POSTCONVICTION REMEDIES NOTE

A Biannual Review of Significant Postconviction Review Decisions

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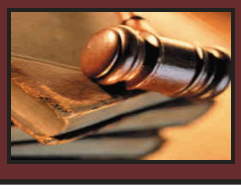

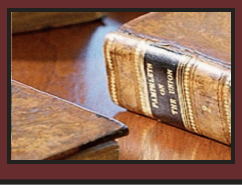


2025 Vol. I

"As for lawyers, it's more fun to play one than to be one." — Sam Waterston

RECENT FEDERAL DECISIONS

JURISDICTION AND SIMILAR MATTERS

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

***Synopsis*: State trial court's release of petitioner from custody and vacatur of her convictions did not render moot cross-appeals from district court's partial grant of habeas relief.**

Garding v. Mont. Dep't of Corr., 105 F.4th 1247 (9th Cir. 2024)

The Ninth Circuit held that the state's cross-appeals from the federal district court's partial grant of habeas relief, despite the state trial court's release of the petitioner and vacatur of her convictions, did not render moot the state's cross-appeals as the state -court judgment was set aside solely due to the district court's habeas decision, initiating a new process in state court. Since a new trial had not yet begun, a federal circuit court could still provide relief to the state by reversing the district court's order on appeal. *Garding v. Mont. Dep't of Corr.*, 105 F.4th 1247, 1255-56 (9th Cir. 2024). The Ninth Circuit held that this result was compelled by *Calderon v. Moore*, 518 U.S. 149, 150, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996) (per curiam) (state's appeal of decision that

Supreme Court Decisions

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By a 6-3 vote, the Court held that enforcement against the homeless of a law restricting encampment on public property does not constitute "cruel and unusual punishment" prohibited by the Eighth Amendment. In *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019), the Ninth Circuit held that "the Eighth Amendment's Cruel

Continued on page 13

defendant's right to self-representation had been violated was not moot, even though defendant had been granted a new trial, because state still had at least a partial remedy available in that a decision in state's favor would release it from the burden of holding a new trial).

The Ninth Circuit declined to follow *Brown v. Vanihel*, 7 F.4th 666, 668-69 (7th Cir. 2021). In *Brown*, a federal district court granted habeas relief, leading the state to request vacatur of petitioner's conviction and a retrial. The state court vacated the conviction, and petitioner then argued for dismissal of the appeal on the grounds that the vacatur order mooted the state's appeal. The Seventh Circuit agreed, holding that the vacatur of the conviction nullified its power to hear the case, as the state's appeal concerned a nonexistent judgment. Thus, it dismissed the case as moot.

The Ninth Circuit held that "[t]he problem is that *Brown* is contrary to the Supreme Court's decision in *Moore*, and thus wrong." *Garding*, 105 F.4th at 1255. The Ninth Circuit also found that *Brown* conflicted with *Eagles v. U.S. ex rel. Samuels*, 329 U.S. 304, 307-08, 67 S.Ct. 313, 91 L.Ed. 308 (1946) (holding that where "the writ has been granted and the prisoner released," an appellate court can still "affect the litigants in the case before it" because "[r]eversal undoes what the habeas corpus court did and makes lawful a resumption of the custody"). *Garding*, 105 F.4th at 1255-56.

Further research: *Introduction to Habeas Corpus*, Chapter Five (2022 ed.); *Postconviction Remedies*, § 8:3 n.29 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 1:79, 12:66 (Thomson Reuters 2024 ed.)

***Synopsis*: Action under 42 U.S.C. § 1983 was proper vehicle for method-of-execution challenge, even though alternative method of execution identified by inmate as feasible and readily implemented was not authorized under state's laws.**

LOGIC PUZZLE

(LEVEL: DIFFICULT)

A TEACHER WRITES SIX WORDS ON A BOARD: "CAT DOG HAS MAX DIM TAG." SHE GIVES THREE STUDENTS, ALBERT, BERNARD AND CHERYL, EACH A PIECE OF PAPER WITH ONE LETTER FROM ONE OF THE WORDS. THEN SHE ASKS, "ALBERT, DO YOU KNOW THE WORD?" ALBERT IMMEDIATELY REPLIES YES. SHE ASKS, "BERNARD, DO YOU KNOW THE WORD?" HE THINKS FOR A MOMENT AND REPLIES YES. THEN SHE ASKS CHERYL THE SAME QUESTION. SHE THINKS AND THEN REPLIES YES. WHAT IS THE WORD?

ANSWER ON PAGE 12.

Nance v. Wood, 597 U.S. 159, 142 S.Ct. 2214, 213 L.Ed.2d 499 (2022)

In evaluating state prisoners' constitutional claims, it may be necessary to examine the dividing line between 42 U.S.C. § 1983 and the federal habeas statute. Each law enables a prisoner to complain of "unconstitutional treatment at the hands of state officials." *Heck v. Humphrey*, 512 U.S. 477, 480, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). However, the similarities end there. The habeas statute includes procedural requirements that are not found in § 1983, potentially leading to the dismissal of a claim under the former statute while

it might not be dismissed under the latter. The scope of the two laws also differs. Section 1983 broadly authorizes suit against state officials for the "deprivation of any rights" secured by the Constitution. "Read literally, that language would apply to all of a prisoner's constitutional claims, thus swamping the habeas statute's coverage of claims that the prisoner is 'in custody in violation of the Constitution.'" *Nance v. Wood*, 597 U.S. 159, 142 S.Ct. 2214, 213 L.Ed.2d 499 (2022) (quoting 28 U.S.C. § 2254(a)). Consequently, § 1983 has not been read literally in the prisoner context. To the contrary, the Supreme Court has insisted that § 1983 contains an "implicit exception" for actions that lie "within the core of habeas corpus." *Wilkinson v. Dotson*, 544 U.S. 74, 79, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005).

"In defining that core, [the Supreme] Court has focused on whether a claim challenges the validity of a conviction or sentence." *Nance v. Ward*, 597 U.S. 159, 167, 142 S.Ct. 2214, 213 L.Ed.2d 499 (2022) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973)). The simplest cases arise when an inmate, alleging a flaw in his conviction or sentence, seeks "immediate or speedier release" from prison. *Heck*, 512 U.S. at 481, 114 S.Ct. 2364. Less obvious, the Court has held that an inmate must proceed in habeas when the relief he seeks would "necessarily imply the invalidity of his conviction or sentence." *Id.* at 487, 114 S.Ct. 2364 (barring § 1983 suits for money damages when prevailing would imply a conviction was wrongful). In doing so, though, the Court has emphasized that the implication must be "necessar[y]." *Wilkinson*, 544 U.S. at 81, 125 S.Ct. 1242. On the other end of the spectrum, the Court has held that a prison-conditions claim may be brought as a § 1983 suit. *See Preiser*, 411 U.S. at 498-99, 93 S.Ct. 1827. "Such a suit—for example, challenging the adequacy of a prison's medical care—does not go to the validity of a conviction or sentence, and thus falls outside habeas's core." *Nance*, 597 U.S. at 168, 142 S.Ct. 2214.

A prisoner who challenges a state's proposed method of execution under the Eighth Amendment must identify a readily available alternative method that would significantly reduce the risk of severe pain. If the prisoner proposes a method already authorized under state law, the Court has held that his claim can go forward under 42 U.S.C. § 1983, rather than in habeas. *See Nelson v. Campbell*, 541 U.S. 637, 644-47, 124 S.Ct. 2117, 158 L.Ed.2d 924. But the prisoner is not confined to proposing a method already authorized under state law; he may ask for a method used in other states. *See Bucklew v. Precythe*, 587 U.S. 587 U.S. 119, 139 S.Ct. 1112, 203 L.Ed.2d 521. The question presented is whether a prisoner who does so may still proceed under § 1983.

In *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004), and *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006), the petitioners challenged the states' proposed method of execution under the Eighth Amendment. The Court held that the two method-of-execution claims fell on the § 1983 side of the line. Both *Nelson* and *Hill*, though, reserved the question of whether the result should be different if a state's death-penalty statute did not authorize the alternative method of execution sought by the petitioner. *See Nelson*, 541 U.S. at 645, 124 S.Ct. 2117; *Hill*, 547 U.S. at 580, 126 S.Ct. 2096.

The Court answered that question in *Nance*, holding that an action under § 1983 was the proper vehicle for a method-of-execution challenge, even though an alternative method of execution identified by inmate as feasible and readily implemented was not authorized under the state's laws. 597 U.S. at 170, 142 S.Ct. 2214.

Further research: *Introduction to Habeas Corpus*, Chapter Five (2022 ed.); *Postconviction Remedies*, §§ 5:2, 5:4, 11:13 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 1:35, 2:16 (Thomson Reuters 2024 ed.)

