697, 704 (9th Cir. 2006) which held that *Heck* barred the plaintiff's § 1983 suit even though he was no longer in custody and habeas relief was unavailable, noting that Guerrero's claims attacked his conviction, and Guerrero did not timely pursue appropriate relief); *see Postconviction Remedies*, § 11:7 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 2:8 (Thomson Reuters 2023 ed.).

The Seventh Circuit determined that allegations supporting the plaintiff's 42 U.S.C. § 1983 claim of unlawful detention, which contended that police officers conspired to detain him without probable cause, intending to afford law enforcement additional time to strengthen their case, were, if deemed true, inherently contradictory to the validity of the plaintiff's state conviction for aggravated discharge of a firearm. This contradiction arose from the plaintiff's assertion that he acted in self-defense during a shoot-out initiated by another person. As a result, the claim was precluded under *Heck*. *Patrick v. City of Chicago*, 81 F.4th 730, 737 (7th Cir. 2023); *see Postconviction Remedies*, § 11:10 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 2:13 (Thomson Reuters 2023 ed.).

AEDPA REVIEW STANDARDS

The Tenth Circuit rejected petitioner's argument that the state court's merits decision was not entitled to AEDPA deference because it concluded in one paragraph that the trial court properly overruled his *Batson* objections. Although the Tenth Circuit recognized that the state court's *Batson* discussion was brief and did not expressly address the circumstances on which petitioner relied to show purposeful discrimination, "AEDPA does not require state courts to show their work." *Cortez-Lazcano v. Whitten*, 81 F.4th 1074, 1084 (10th Cir. 2023) (citing *Harrington v. Richter*, 562 U.S. 86, 99, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (AEDPA deference applies even when state court issues summary ruling); *Johnson v. Williams*, 568 U.S. 289, 300, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) ("[F]ederal courts have no authority to impose mandatory opinion-writing standards on state courts.")). So although under *Batson* a state court assuredly must evaluate the totality of the evidence and consider all relevant circumstances, "it need not 'prove to a federal court that it did so by setting out every relevant fact or argument in its written opinion.'" *Cortez-Lazcano,* 81 F.4th at 1084 (quoting *Lee v. Comm'r, Ala. Dept. of Corr.*, 726 F.3d 1172, 1212 (11th Cir. 2013)); *see Postconviction Remedies*, § 29:48 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:70 (Thomson Reuters 2023 ed.).

The Third Circuit determined that the state court's ruling, stating that petitioner failed to show *Strickland* prejudice because he did not demonstrate that the outcome of his murder trial "would have been different," was contrary to clearly established federal law. *Strickland* only necessitates a "reasonable probability" that the result of the proceeding would have been different. *Rogers v. Supt. Greene SCI*, 80 F.4th 458, 464-65 (3d Cir. 2023); *see Postconviction Remedies*, §§ 29:33 n.10, 29:35 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:51 (Thomson Reuters 2023 ed.).

The Ninth Circuit rejected petitioner's argument that the prosecutor committed prejudicial misconduct during the penalty-phase closing arguments in a capital case by quoting the Bible. The court, while acknowledging that it would consider the statements unconstitutional under de novo review, emphasized

that only Supreme Court precedent serves as "clearly established" law for AEDPA purposes. As of 2007, the state supreme court was bound by the Supreme Court's general Eighth Amendment and due process statements, and there was no clearly established precedent from the Supreme Court indicating that invoking religious principles, including the Bible, during closing arguments violated the Constitution. Therefore, AEDPA barred petitioner's claim. *McDermott v. Johnson*, 85 F.4th 898, 908 (9th Cir. 2023); *see Postconviction Remedies*, § 29:31 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:41 (Thomson Reuters 2023 ed.).

The Ninth Circuit held that a prior federal habeas petition, filed by petitioner before the effective date of AEDPA seeking the appointment of counsel and a stay of execution, was not considered an actual application adjudicating on the merits, making AEDPA applicable to the operative habeas petition. The initial filing disclaimed completeness, lacked supporting facts for most grounds, and did not involve a signed document under penalty of perjury. The subsequent appointment of counsel led to the filing of a habeas petition containing 27 claims for relief that was not styled as an amended complaint or an amended habeas petition. *Clark v. Broomfield*, 83 F.4th 1141, 1148-49 (9th Cir. 2023); *see Postconviction Remedies*, § 29:2 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:3 (Thomson Reuters 2023 ed.).