***Synopsis*: Assuming that a freestanding claim of actual innocence is cognizable on habeas corpus in a noncapital case, the degree of proof exceeds the degree of proof required to establish gateway innocence that excuses a procedural default.**

Jimenez v. Stanford, 96 F.4th 164 (2d Cir. 2024)

Petitioner filed a state habeas petition challenging his conviction for second degree murder. The prosecution's case-in-chief relied on identifications by two eyewitnesses to prove petitioner's guilt: Carmen Velazquez and Harry Ramos. Then, almost twenty years after the trial, one eyewitness (Ramos) recanted his testimony and claimed that the investigating detective had fed him misleading information that improperly influenced his courtroom identification of petitioner. Two alibi witnesses, who had not testified at trial, also came forward. Petitioner sought relief from his conviction, claiming that he was factually innocent. Despite the thin remaining evidence of his guilt, the state court declined to hold an evidentiary hearing and denied postconviction relief on the ground that petitioner had not proven his innocence, in large part because the court did not believe the recanting eyewitness or the alibi witnesses. The district court denied habeas relief.

The Second Circuit characterized the appeal as "a troubling case about a weakly supported thirty-year-old murder conviction that may have condemned an innocent teenager to decades in prison." *Jimenez v. Stanford*, 96 F.4th 164, 169 (2d Cir. 2024). It was troubling, the court stated, because, "despite our considerable doubt regarding the petitioner's guilt, we are bound to conclude that he is not entitled to a writ of habeas corpus based only on the contention that he is, in fact, innocent." *Id.*

Initially, petitioner was required to demonstrate that his freestanding claim of actual innocence was cognizable under the Eighth and Fourteenth Amendments. "To this day, '[w]hether ... a federal right [based on a claim of actual innocence] exists is an open question.' *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009)." *Jimenez*, 96 F.4th at 183. "The Supreme Court has provided scant guidance on the cognizability of a freestanding right to habeas corpus relief based on a claim of wrongful conviction after a fair trial free of error," and no circuit court has "recognized the existence of such a right or granted habeas relief based on such a claim." *Id.*

In *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the Court merely assumed without deciding that "in a *capital case* truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," but concluded that the petitioner in that case had fallen "far short" of making that demonstration. *Id.* at 417-19, 113 S.Ct. 853 (emphasis added). Importantly, *Herrera* announced that the burden of proof for a "threshold showing" of such a right "would necessarily be extraordinarily high." *Id.* at 417, 113 S.Ct. 853. In light of the difficult questions recognizing such a right would pose, the Second Circuit assumed, for purposes of this case, both that an innocence right exists and that its scope extends beyond a right against execution.

Turning to the high standard any claimant would have to meet, the Second Circuit noted that "the distinction between the more established standards of gateway innocence and the unsettled, hypothetical standards of freestanding innocence hinted at in *Herrera*" was central to its analysis of the merits. *Jimenez*, 96 F.4th at 184. The court began by reviewing the strength of petitioner's actual innocence claim under the threshold standards of gateway innocence.

Gateway innocence is an equitable exception, allowing avoidance of AEDPA's one-year limitations period, 28 U.S.C. § 2244(d)(1), on the ground that a procedural limitation precludes a

federal court from hearing the merits of a potentially innocent petitioner's habeas petition could result in a "fundamental miscarriage of justice." *McQuiggin v. Perkins*, 569 U.S. 383, 393-98, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013). The same standard applies in the procedural default context. *Schlup v. Delo*, 513 U.S. 298, 319-21, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Untimeliness or a procedural default can be excused in a "narrow class of 'truly extraordinary' cases" of claims of actual innocence, *id.* at 321, 115 S.Ct. 851, where such claims are supported by new evidence of "factual innocence, not mere legal insufficiency," *Bousley v. U.S.*, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). Even if a petitioner overcomes this demanding standard, however, gateway innocence cannot itself afford the petitioner habeas relief from his state conviction. It can only open a gateway to federal review of an otherwise barred claim that, if itself successful, could afford him relief.

The Second Circuit observed that the only examples of sufficiently compelling gateway innocence claims were close cases. For instance, in *Rivas v. Fischer*, 687 F.3d 514, 546 (2d Cir. 2012), the court found compelling evidence of the petitioner's innocence in a new expert opinion that revised the victim's time of death to a period when he had an unchallenged alibi, as well as in unchallenged testimony discrediting the originally incriminating medical examiner's report. But *Rivas* stressed that it was a "close case" and cautioned that "we would not expect a lesser showing of actual innocence to satisfy the *Schlup* standard." *Rivas*, 687 F.3d at 546.

More recently, in *Hyman v. Brown*, 927 F.3d 639 (2d Cir. 2019), the court observed that *Schlup*, *House v. Bell*, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), and *Rivas* shared a common feature: new evidence "directly supported petitioner's factual innocence by indicating either that he *did not* commit, or *could not* have committed, the crimes of conviction." *Id.* at 665 (emphasis in original). *Hyman* reasoned that in each case, compelling evidence of innocence came through a combination of eyewitness misidentification, testimony and forensic evidence ruling out the petitioner's ability to commit the crime, and evidence strongly incriminating a third party. *Id.* at 665-66. The court concluded that the petitioner had not met his burden in that case because, even though the only eyewitness to identify him as a participant in a large shootout (out of a total of four eyewitnesses) had recanted her testimony, that alone did not affirmatively demonstrate that the petitioner did not, or could not have, fired a gun when the witness's recantation was compared to the weight of the remaining incriminating evidence (the other three eyewitnesses' testimonies, ballistics evidence, and the petitioner's concession that he had been at the scene). *Id.* at 666-71.

The Second Circuit concluded that, although the weaker incriminating evidence in this record distinguished *Hyman*, "[T]he closeness of this case is sufficient to make us prefer to simply assume *arguendo* that [petitioner] demonstrated a sufficient likelihood of innocence to satisfy *Schlup*'s 'gateway' standard." *Jimenez*, 96 F.4th at 186.

But even assuming petitioner met his threshold burden, he had, at most, made out only a "close case" of gateway innocence. As in *House* and *Rivas*, the remaining inculpatory evidence was weak in this case, and "it may be enough for the petitioner to introduce credible new evidence that thoroughly undermines the evidence supporting the jury's verdict" in order to pass through the innocence gateway. *Jimenez*, 96 F.4th at 186-87 (internal quotation marks omitted). But unlike in *House* and *Rivas*, petitioner's exculpatory evidence was also weak, because neither the witness's recantation nor the alibi witnesses' testimony "'thoroughly undermine[d]'" the independent basis for Velazquez's identification of petitioner as the killer. *Jimenez*, 96 F.4th at 187.

Having assumed that petitioner passed through the actual innocence gateway, the Second Circuit addressed what standard applied "when, after

opening the door, all that lies beyond is the same claim of innocence?" *Jimenez*, 96 F.4th at 187. In *Herrera*, the Supreme Court struggled with that question prior to AEDPA's passage and said only that whatever the standard of proof, it is "extraordinarily high." 506 U.S. at 417, 113 S.Ct. 853. No court has ever found it met. *Jimenez*, 94 F.4th at 187.

Before AEDPA was enacted, *Herrera* vaguely described a cognizable actual innocence claim as requiring a "truly persuasive demonstration" in light of "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States." 506 U.S. at 417, 113 S.Ct. 853. Later, in *Schlup*, the Court described the difference between the proof required to establish gateway innocence, as opposed to substantive innocence, by illustration:

> In *Herrera* ..., the evidence of innocence would have had to be strong enough to make his execution "constitutionally intolerable" *even if* his conviction was the product of a fair trial. For Schlup, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial.

Schlup, 513 U.S. at 316, 115 S.Ct. 851 (emphasis in original). Accordingly, *Schlup* concluded, if "there were no question about the fairness of the criminal trial, a *Herrera*-type claim would have to fail unless the federal habeas court is itself convinced that those new facts *unquestionably establish* [the petitioner's] innocence." *Id.* at 317, 115 S.Ct. 851 (emphasis added).

Following AEDPA's enactment, the Supreme Court in *House* finally reasoned that the "sequence of the Court's decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*." *House*, 547 U.S. at 555, 126 S.Ct. 2064.

The Second Circuit concluded "the degree of proof required to make out a freestanding claim of innocence (assuming that such a claim is cognizable on habeas corpus even in a noncapital case) exceeds the proof required to establish gateway innocence." *Jimenez*, 94 F.4th at 188. With that understanding, the Second Circuit held that petitioner had not met that threshold under the deference owed to the state court's reasoning as required by AEDPA. Applying the analysis in *Hyman*, petitioner "ultimately had not shown that he did not do, or could not have done, the crime because the inconsistencies in Velazquez's prior descriptions of the shooter reduce the proper weight a juror might give to her testimony but do not affirmatively show [petitioner's] innocence." *Id.*

Petitioner's exculpatory evidence was, in fact, "the same type of evidence as Velazquez's testimony—witnesses swearing to what they saw, heard, did, and thought." *Jimenez*, 94 F.4th at 187. The "resulting credibility contest, which may be compelling enough for the purposes of gateway innocence given the dearth of physical evidence cutting in either direction, does not surpass the heightened standard required on review of the merits of a freestanding innocence claim." *Id.*

The Second Circuit concluded that it did not need to identify the exact degree of proof required because "the same body of evidence that could, at most, only barely surmount the gateway innocence barrier in this case logically 'falls short' of the greater certainty demanded in substantive innocence claims." *Jimenez*, 94 F.4th at 188 (quoting *House*, 547 U.S. at 555, 126 S.Ct. 2064).

The Second Circuit was unpersuaded by petitioner's argument that he had met the standard required to affirmatively prove his innocence

because he had shown that it was likely that no reasonable juror would convict him in light of Ramos's recantation and the alibi witnesses' testimonies:

> That metric … reflects the less demanding gateway standard, which calls for an assessment of the probability that a rational jury would have acquitted him in a hypothetical trial in a manner akin to prejudice or harmless error standards in other constitutional claims … Such a hypothetical second trial, moreover, is not easily assessed. One can, of course, predict that a trial without Ramos (or with a fatally impeached Ramos) and with the two Alibi Witnesses would present a difficult road for a prosecutor relying solely on Velazquez's testimony. But we return to the essential problem: how do we weigh Velazquez's testimony? Even assuming she is available to testify, a witness who was believable when testifying a few years after the event will necessarily find it harder to recall details thirty years later. An effort to cobble together a hypothetical trial that weighs the credibility of Velazquez's original testimony, which none of us saw in person, against the putative future testimony of the Alibi Witnesses (whom we have also not seen testify), is an inherently problematic exercise. *Herrera*, *Schlup*, and *House*, by contrast, are clear that demonstrating freestanding innocence calls for more than a sheer probability that a new trial, proceeding under impossible real -world conditions, would likely end in acquittal.

Jimenez, 94 F.4th at 189-90.

The Second Circuit was also unpersuaded by petitioner's argument that clear and convincing evidence of innocence is sufficient to meet the threshold implied in *Herrera*. *Jimenez*, 94 F.4th at 190.

Finally, the Second Circuit turned to AEDPA, the final barrier to both petitioner's claim and the court's own authority to decide differently. Petitioner argued that AEDPA does not apply to freestanding claims of actual innocence because that right, if it exists, is a fundamental constitutional right that requires petitioners to shoulder a heavier burden than required for other "arguably less fundamental" rights. The court disagreed, stating that "[t]here is no principled reason why AEDPA would not apply to freestanding actual innocence claims (presuming they exist) to the same extent it does to other types of alleged violations of the Constitution." *Jimenez*, 94 F.4th at 196. Nothing in the text of § 2254(d)(1) or elsewhere in AEDPA indicates an intent to carve out an exception just for freestanding claims of actual innocence.

Turning to the application of AEDPA, the court stated that "all that is clearly established in the law of freestanding innocence is the lack of clarity about the scope of any actual innocence right and the evidentiary burden necessary to demonstrate it." *Jimenez*, 94 F.4th at 194. "We cannot determine that the State court was wrong to deny [petitioner's] claim, because even if we could characterize the doubt that [petitioner] has cast on his guilt as sufficient to satisfy *Herrera*, the deferential requirements of AEDPA all but foreclose the possibility of granting relief on such a claim where there is little 'clearly established Federal law.'" *Jimenez*, 94 F.4th at 194 (quoting 28 U.S.C. § 2254(d)(1)).

But even treating Supreme Court dicta as if they were holdings and deciding the reasonableness of the state court's decision, the AEDPA standard still would not be met. Section 2254(d)(1) prohibits courts from granting habeas relief "where a petitioner's claim pursuant to ... the U.S. Constitution[ ] has been adjudicated on its merits in state court proceedings in a manner that is not manifestly contrary to common sense." *Contreras v. Artus*, 778 F.3d 97, 106 (2d Cir. 2015) (internal

quotation marks omitted). "That review is extremely forgiving to State courts; federal courts must 'extend considerable deference even to deficient reasoning [by the State court,] at least in the absence of an analysis so flawed as to undermine confidence that the constitutional claim has been fairly adjudicated.'" *Jimenez*, 94 F.4th at 195 (quoting *McCray v. Capra*, 45 F.4th 634, 640 (2d Cir. 2022) (internal citations, quotation marks, and alterations omitted)).

The Second Circuit concluded that the state court's decision was not objectively unreasonable. As previously concluded, petitioner had not provided "new evidence so powerful that it 'unquestionably established' his innocence." *Jimenez*, 94 F.4th at 195 (quoting *Schlup*, 513 U.S. at 317, 115 S.Ct. 851).

Further research: *Introduction to Habeas Corpus*, Chapter Five (2022 ed.); *Postconviction Remedies*, § 6:17 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 1:61 (Thomson Reuters 2024 ed.)

HECK DOCTRINE

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

Kitchen v. Whitmer, 106 F.4th 525 (6th Cir. 2024)

***Synopsis*: The writ of habeas corpus, not § 1983, was the exclusive remedy for a state prisoner's claim that a statute requiring him to serve 42 to 60 years before parole eligibility violated the Eighth Amendment, as applied to a juvenile offender who would not be eligible for parole until nearly 58 years old, since granting relief would imply the invalidity of his sentence; the challenge involved both the statute and the length of the minimum term, making it impossible to challenge the statute without attacking the sentence, and if successful, the 42 -year minimum sentence would need to be replaced with a shorter term ensuring parole eligibility.**

Petitioner filed a lawsuit against the government under 42 U.S.C. § 1983, raising an as-applied challenge to the constitutionality of a state statute that required him to serve a minimum term of an indeterminate 42 to 60-year sentence for various crimes committed when he was a juvenile before he could be considered eligible for parole. The issue was whether petitioner was required to bring his claim in habeas corpus rather than § 1983.

In *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." The Court later elaborated on this holding in *Heck v. Humphrey*, 512 U.S. 477, 481, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), stating that § 1983 claims are not "cognizable" if success "would necessarily imply the invalidity" of the "conviction or sentence."

More recently, in *Wilkinson v. Dotson*, 544 U.S. 74, 77, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), the Court addressed a claim by two prisoners challenging the denial of parole. In denying the petitioners parole, the parole board applied guidelines adopted after the prisoners began to serve their terms. The prisoners argued that using the newer guidelines was unconstitutional and sought an injunction that ordered a new parole hearing under constitutionally proper procedures. The Court held that a § 1983 action is barred "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." This rule was used by the Court to decide that the plaintiffs' claims were "cognizable under § 1983." This was because neither prisoner asked for "an injunction ordering his immediate or speedier release," and "a favorable judgment" would "not necessarily imply the invalidity of their

convictions or sentences." *Id.* at 82, 125 S.Ct. 1242 (cleaned up).

In the present case, the Sixth Circuit held that in determining whether a writ of habeas corpus, and not § 1983, was the exclusive remedy for a petitioner's claim, the inquiry was not limited to whether the relief sought would result in an *earlier release* but also required a determination of whether such relief would necessarily *implicate the invalidity of the sentence*. Thus, the district court erred by analyzing only whether petitioner's requested relief would lead to a quicker release and ignored the question of invalidity, an essential part of the Supreme Court's test. "Indeed, our court has emphasized that a focus *only* on whether a challenge will lead to a speedier release is a 'crabbed reading' of Supreme Court caselaw." *Kitchen v. Whitmer*, 106 F.4th 525, 539 (6th Cir. 2024) (quoting *Sampson v. Garrett*, 917 F.3d 880, 882 (6th Cir. 2019)). Courts must consider both speedier release and invalidation of the sentence.

Applying this test, the Sixth Circuit held that petitioner's claim would necessarily imply the invalidity of his sentence if successful. The Eighth Amendment challenge did not arise solely from the operation of the statute but was also based on the length of the minimum term sentence imposed. Therefore, it was impossible to challenge the statute as applied without also attacking the sentence, and if petitioner prevailed, his 42-year minimum sentence would be constitutionally invalid, necessitating a shorter minimum sentence that ensured his parole eligibility. Accordingly, petitioner's claim was not appropriate for § 1983 and instead must be brought in habeas corpus. *Kitchen*, 106 F.4th at 541-44.

The dissenting judge opined that petitioner did not challenge his sentence, but, rather, "the State's choice to tie parole eligibility to the minimum term of an indeterminate sentence as violative of the Eighth Amendment as applied to him." *Kitchen*, 106 F.4th at 544 (White, J., dissenting). Moreover, even if the petitioner's challenge implied the invalidity of the minimum-sentence provision of his sentence, under the state's indeterminate sentencing scheme, its success would not necessarily imply the lawfulness of the state's confinement of the petitioner, either from commencement or any time thereafter.

Further research: *Introduction to Habeas Corpus*, Chapter Five (2022 ed.); *Postconviction Remedies*, §§ 5:4, 11:2, 11:15 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 1:35, 2:1, 2:18 (Thomson Reuters 2024 ed.)

***Synopsis*: Federal court of appeals lacked jurisdiction under collateral order doctrine over police officer's *Heck* claim on appeal of district court's denial of his motion for summary judgment on qualified immunity grounds.**

Chaney-Snell v. Young, 98 F.4th 699 (6th Cir. 2024)

With a few exceptions, Congress has granted circuit courts jurisdiction to review only "final decisions of the district courts[.]" 28 U.S.C. § 1291. The phrase "final decisions" generally covers only those orders that end the litigation. *See Hall v. Hall*, 584 U.S. 59, 64, 138 S.Ct. 1118, 200 L.Ed.2d 399 (2018). Under the collateral-order doctrine, however, the Supreme Court treats some decisions that do not end the litigation as sufficiently "final" for purposes of § 1291. To qualify as a "final" decision under this doctrine, an order must resolve a concrete issue, that issue must be distinct from the merits of the plaintiff's claims, and the issue must be "effectively unreviewable" if an appellate court waits to hear the issue until the case's completion. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009).