The Seventh Circuit held that, on limited occasions, the decision under § 2254(a) whether a writ should issue cannot be reached because of the state of the record. In that circumstance, the district court may hold an evidentiary hearing. "One such exception is when the state court record does not contain sufficient factual information to adjudicate a claim, and the factual predicate could not have been previously discovered through the petitioner's exercise of due diligence. 28 U.S.C. § 2254(e)(2)(A)(ii). In that situation, we have remanded a case for an evidentiary hearing." *McMullen v. Dalton*, 83 F.4th 634, 647-48 (7th Cir. 2023) (remand necessary where petitioner contended ineffective assistance due to counsel's insufficient investigation into the petitioner's background and mental health, requiring determination whether counsel had strategic reasons for not presenting this evidence and the state court record did not disclose whether such strategic reasons existed for the limitations in counsel's investigation and the presentation of mitigating circumstances); *accord Taylor v. Grounds*, 721 F.3d 809, 824 (7th Cir. 2013) (federal court of appeal would not determine whether petitioner was entitled to habeas relief based on his trial counsel's conflict of interest in the absence of a state court determination on whether petitioner was adversely affected by his trial counsel's conflict of interest, even though the state court's decision on petitioner's motion for postconviction relief unreasonably applied Supreme Court law in finding no conflict of interest and the state court rested its adverse effect analysis upon an unreasonable factual determination); *Stitts v. Wilson*, 713 F.3d 887, 895-97 (7th Cir. 2013) (remanding for an evidentiary hearing where state court of appeals unreasonably applied *Strickland* in evaluating whether trial counsel had restricted an alibi investigation and there was an unresolved critical factual question regarding the actual extent of trial counsel's investigation); *see also Anderson v. U.S.*, 981 F.3d 565, 578 (7th Cir. 2020) (remanding for an evidentiary hearing where record contained insufficient information for the court to determine whether counsel acted based on strategic or other reasons); *Price v. Thurmer*, 514 F.3d 729, 733 (7th Cir. 2008) ("When the merits of a petition for habeas corpus cannot be determined from the record compiled in the state court, through no fault of the petitioner ... the district court is authorized,

and may be directed by the court of appeals, to conduct its own hearing and make appropriate findings"); *see Cullen v. Pinholster*, 563 U.S. 170, 205, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (Breyer, J., concurring in part and dissenting in part) ("if the state-court rejection assumed the habeas petitioner's facts (deciding that, *even if* those facts were true, federal law was not violated), then (after finding the state court wrong on a [§ 2254(d)] ground), a[ ] [§ 2254(e)] hearing might be needed to determine whether the facts alleged were indeed true"); *see Postconviction Remedies*, § 29:43 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 4:4 (Thomson Reuters 2023 ed.).

The Ninth Circuit determined that petitioner was precluded from securing a federal evidentiary hearing in a capital case concerning his claim of an irreconcilable conflict of interest with counsel. *Clark v. Broomfield*, 83 F.4th 1141, 1156 (9th Cir. 2023). First, an evidentiary hearing was precluded by *Cullen v. Pinholster*, 563 U.S. 170, 181-82, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), which generally limits federal habeas review to the state-court record. Second, a hearing was precluded by 28 U.S.C. § 2254 (e) because petitioner failed to develop any additional facts at trial and solely raised the claim on direct appeal. *Clark*, 83 F.4th at 1156 (citing *Deere v. Cullen*, 718 F.3d 1124, 1148 (9th Cir. 2013)). Third, petitioner did not allege facts that, if proven true, would entitle him to relief. Fourth, because the Supreme Court had not recognized a Sixth Amendment claim based on an irreconcilable conflict in the absence of resulting ineffectiveness, a hearing would be futile. *Clark*, 83 F.4th at 1156 (citing *Carter v. Davis*, 946 F.3d 489, 508 (9th Cir. 2019)); *see Postconviction Remedies*, § 22:6 n.5 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 4:7 (Thomson Reuters 2023 ed.).