The denial of a *Heck* challenge does not satisfy the collateral-order test. "The bar ensures that § 1983's broad cause of action does not swallow up the habeas laws by covering claims that prisoners traditionally litigated in habeas." *Chaney-Snell v. Young*, 98 F.4th 699, 708 (6th Cir. 2024). Those sued under § 1983 can vindicate this interest after a final judgment. *Id.* "As many courts have recognized, the denial of a *Heck* claim is not 'effectively unreviewable' at a suit's end." *Id.* (citing *Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000)); *see also Sayed v. Virginia*, 744 Fed. App'x 542, 547-49 (10th Cir. 2018) (collecting cases); *Harrigan v. Metro Dade Police Dep't Station No. 4*, 636 F. App'x 470, 476 (11th Cir. 2015); *Norton v. Stille*, 526 F.App'x 509, 515 (6th Cir. 2013). Although circuit courts are not unanimous on this issue, courts that have considered *Heck* on an interlocutory appeal have generally done so without explaining in detail the basis for their jurisdiction. *See, e.g., Poole v. City of Shreveport*, 13 F.4th 420, 426-27 (5th Cir. 2021); *Lucier v. City of Ecorse*, 601 Fed. App'x 372, 376 (6th Cir. 2015).

The Supreme Court has suggested in dicta that interlocutory jurisdiction might cover an unappealable issue if it is "inextricably intertwined" with an appealable issue or if a court needs to review the unappealable issue to give "meaningful review" to the appealable one. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995)). Some courts have found *Heck* claims "inextricably intertwined" with qualified-immunity appeals. *Chaney-Snell*, 98 F.4th at 709 (citing *Lucier v. City of Ecorse*, 601 Fed. App'x 372, 376 (6th Cir. 2015); *McAdam v. Warmuskerken*, 517 Fed. App'x 437, 438 (6th Cir. 2013) (per curiam)). But another pair of unpublished cases held that an appellate court lacks jurisdiction over *Heck* claims in this setting. *Chaney-Snell*, 98 F.4th at 709 (citing *Flanigan v. Panin*, 724 Fed. App'x 375, 377 (6th Cir. 2018); *Norton v. Stille*, 526 Fed. App'x 509, 515 (6th Cir. 2013)).

The Sixth Circuit in *Chaney-Snell* held that it lacked pendent appellate jurisdiction over *Heck* claims in qualified-immunity appeals because those claims did not satisfy the "inextricably intertwined" test, and because the court could give "meaningful review" to the district court's denial of qualified immunity without addressing its *Heck* ruling. 98 F.4th at 709-10; *accord Dennis v. City of Philadelphia*, 19 F.4th 279, 285-87 (3d Cir. 2021); *Limone v. Condon*, 372 F.3d 39, 50-52 (1st Cir. 2004); *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000). The Fifth Circuit has conflicting decisions on the issue. *See Poole v. City of Shreveport*, 13 F.4th 420, 426 (5th Cir. 2021).

Further research: *Introduction to Habeas Corpus*, Chapter Five (2022 ed.); *Postconviction Remedies*, § 11.2 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 2:1 (Thomson Reuters 2024 ed.)

AEDPA REVIEW

STANDARDS

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

***Synopsis*: When the California Supreme Court denies relief on a postconviction habeas petition without issuing an order to show cause, indicating that the petitioner had not made a prima facie showing of entitlement to relief, it is unclear whether a federal court determines whether to evaluate only whether the petitioner made out a prima facie case in his state habeas petition or whether it assesses the full merits of the claim to decide if the California Supreme Court could have reasonably denied habeas relief.**

Marks v. Davis, 106 F.4th 941 (9th Cir. 2024)

Petitioner argued that he satisfied § 2254(d) on his incompetency claim because the California Supreme Court's determination that he failed to

establish a "prima facie case" of incompetence was objectively unreasonable. The Ninth Circuit stated:

> Our case law may be in some tension regarding the proper framing of the AEDPA inquiry when the California Supreme Court summarily denies a federal constitutional claim on state postconviction review. On the one hand, we held in *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir. 2003), that the inquiry under § 2254(d) "requires analysis of the state court's *method* as well as its result." *Id.* at 1054. We concluded in *Nunes* that § 2254(d)(1) was satisfied because the petitioner "clearly made out a prima facie case of ineffective assistance of counsel" and "it was objectively unreasonable for the state court to conclude on the record before it that no reasonable factfinder could believe that *Nunes* had been prejudiced." *Id.* at 1054-55; *see also Lopez v. Allen*, 47 F.4th 1040, 1048 (9th Cir. 2022); *Cannedy v. Adams*, 706 F.3d 1148, 1160–61 (9th Cir. 2013).
>
> On the other hand, our decision in *Montiel v. Chappell*, 43 F.4th 942, 957 n.13 (9th Cir. 2022), states that, even when the California Supreme Court summarily denies a claim for failure to establish a prima facie case, "we must evaluate [the petitioner's] claims in their entirety to determine whether the California Supreme Court could reasonably reject those claims on the merits."

Marks v. Davis, 106 F.4th 941, 970 (9th Cir. 2024).

The Ninth Circuit concluded that it did not need to resolve any tension between *Nunes* and *Montiel*. "The inquiry under *Nunes* turns on 'whether the allegations contained in the petition, *viewed in the context of the trial record*, established a prima facie case' of incompetence." *Marks*, 106 F.4th at 971 (quoting *Cannedy*, 706 F.3d at 1160 (emphasis altered)). In the present case, "it was objectively reasonable for the California Supreme Court—viewing the trial record in its entirety—to conclude that [petitioner] failed to establish a prima facie case of incompetence. We therefore need not resolve any tension in our case law." *Id.*; *see also Hart v. Broomfield*, 97 F.4th 644, 653 n.2 (9th Cir. 2024) ("[W]e have explained that even when the CSC rejects a petition for failure to state a prima facie claim, a federal court must evaluate the full merits of [the petitioner's] claims to assess whether the [CSC] could reasonably have denied habeas relief. Additionally, even when considering only whether a petitioner has stated a prima facie case, California courts conduct their own review of the trial record and do not credit wholly conclusory allegations or those based on hearsay.") (internal quotations marks and citations excluded).

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, §§ 29:12, 29:43 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 3:15, 3:64 (Thomson Reuters 2024 ed.)

***Synopsis*: A claim is considered "adjudicated on the merits" by a state court if the court evaluated the substance of the claim and had sufficient evidence to decide it, even if the federal constitutional basis was established by the U.S. Supreme Court after the state court's denial.**

Roberts v. Payne, 113 F.4th 801 (8th Cir. 2024)

The Eighth Circuit ruled that even though the petitioner's trial occurred before the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding that the Eighth Amendment prohibits the execution of individuals with intellectual disabilities), his *Atkins* claims in federal court had been adjudicated on the merits. *Roberts v. Payne*, 113 F.4th 801 (8th Cir. 2024). This was because the petitioner had attempted to persuade the jury that he lacked the requisite mental state for murder, and the state court had heard extensive evidence regarding his alleged intellectual disability. Thus,

the petitioner was barred from presenting new evidence in federal court to support his *Atkins* claims under *Cullen v. Pinholster*, 563 U.S. 170, 190, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). *Roberts*, 113 F.4th at 809-10; *see also Conaway v. Polk*, 453 F.3d 567, 592 (4th Cir. 2006) (holding that a state court had decided "the dispositive issue in the *Atkins* claim" when, before *Atkins* was decided, it determined that a defendant was not intellectually disabled under North Carolina law, noting that a state court ruling that does not cite relevant Supreme Court precedent could still reach the "merits" of that precedent for AEDPA purposes) (citing *Early v. Packer*, 537 U.S. 3, 7-8 (2002)).

Moreover, based on similar reasoning, the court found that the *Atkins* claim did not rely on a "new" and "previously unavailable" rule of constitutional law made retroactively applicable by the Supreme Court, which would have allowed him to present additional evidence under 28 U.S.C. § 2254(e)(2). *Roberts*, 113 F.4th at 809-10.

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, §§ 29:8, 22:3 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 3:10, 4:8 (Thomson Reuters 2024 ed.)

***Synopsis*: Petitioner failed to overcome the presumption that the state supreme court adjudicated the merits of his constitutional claims, and therefore, the deferential AEDPA review standards applied.**

Sherman v. Gittere, 92 F.4th 868 (9th Cir. 2024)

Petitioner filed a federal habeas petition alleging that the state trial court violated his constitutional right to present a complete defense by excluding certain testimony that impeached a witness, which he asserts prevented him from presenting his theory of defense. The district court denied relief.

In his Ninth Circuit appeal, petitioner argued for the first time that *de novo* review, not AEDPA's deferential standard, applied to his right-to-present-a-complete-defense claim because the state

(Continued on page 15)

Solution to logic puzzle from page 2.

The word is "dog." Here's the reasoning step by step:

Albert's statement: Albert knows the word right away. This means that the letter he has appears in only one of the six words, so he can immediately figure out which word it is. This rules out any letter that appears in multiple words. Looking at the words:

"cat" has the letters C, A, T
"dog" has the letters D, O, G
"has" has the letters H, A, S
"max" has the letters M, A, X
"dim" has the letters D, I, M
"tag" has the letters T, A, G

The letters A, T, G, and D appear in multiple words, so Albert cannot have one of those letters. This leaves only the letters O, H, M, I, and X as possibilities for Albert's letter.

Bernard's statement: After Albert says he knows the word, Bernard then thinks for a moment and says he also knows the word. Bernard's letter must narrow it down even further, but he couldn't know initially because he didn't have a unique letter like Albert did. This means that Bernard's letter must be one that appears in some of the remaining possibilities, but once Albert has spoken, Bernard can deduce the word. The letters O, H, M, I, and X are still in play, and Bernard now knows the word, so Bernard must have a letter that clarifies the choice between these.

Cheryl's statement: Cheryl, after hearing both Albert and Bernard, is also able to figure out the word. This means that Cheryl's letter completes the process of elimination, and like Bernard, her letter is not entirely unique until others have spoken. The word must have letters that all three of them can deduce at this point.

Thus, the word must be "dog," because: Albert has the letter O, which appears only in "dog." Bernard must have D, which still leaves the possibility of "dog" or "dim" until Albert speaks. Cheryl must have G, which appears only in "dog," confirming the word. Thus, the word is "dog."

(Continued from page 1)

and Unusual Punishments Clause barred Boise from enforcing its public-camping ordinance against homeless individuals who lacked "access to alternative shelter[,]" which occurs when "'there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters.'" Many suits by the homeless followed in the wake of *Martin*, including this one brought against the City of Grants Pass, Oregon. Grants Pass prohibits sleeping "on public sidewalks, streets, or alleyways"; "[c]amping" on public property; and "[c]amping" and "[o]vernight parking" in the city's parks. An initial violation might be penalized by a fine; a person receiving multiple citations may be barred from city parks for 30 days; and violations of those orders might constitute criminal trespass, punishable by up to 30 days in prison and a $1250 fine. Shortly after *Martin* issued, two homeless individuals filed suit challenging Grants Pass's public-camping laws. A district court certified a class of involuntarily homeless people living in Grants Pass and "enjoined the city from enforcing its public-camping laws against the homeless." A divided panel of the Ninth Circuit affirmed after agreeing with the district court that the city's homeless exceed "available" shelter beds. In an opinion by Justice Gorsuch, the Court reversed and remanded.

The Court emphasized that the Eight Amendment "'has always been considered, and properly so, to be directed at the method or kind of punishment' a government may 'impos[e] for the violation of criminal statutes.'" By contrast, the Amendment has not focused "on the question whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense." The one exception is *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 141, 78 L.Ed.2d 758 (1962), where "the Court invoked the Cruel and Unusual Punishments Clause to hold that California could not enforce its law making 'the "status" of narcotic addiction a criminal offense.'" But *Robinson* stressed its own limits, making clear it didn't reach laws targeting conduct by addicts. And so the Court held here that, "[w]hatever its persuasive force as an interpretation of the Eighth Amendment, it cannot sustain the Ninth Circuit's course since *Martin*." That's because the laws at issue in *Martin* and here forbid actions (e.g., public camping), not mere status. "Under the city's laws, it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest on the lawn of a municipal building."

The Court rejected the plaintiffs and dissent's contention that *Robinson* should be extended to apply here because "laws like these seek to regulate actions that are in some sense 'involuntary,' for some homeless persons cannot help but do what the law forbids." The Court said it already rejected that view in *Powell v. Texas*, 392 U.S. 514 (1968), when it rejected a challenge to a public drunkenness conviction of a person who claimed "his drunkenness was an 'involuntary' byproduct of his status as an alcoholic." That said, the Court noted that "a variety of other legal doctrines and constitutional provisions work to protect" those in the plaintiffs' shoes, such as the "necessity" defense and state laws such as one just passed in Oregon that "specifically address[es] how far its municipalities may go in regulating public camping."

The Court elaborated that extending *Robinson* would have untoward effects, and would lead the Court to "interfere with 'essential considerations of federalism' that reserve to the

(Continued from page 13)

States primary responsibility for drafting their own criminal laws." *Martin*, for example, created numerous problems. City officials and law enforcement officers cannot readily determine who is "involuntarily" homeless (e.g., because the person turned down a shelter), how many homeless there are on a given day, how many shelter beds are "adequate" and "available" on a given day, and so on. And would adopting plaintiffs' proposed rule also "require[] cities to tolerate other acts no less 'attendant [to] survival' than sleeping, such as starting fires to cook food and 'public urination and defecation'"? In the end, said the Court, "[h]omelessness is complex. Its causes are many. So may be the public policy responses required to address it." But the Eighth Amendment does not "grant[] federal judges primary responsibility for assessing those causes and devising those responses."

Justice Thomas issued a concurring opinion to "make two additional observations." First, he believed that *Robinson* should be overruled in the appropriate case. Second, the plaintiffs "have not established that their claims implicate the Cruel and Unusual Punishments Clause" because they failed to explain "how the civil fines and park exclusion orders constitute a 'penalty imposed for the commission of a crime.'"

Justice Sotomayor issued a dissenting opinion, which Justices Kagan and Jackson joined. She began: "Sleep is a biological necessity, not a crime. For some people, sleeping outside is their only option. The City of Grants Pass jails and fines those people for sleeping anywhere in public at any time, including in their cars, if they use as little as a blanket to keep warm or a rolled-up shirt as a pillow. For people with no access to shelter, that punishes them for being homeless. That is unconscionable and unconstitutional. Punishing people for their status is 'cruel and unusual' under the Eighth Amendment. *See Robinson v. California*, 370 U.S. 660 (1962)." In particular, Justice Sotomayor concluded that the "purpose, text, and enforcement" of Grants Pass's anti-public-camping ordinances show that they "target status, not conduct." The ordinances' purpose is "to criminalize being homeless," as shown by statements made by members of the city council at a pivotal public meeting in 2013. Turning to text, Justice Sotomayor found that the ordinances' "terms single out homeless people." That is because "the Ordinances do not apply unless bedding is placed to maintain a temporary place to live. Thus, what separates prohibited conduct from permissible conduct is a person's intent to live in public spaces." (Internal quotation marks omitted.) "Put another way, the Ordinances single out for punishment the activities that define the status of being homeless." For example, she said, "[t]he Ordinances' definition of 'campsite' creates a situation where homeless people necessarily break the law just by existing." Third, Justice Sotomayor found that "[t]he Ordinances are enforced exactly as intended: to criminalize the status of being homeless."

For all those reasons, Justice Sotomayor stated that "*Robinson* should squarely resolve this case." She then insisted that "[u]pholding *Martin* does not call into question all the other tools that a city has to deal with homelessness," and that the Court "overstates the line-drawing problems that a baseline Eighth Amendment standard presents." Justice Sotomayor then noted that the Court did not decide "whether the Ordinances are valid under a new law that codifies *Martin*," the Eighth Amendment's Excessive Fines Clause, or the Due Process Clause.

Today I Learned . . .

TIL that there's a 3,200-year-old Egyptian tablet that records excuses for why people missed work.

TIL that by letting a wolf population recover, traffic collisions caused by deer are reduced by nearly 25%; the reduction is not based as much on the decimation of the deer population but on the "landscape of fear" created by the wolves.

TIL that the Wright Brothers only flew together on the same flight one time, a six-minute flight on May 25th, 1910. They promised their father, Milton, they would never fly together to avoid the chance of a double tragedy and to ensure one

(Continued from page 12)

supreme court failed to adjudicate it on the merits. Petitioner contended that the state supreme court "overlooked" his federal constitutional claim and denied the claim solely on state-law grounds.

"When a petitioner presents a federal claim 'to a state court and the state court has denied relief,' we presume that 'the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.'" *Patsalis v. Shinn*, 47 F.4th 1092, 1098 (9th Cir. 2022) (quoting *Harrington v. Richter*, 562 U.S. 86, 99, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)). The federal court applies "this presumption 'even when the state court resolves the federal claim in a different manner or context than advanced by the petitioner so long as the state court 'heard and *evaluated* the evidence and the parties' substantive arguments.'" *Patsalis*, 47 F.4th at 1098 (quoting *Johnson v. Williams*, 568 U.S. 289, 302, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) (emphasis in original)).

This presumption can be "rebutted" in "limited" or "unusual circumstances." *Johnson*, 568 U.S. at 301-02, 133 S.Ct. 1088. For example, the presumption doesn't hold if the federal claim was "rejected as a result of sheer inadvertence." *Id.* at 302-03, 133 S.Ct. 1088. Even so, to show this, "the evidence" must "very clearly" lead to "the conclusion that a federal claim was inadvertently overlooked in state court." *Id.* at 303, 133 S.Ct. 1088.