The Seventh Circuit held that AEDPA deference should be accorded to the state appellate court's decision on petitioner's claim asserting ineffective assistance of counsel due to the failure to present mitigation evidence at sentencing. Even though the state court did not expressly find trial counsel's performance to be reasonable, the appellate court noted that the sentencing court was already well-informed about petitioner's background and mental health through the presentence investigation report. The Seventh Circuit clarified that if the state sentencing court was already aware of the relevant information, the state appellate court did not entertain the possibility that counsel's performance was deficient. *McMullen v. Dalton*, 83 F.4th 634, 642 (7th Cir. 2023); *see Postconviction Remedies*, § 29:4 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:7 (Thomson Reuters 2023 ed.).

The Seventh Circuit determined that the state appellate court erred in its legal analysis of the prejudice component of petitioner's *Strickland* claim. The claim asserted that petitioner was deprived of effective assistance because his counsel failed to present mitigation evidence during sentencing. The state court's ruling, indicating that additional mitigation evidence would not have accounted for or explained the illegal possession of drugs for which petitioner was convicted, was deemed a legal error. Because mitigating evidence was not necessarily required to excuse or diminish petitioner's illegal conduct, the Seventh Circuit held that AEDPA deference did not apply to the state court's resolution of the prejudice prong of the *Strickland* inquiry. *McMullen v. Dalton*, 83 F.4th 634, 642 (7th Cir. 2023); *see Postconviction Remedies*, § 29:37 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:51 (Thomson Reuters 2023 ed.).

UNITED STATES SUPREME COURT GRANTS OF CERTIORARI

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Thornell v. Jones, 22-982. In this capital case, the question presented is: "Did the Ninth Circuit violate this Court's precedents by employing a flawed methodology for assessing *Strickland* prejudice when it disregarded the district court's factual and credibility findings and excluded evidence in aggravation and the State's rebuttal when it reversed the district court and granted habeas relief" on respondent's ineffective-assistance-of-counsel-at-sentencing claim.

In March 1992, respondent Danny Lee Jones brutally murdered Robert Weaver and Weaver's 7-year-old daughter Tisha, attacked Weaver's mother, stole Weaver's gun collection, and fled the Weaver home. After police apprehended him, the State of Arizona charged Jones with two counts of premeditated first-degree murder and one count of attempted first-degree murder, and sought the death penalty. The jury convicted Jones on all counts. The penalty phase—the focus of the case now—came next.At sentencing, the trial court found that the State proved four aggravating factors: Jones committed the murders for pecuniary gain; Jones committed the murders in an especially heinous, cruel, or depraved manner; Jones was convicted of multiple murders; and one of the victims, Tisha, was under age 15. To help his mitigation case, defense counsel called Jones's stepfather and Dr. Jack Potts, whom the court appointed to perform a mental health examination of Jones. Potts testified about "Jones's 'chaotic and abusive childhood' and its effect on his mental health and development . . .; Jones's history of significant substance abuse; likelihood that he suffered from an attenuated form of bipolar disorder; history of multiple head injuries; and genetic predisposition for substance abuse and affective disorders." Dr. Potts also testified that additional neurological testing would help corroborate that Jones suffered from traumatic brain injury and organic neurologic dysfunction since he was 13. The trial court denied defense counsel Novak's request for neurological testing. At the conclusion of the hearing, the trial court "did not find any statutory mitigating circumstances, but found proven as non-statutory mitigating factors that Jones suffered from long-term substance abuse; was under the influence of alcohol and drugs at the time of the offense; had a chaotic and abusive childhood; and suffered from [a] substance abuse problem [that] may have resulted from genetic factors and aggravated by head trauma." The trial court concluded, however, that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating factors and call for leniency, and sentenced Jones to death for each murder. The Arizona Supreme Court affirmed Jones's convictions and sentence on direct appeal. Following an evidentiary hearing, a state postconviction court denied relief, and the Arizona Supreme Court denied review.