In the present case, petitioner failed to rebut the presumption that the state supreme court adjudicated his federal claim on the merits. Instead, the Ninth Circuit concluded that the state supreme court "'heard and *evaluated* the evidence and the parties' substantive arguments' regarding [petitioner's] federal right-to-a-complete-defense claim." *Sherman v. Gittere*, 92 F.4th 868, 876 (9th Cir. 2024) (quoting *Johnson*, 568 U.S. at 302, 133 S.Ct. 1088 (emphasis in original)). While the state supreme court found petitioner's brief "somewhat confusing," petitioner presented his federal claim to the state supreme court in a section of his appellate opening brief entitled "the [trial] court erred in denying Sherman the ability to impeach Dianne Bauer and to establish a defense to the charge of first-degree murder." *Sherman*, 92 F.4th at 876. Petitioner then discussed the evidentiary and constitutional issues together—with most of the section focused on the evidentiary error. Only in one line of the final paragraph of the section did petitioner contend the evidentiary "ruling deprived petitioner of an effective defense under the Sixth Amendment and violated his right to a

fundamentally fair trial and due process of law." *Id.* Indeed, petitioner's briefing failed to cite a single federal case discussing the constitutional right to present a complete defense. *Id.*

Despite the lack of clarity in petitioner's briefing, the state supreme court recognized that the substance of petitioner's evidentiary claim presented a constitutional challenge. It expressly noted petitioner's argument that the excluded evidence was not "simply attacking Dianne's credibility as a witness," but in fact "tended to support his theory of the case." *Sherman*, 92 F.4th at 876. The state supreme court recognized that petitioner sought to develop a defense to first-degree murder with the excluded evidence, a claim that implicated his constitutional rights. While the state supreme court didn't expressly purport to decide a federal constitutional question, its discussion of petitioner's defense theory shows that it "understood itself to be deciding a question with federal constitutional dimensions." *Id.* (citing *Johnson*, 568 U.S. at 305, 133 S.Ct. 1088). "By acknowledging that the excluded evidence touched on more than just Dianne's credibility, the court recognized that the evidentiary ruling also pertained to [petitioner's] constitutional right to present a defense." *Id.* at 876-77.

Moreover, the state supreme court's evaluation of the claim did not demonstrate a basis to rebut the presumption of a merits adjudication. While the state supreme court expressly analyzed the claim under two statutory evidentiary rules, the court's analysis also suggested acknowledgment of the claim's federal dimensions. For instance, the state supreme court cited a state case that considered whether admitting extrinsic evidence contrary to one of the state evidentiary statutes applied by the state court in this case resulted in the denial of a "fair trial" and cited *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)—the seminal case on the federal constitutional harmless-error standard. "Thus, this case is like *Johnson*, in which the Supreme Court observed that it was '[m]ost important' that the Supreme Court of California discussed a state-court opinion which cited several federal cases discussing the constitutional issue." *Sherman*, 92 F.4th at 877 (quoting *Johnson*, 568 U.S. at 304, 133 S.Ct 1088).

The court noted that petitioner did not argue that the state supreme court overlooked this federal claim until his briefing in the Ninth Circuit—despite contending in the district court that the state supreme court overlooked other claims. "As the Supreme Court has observed, a petitioner 'presumably knows her case better than anyone else, and the fact that she does not appear to have thought that there was an

Today I Learned . . .

brother would remain to continue their flight experiments.

TIL that "Old Book Smell" is caused by lignin—a compound in wood-based paper. When it breaks down over time, it emits a faint vanilla scent.

TIL that 1996's movie "Twister" was rated PG-13 for "intense depiction of very bad weather."

TIL that the new Rolls-Royce Ghost sound-proofing was so over-engineered that occupants in the car found the near-total silence disorienting, and some felt sick. Acoustic engineers had to go back and work on "harmonizing" various sounds in the car to add a continuous soft whisper.

oversight' until the federal appellate process 'makes such a mistake most improbable.'" *Sherman*, 92 F.4th at 878 (quoting *Johnson*, 568 U.S. at 306, 133 S.Ct. 1088).

The Ninth Circuit also recognized that, while the state supreme court did not expressly cite this principle, under state law, the application of the state statutory rule of evidence must comport with the due process clause right to introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case. Thus, the state's standard for evaluating this state statutory rule of evidence is "'at least as protective as the federal standard' for evaluating the admissibility of evidence." *Sherman*, 92 F.4th at 877 n.4 (quoting *Patsalis*, 47 F.4th at 1100).

While the state supreme court could have been more explicit in explaining its ruling, the Ninth Circuit stated that it did not "'impose mandatory opinion-writing standards on state courts.'" *Sherman*, 92 F.4th at 877 (quoting *Johnson*, 568 U.S. at 300, 133 S.Ct. 1088 (simplified)). Indeed, the Ninth Circuit stated that any shortcomings in the state supreme court's decision likely originated from petitioner's briefing. "Considering the minimal attention Sherman afforded the federal issue in his briefing, it's understandable that the Nevada court would not opine on it at length." *Sherman*, 92 F.4th at 877. While petitioner argued that the state supreme court's use of the deferential "manifestly wrong" standard of review indicates it ruled solely on state-law grounds, it was petitioner himself who advocated for the "clearly erroneous" standard in his briefing. "Therefore, it is 'entirely plausible that the [state supreme court] applied a deferential standard of review because [petitioner] invited the court to do so—not because it ignored his constitutional claim.'" *Sherman*, 92 F.4th at 877 (quoting *Hinkle v. Neal*, 51 F.4th 234, 240 (7th Cir. 2022)). "We do not require state courts to use specific phrases or meet minimum word counts to apply the presumption of adjudication on the merits." *Sherman*, 92 F.4th at 877-78.

In sum, the Ninth Circuit concluded that both *Patsalis* and *Johnson* showed that it was required to treat petitioner's right-to-a-complete-defense claim as adjudicated on the merits. As in both of those cases, petitioner presented his state and federal constitutional challenges together and discussed them interchangeably. As in *Patsalis* and *Johnson*, the state supreme court here "'recognized that [petitioner] was presenting both a state and federal constitutional challenge.'" *Sherman*, 92 F.4th at 878 (quoting *Patsalis*, 47 F.4th at 1100). "And in both *Patsalis* and *Johnson*, the federal courts concluded that the claim was adjudicated on the merits by the state court." *Sherman*, 92 F.4th at 878 (citing *Johnson*, 568 U.S. at 306, 133 S.Ct. 1088; *Patsalis*, 47 F.4th at 1100). Given the similarities here, the Ninth Circuit held that the state supreme court adjudicated petitioner's constitutional claim for violating his right to present a complete defense on the merits. *Sherman*, 92 F.4th at 878.

Further research: *Introduction to Habeas Corpus*, Chapter Seven (2022 ed.); *Postconviction Remedies*, §§ 29:4, 29:8 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 3:7, 3:10 (Thomson Reuters 2024 ed.)

Thank you to Julie Hokans for her invaluable assistance.

EVIDENTIARY HEARINGS

Chapter 8 of *Postconviction Remedies*
Chapter 3 of *Federal Habeas Manual*
Chapter Fifteen of *Introduction to Habeas Corpus*

Fooks v. Sup't Smithfield SCI, 96 F.4th 595 (3d Cir. 2024)

***Synopsis*: Petitioner was entitled to a federal evidentiary hearing on his claim that counsel misadvised him about his parole eligibility.**

Petitioner pleaded guilty in return for a stipulated sentence of twenty to forty years in prison. Later, petitioner filed for state collateral relief, claiming ineffective assistance of counsel. He alleged that his lawyer had misadvised him that he would be eligible for parole after ten years. In fact, he had to serve at least twenty. He also alleged that his lawyer should have moved to withdraw his guilty plea. He claimed that if he had known the truth, he would not have pleaded guilty.

The trial court denied his petition on its merits without an evidentiary hearing. The decision was affirmed on the grounds that nothing in the record supported petitioner's claim that plea counsel represented to him that he would be eligible for parole after serving half of his minimum sentence. The state court noted that petitioner conceded that he knew he would get a sentence of twenty to forty years. In light of this concession, the state court found the ineffective-assistance claim meritless.

Next, petitioner filed a federal habeas petition. The district court denied it, holding that the state court's decision was not contrary to clearly established federal law and had not been applied unreasonably. The district court also declined to hold an evidentiary hearing.

The Third Circuit held that petitioner was not entitled to relief based on the *existing record*, as the state court had applied the correct legal standard. Although petitioner alleged that his attorney misinformed him regarding parole eligibility, the court found these claims to be unsupported by evidence. However, the court noted that petitioner had repeatedly sought opportunities in both state and federal courts to develop the record but was denied. As a result, the district court should have conducted an evidentiary hearing to allow for full consideration of the claim. *Fooks v. Sup't Smithfield SCI*, 96 F.4th 595, 597 (3d Cir. 2024).

Although statute and precedent restrict a habeas petitioner's access to an evidentiary hearing, neither limitation applied in this case. Under 28 U.S.C. § 2254(e)(2), a federal district court cannot hold an evidentiary hearing if a petitioner "failed to develop the factual basis of a claim in State court proceedings." Here, however, the petitioner did not fail to develop his claim, as he had promptly requested an evidentiary hearing under state law, which the state court denied. Thus, the statutory bar was inapplicable. *Fooks*, 96 F.4th at 597.

Similarly, the limitation from *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), was not applicable. *Pinholster* restricts review under § 2254(d)(1) to the state court record, but an exception exists "when the state court has denied the petitioner a hearing because it thought that he would lose *even if* his allegations were presumed true. In that case, *Pinholster*'s bar does not apply if that ruling was unreasonable as a matter of clear federal law." *Fooks*, 96 F.4th at 597-98 (emphasis added) (citing *Jordan v. Hepp*, 831 F.3d 837, 849-50 (7th Cir. 2016)).

The Third Circuit held that the petitioner qualified for an exception to *Pinholster*'s bar. The state court denied his request for an evidentiary hearing based on the conclusion that, even assuming the truth of his allegations, they would not warrant relief. However, petitioner presented facts that, if proven, would render his attorney's performance objectively unreasonable under *Strickland*, making the state court's decision unreasonable under § 2254(d)(1). As a result, *Pinholster* did not preclude petitioner from obtaining an evidentiary hearing. *Fooks*, 96 F.4th at 598.

Although petitioner was not barred from receiving a federal evidentiary hearing, he was not automatically entitled to one. He needed to make a prima facie showing that his factual allegations, if true, would justify federal habeas relief. The key question was whether his allegations would entitle him to relief on the merits. "[I]f 'the record refutes [the petitioner's] factual allegations or otherwise precludes habeas relief,' no hearing is needed." *Id.* (quoting *Schriro*, 550 U.S. at 474, 127 S.Ct. 1933). The state court's decision on the merits is reviewed deferentially, "granting relief only if it was unreasonable." *Id.* (citing *Schriro*, 550 U.S. at 474, 127 S.Ct. 1933).

In this case, petitioner met that burden. *Strickland* forbids giving a defendant incorrect or misleading advice that influences his decision to plead guilty, a principle that was clearly established when petitioner pleaded guilty in 2015. Petitioner's lawyer allegedly gave him bad advice about his parole eligibility, a misunderstanding that no one cleared up. Also, the lawyer's bad advice is allegedly why petitioner took the plea deal.

The state and district courts rejected petitioner's claim as meritless, relying on two statements he made during his plea hearing, neither of which contradicted his allegations. First, petitioner agreed that no promises were made beyond those in the plea agreement, and his lawyer certified in writing that no outside promises were given. However, petitioner did not claim his lawyer promised parole, only that his lawyer incorrectly advised him that he would be eligible for it—an error, not a promise. Second, while petitioner acknowledged that his sentence would be twenty to forty years, he said nothing about parole eligibility, and no one addressed it during the hearing. Petitioner may have believed that parole could reduce his prison time, allowing him to serve the remainder of the sentence on parole. Nothing in the record contradicted this belief. *Fooks*, 96 F.4th at 598-99; *cf. Prescott v. Santoro*, 53 F.4th 470, 481 (9th Cir. 2022) (state court's decision not to conduct an evidentiary hearing to assess petitioner's contentions was not unreasonable because the state court could have reasonably found that it did not need to make a credibility finding to reject petitioner's claims of actual innocence).

Further research: *Introduction to Habeas Corpus*, Chapter Seven (2022 ed.); *Postconviction Remedies*, §§ 22:11, 22:12, 22:20, 22:4, 28:4, 28:5, 29:18, 29:43, 35:13-15 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 3:20, 3:64, 3:88, 3:94, 4:5, 4:12, 4:13, 4:15, 4:21 (Thomson Reuters 2024 ed.)

***Synopsis*: Petitioner's § 2255 motions fell within the scope of the appeal waivers in his plea agreements.**

Rudolph v. U.S., 92 F.4th 1038 (11th Cir. 2024)

In his plea agreement, petitioner waived his right to appeal his conviction and sentence, as well as his right to collaterally attack his sentence in any postconviction proceeding, including under 28 U.S.C. § 2255. Nonetheless, he filed two petitions under § 2255 to vacate several sentences, asserting that under *U.S. v. Davis*, 588 U.S. 445, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019), his arson offenses no longer qualified as crimes of violence under federal law. To bypass his appeal waiver, he argued that his § 2255 motions were collateral attacks on his convictions. The government countered that these motions constituted attacks on his sentences, rendering them barred by his plea waiver.

The court agreed with the government, stating: "The text of 28 U.S.C. § 2255, the history of that statute, and the habeas corpus right it codified all point in the same direction: § 2255 is a vehicle for attacking sentences, not convictions. Supreme Court precedents show the same, as does [petitioner's] requested relief." *Rudolph v. U.S.*, 92 F.4th 1038, 1043 (11th Cir. 2024). Consequently, because petitioner's § 2255 motions were collateral

attacks on his sentences, they were barred by his plea agreement. *Id.*

The court acknowledged that the Tenth Circuit, in *U.S. v. Loumoli*, 13 F.4th 1006, 1009-10 (10th Cir. 2021), held that § 2255 enables a collateral attack on a conviction independent of a sentence. However, the Eleventh Circuit found this decision "under reasoned" and ultimately relied on the statute's text and history in reaching a contrary conclusion. *Rudolph*, 92 F.4th at 1045.

Finally, the Eleventh Circuit declined to adopt a miscarriage of justice exception to the enforceability of appeal waivers, though it noted that "'there are certain fundamental and immutable legal landmarks within which the district court must operate regardless of the existence of sentence appeal waivers,'" such as the inviolability of statutory maximum sentences. *Rudolph*, 92 F.4th at 1048 n.3 (quoting *U.S. v. Bushert*, 997 F.2d 1343, 1350 n.18 (11th Cir. 1993)). The court acknowledged that "[s]ome of our sister circuits have adopted such an exception—overriding a valid waiver where 'denying a right of appeal would work a miscarriage of justice'—but this exception has proved 'infinitely variable.'" *Rudolph*, 92 F.4th at 1048-49 (quoting *U.S. v. Teeter*, 257 F.3d 14, 25 & n.9 (1st Cir. 2001) ("[T]he term 'miscarriage of justice' is more a concept than a constant. Nevertheless, some of the considerations come readily to mind: the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result. Other considerations doubtless will suggest themselves in specific cases…. While open-ended, the general reservation … will be applied sparingly and without undue generosity."), and citing *U.S. v. Andis*, 333 F.3d 886 (8th Cir. 2003) (en banc) (applying the miscarriage of justice exception to an "illegal sentence"); *U.S. v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (per curiam) (same); *U.S. v. Khattak*, 273 F.3d 557 (3d Cir. 2001) (same)).

Further research: *Introduction to Habeas Corpus*, Chapter Five (2022 ed.); *Postconviction Remedies*, § 6:19 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 1:63 (Thomson Reuters 2024 ed.)

***Synopsis*: State court's conclusion that the petitioner's high-speed chase, rather than the officer's maneuver to stop the vehicle, was the proximate cause of the passenger's death is binding on the federal court and precludes the petitioner from demonstrating prejudice under *Strickland* due to trial counsel's failure to assert proximate and intervening cause as defenses; additionally, a federal court's absolute deference to state court rulings on intertwined state law issues in habeas cases arises not from AEDPA, but from fundamental principles of federalism and the federal-state law distinction foundational to the legal system.**

Calhoun v. Warden, Baldwin State Prison, 92 F.4th 1338 (11th Cir. 2024)

The Eleventh Circuit determined that the Georgia Supreme Court's ruling on proximate cause in petitioner's case—that the high-speed chase, rather than the officer's maneuver, was the proximate cause of the passenger's death—constituted a binding interpretation of state law on the federal district court during petitioner's federal habeas review. The court stated: "Because it has been authoritatively and finally decided by the Supreme Court of Georgia that [petitioner] proximately caused Shore's death under Georgia law, and that the use of the PIT maneuver was not an intervening cause of her death under Georgia law, any asserted errors or failures of trial counsel regarding those issues are not prejudicial: they do not undermine our confidence in [petitioner's]

conviction for felony murder." *Calhoun v. Warden, Baldwin State Prison*, 92 F.4th 1338, 1351 (11th Cir. 2024).

Petitioner sought to challenge the state court's conclusions on proximate and intervening causes under state law by arguing that the court made multiple unreasonable factual determinations regarding the PIT maneuver, as addressed in 28 U.S.C. § 2254(d)(2). However, the Eleventh Circuit clarified that § 2254(d)(2) serves only to remove deference from a state court's decision on a federal constitutional claim, triggering *de novo* review. In this instance, petitioner's ineffective assistance claim was already subject to *de novo* review under § 2254(d)(1) since the state court had applied a test contrary to *Strickland*. *Calhoun*, 92 F.4th at 1351-52.

The Eleventh Circuit underscored the necessity of distinguishing between § 2254(d)'s conditional deference to a state court's decision on federal claims, such as ineffective assistance of counsel, and the "unconditional deference" owed to a state supreme court's ruling on state law issues within a federal habeas case. The court clarified that in this case, it was "*not* applying the former; we *are* applying the latter." *Calhoun*, 92 F.4th at 1352. This absolute deference to state law, even when intertwined with a federal claim, is grounded not in § 2254(d) or AEDPA but rather in principles of federalism and the division between state and federal law. The Eleventh Circuit further highlighted that this deference is mandated by numerous decisions from the U.S. Supreme Court and federal appellate courts. *Id.*

Further research: *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, §§ 6:4, 28:2 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 1:44, 3:80 (Thomson Reuters 2024 ed.)