Jones sought federal habeas relief. The district court (pre-*Cullen v. Pinholster*, 563 U.S. 170 (2011)) held an evidentiary hearing. At the hearing, Jones presented testimony or submitted reports from five mental health experts; the State presented testimony from three mental health experts. On most disputed issues, the district court credited the State's experts, not the defense's experts. The court thus concluded that Jones failed to establish that he suffered from cognitive impairment; failed to establish that he suffered from PTSD at the time of the murders; established that he suffered from AD/HD disorder at the time of the crimes, but that the condition was unrelated to violent behavior and thus was not persuasive mitigation; did not establish that he suffered from a major affective disorder; and established that he suffered from dependence on alcohol, amphetamine, and cannabis. The court concluded that "the results of subsequent examinations performed by the parties' mental health experts have not established a more-persuasive case in

mitigation than that presented through the report and testimony of Dr. Potts at sentencing." It thus concluded that Jones failed to show *Strickland* prejudice, i.e., that "this additional information [presented at the evidentiary hearing] would alter the trial court's sentencing decision after it weighed the totality of the mitigation evidence against the strong aggravating circumstances proven at trial." A Ninth Circuit panel reversed, the Supreme Court vacated and remanded, the Ninth Circuit remanded to the district court, the district court again denied habeas relief, and the Ninth Circuit panel then reversed in the amended opinion that is the subject of the Supreme Court's current review. 52 F.4th 1104.

The Ninth Circuit found that AEDPA governed its review of Jones's ineffective assistance claims but, because it concluded that the postconviction court did not address *Strickland*'s prejudice prong, it reviewed the prejudice ruling de novo. Then, after finding deficient performance, the Ninth Circuit held that there was a reasonable probability that, had Novak obtained a defense mental health expert and sought neuropsychological and neurological testing, the results of sentencing would have been different. The court found that "had counsel secured a defense mental health expert, that expert would have uncovered (and presented at sentencing) a wealth of available mitigating mental health evidence. . . . [T]hat expert could have provided substantial evidence—through neuropsychological testing or otherwise—that Jones suffered from mental illness, including evidence supporting any of the diagnoses made by experts in federal district court." Thus, the court (in contrast to the district court) credited the defense's experts; and further held that under Ninth Circuit precedent "[i]t was improper for the district court to weigh the testimony of the experts against each other in order to determine who was the most credible." Finally (in the words of Arizona's petition), "although the panel listed Jones's aggravating factors and acknowledged it was required to weigh them against the mitigation evidence, nowhere did the court discuss the aggravation or its weightiness as compared against the proffered mitigation." (Citation omitted.) Judge Mark Bennett authored a nine-judge dissent from the denial of en banc review.

In its petition, Arizona asserts that the Ninth Circuit's "egregiously flawed *Strickland* prejudice analysis takes Jones's evidence at face value, without crediting the district court's extensive factual and credibility findings regarding that evidence. The panel's decision thus directly conflicts with the bedrock rule that 'courts of appeal may not set aside a district court's factual findings unless those findings are clearly erroneous.' *Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009)." (Citation and internal quotation marks omitted.) The petition proceeds to offer many examples of this alleged error, including the Ninth Circuit's disregarding the district court's credibility determinations with respect to the experts. Next, Arizona contends that "the panel impermissibly ignored entire categories of relevant evidence as required by this Court's case law. Although the panel gave lip service to the requirement that it must reweigh the evidence in aggravation against the totality of available mitigating evidence, it never actually did that mandatory reweighing. Instead, the panel merely listed the aggravating circumstances found by the sentencing court and never mentioned them again, much less assessed their weight against the mitigating evidence." (Citation and internal quotation marks omitted.) Further, says Arizona, the Ninth Circuit panel wrongly failed to consider the State's rebuttal evidence in evaluating Jones's mitigation evidence. Arizona concludes by arguing that "[h]ad the panel followed the prescribed framework it would have been compelled to affirm the district court's denial of habeas relief."