TEAGUE NON-RETROACTIVITY DOCTTRINE

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

***Synopsis*: *Teague* nonretroactivity principle barred retroactive application of petitioner's claimed substantive due process right to be free from continued conviction obtained by credibly recanted testimony, regardless of government's knowledge of testimony's falsity.**

Marcy v. Sup't Phoenix SCI, 110 F.4th 210 (3d Cir. 2024)

A jury convicted petitioner of raping his five-year-old daughter. Years after providing testimony against her father, the victim partially recanted during a state postconviction relief hearing. Petitioner subsequently filed for a writ of habeas corpus, asserting that due process demands his release. He argued that his ongoing incarceration, based on a conviction secured with testimony later recanted, constitutes a violation of the Constitution, regardless of how the testimony was introduced or whether any state actor knew it to be false. In essence, petitioner claimed a right to freedom from a conviction upheld by credibly recanted testimony, independent of the government's knowledge of its falsity. He further argued that this right was established at the time of his original conviction.

The Third Circuit held that *Teague*'s nonretroactivity principle barred the retroactive application of petitioner's claim. The court explained that the Supreme Court had never recognized a right to release from a conviction based on recanted testimony when no state actor knew of the statements' falsity. Furthermore, two outlying decisions from other circuits that had addressed this issue, *Maxwell v. Roe*, 628 F.3d 486 (9th Cir. 2010) ("a conviction based on uncorrected false material evidence ... is a violation of a

defendant's due process rights under the Fourteenth Amendment"), and *Sanders v. Sullivan*, 863 F.2d 218 (2d Cir. 1988) (finding a constitutional violation without evidence of prosecutorial knowledge), did not show a rule apparent to all reasonable jurists. *Marcy v. Sup't Phoenix SCI*, 110 F.4th 210, 217-18 (3d Cir. 2024).

Further research: *Introduction to Habeas Corpus*, Chapter Thirteen (2022 ed.); *Postconviction Remedies*, § 26:18 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 7:40 (Thomson Reuters 2024 ed.)

PROCEDURAL DEFAULT

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

***Synopsis*: A *Martinez* hearing was inappropriate to establish cause for petitioner's procedural default, as the record showed that even if the default were excused, petitioner would not be entitled to federal habeas merits relief based on the state court record.**

Black v. Falkenrath, 93 F.4th 1107 (8th Cir. 2024)

Petitioner argued he was entitled to an evidentiary hearing to establish cause for excusing his procedurally defaulted ineffective assistance of trial counsel claim. He acknowledged that *Shinn v. Ramirez*, 596 U.S. 366, 142 S.Ct. 1718, 212 L.Ed.2d 713 (2022), prohibits an evidentiary hearing on the merits of an underlying claim when a petitioner has failed to sufficiently develop supporting facts in state court as required by 28 U.S.C. § 2254(e)(2). However, he sought a hearing under *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), to demonstrate that his procedural default was excusable, thereby allowing him to proceed with his ineffective assistance claim based solely on the state court record. He clarified that he did not intend to introduce new evidence in support of his ineffective assistance claim, acknowledging the limitation imposed by *Shinn*.

Shinn left open whether habeas petitioners are entitled to *Martinez* hearings to establish cause and prejudice when the requirements of 28 U.S.C. § 2254(e)(2) are not satisfied, though it noted there were "good reasons to doubt" this interpretation *Shinn*, 596 U.S. at 366, 142 S.Ct. 1718.

Nonetheless, *Shinn* affirmed that a *Martinez* hearing is improper if the newly developed evidence would not entitle the petitioner to federal habeas relief on the merits. Here, petitioner could not overcome the presumption that trial counsel's conduct constituted sound trial strategy. Since petitioner failed to demonstrate ineffective assistance, he was not entitled to a *Martinez* hearing to establish cause for excusing his procedural default. *Black v. Falkenrath*, 93 F.4th 1107, 1109-10 (8th Cir. 2024).

Further research: *Introduction to Habeas Corpus*, Chapter Twelve (2022 ed.); *Postconviction Remedies*, § 24:17 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 9B:62, 9B:65 (Thomson Reuters 2024 ed.)

***Synopsis*: District court was prohibited from considering any of petitioner's new evidence in connection with the merits of his claim of ineffective assistance of trial counsel, even though first post-conviction counsel's ineffectiveness led to the failure to develop evidence, and a successive state post-conviction petition in which he attempted to develop evidence was rejected as procedurally barred.**

McLaughlin v. Oliver, 95 F.4th 1239 (9th Cir. 2024)

Petitioner filed a federal habeas petition challenging his state court convictions, claiming that his trial counsel was ineffective for failing to

pursue a defense of voluntary intoxication. The district court conducted an evidentiary hearing, during which it received substantial evidence not previously considered by the state courts when they rejected petitioner's ineffective assistance claim on the merits. The district court ultimately denied relief, prompting petitioner to appeal. The Ninth Circuit held that, under the Supreme Court's decision in *Shinn v. Ramirez*, 596 U.S. 366, 142 S.Ct. 1718, 212 L.Ed.2d 713 (2022), federal courts were barred by 28 U.S.C. § 2254(e)(2) from considering any new evidence presented by petitioner in support of his federal petition. *McLaughlin v. Oliver*, 95 F.4th 1239, 1249 (9th Cir. 2024).

Federal courts generally refrain from hearing any federal claims that were not presented to the state courts in accordance with state procedural rules. However, a federal court may excuse a procedural default if a prisoner demonstrates cause for the default and actual prejudice resulting from the alleged violation of federal law.

In *Shinn*, the Supreme Court clarified the circumstances under which a federal habeas court may consider a procedurally defaulted *ineffective assistance of trial counsel* claim, specifically addressing the ability to "hear [such] a claim or consider evidence that a prisoner did not previously present to the state courts in compliance with state procedural rules." 596 U.S. at 375-76, 142 S.Ct. 1718. These claims raise unique concerns because some states explicitly require prisoners to raise ineffective assistance claims for the first time during state collateral proceedings, where there is no constitutional right to counsel. *Id.* at 380, 386, 142 S.Ct. 1718. Other states implicitly necessitate the use of collateral proceedings by effectively foreclosing direct review of trial-ineffective-assistance claims. *Id.* at 380, 142 S.Ct. 1718.

Given these unique circumstances, the Supreme Court held in *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), that ineffective assistance of state *postconviction* counsel may constitute "cause" to excuse the procedural default of a trial-ineffective-assistance claim in states that require the use of collateral proceedings to raise such claims. *Shinn*, 596 U.S. at 380, 142 S.Ct. 1718. This decision established a limited exception to the general rule that attorney error cannot establish cause to excuse a procedural default unless it violates the Constitution.

The Supreme Court in *Shinn* addressed whether the special rule established in *Martinez* for applying the cause-and-prejudice test in trial-ineffective-assistance claims extends to excusing a prisoner's failure to develop the state court record concerning such claims. The Court noted that prior to AEDPA, it applied the same cause-and-prejudice standard used for procedural defaults generally when evaluating record-development failures. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10-11, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). However, Congress replaced this standard with the more stringent requirements now codified at 28 U.S.C. § 2254(e)(2). The Court explained these requirements:

> Section 2254(e)(2) provides that, if a prisoner "has failed to develop the factual basis of a claim in State court proceedings," a federal court may hold "an evidentiary hearing on the claim" in only two limited scenarios. Either the claim must rely on (1) a "new" and "previously unavailable" "rule of constitutional law" made retroactively applicable by th[e] [Supreme] Court, or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence." §§ 2254(e)(2)(A)(i), (ii). If a prisoner can satisfy either of these exceptions, he also must show that further factfinding would demonstrate, "by clear and convincing evidence," that "no reasonable factfinder" would have convicted him of the crime charged. § 2254(e)(2)(B). Finally, even if all of these requirements are satisfied, a federal habeas court still is not required to hold a hearing or take any evidence. Like the decision to grant habeas relief itself, the decision to permit new evidence must be

> informed by principles of comity and finality that govern every federal habeas case.

Shinn, 596 U.S. at 381-82, 142 S.Ct. 1718.

The Court in *Shinn* held that because Congress displaced *Keeney*'s cause-and-prejudice standard with a stricter statutory framework, it could not invoke its "equitable judgment and discretion" to create exceptions for a prisoner's failure to develop the factual basis of a claim in state court. The Court emphasized that § 2254(e)(2) is a statute that courts cannot amend, and its provisions must be enforced as written, without *Martinez*-style equitable exceptions for specific claims. *Shinn*, 596 U.S. at 385-87, 142 S.Ct. 1718.

The Court also reaffirmed what constitutes a "failure to develop the factual basis of a claim in State court" under § 2254(e)(2). It ruled that a petitioner fails to develop the state court record when *they or their state post-conviction counsel* are "at fault" for the undeveloped record. The Court noted, "A prisoner bears the risk in federal habeas for all attorney errors made in the course of representation, unless counsel provides constitutionally ineffective assistance. Since there is no constitutional right to counsel in state post-conviction proceedings, a prisoner is ordinarily responsible for all attorney errors during those proceedings." *Shinn*, 596 U.S. at 382-83, 142 S.Ct. 1718 (simplified).

Additionally, the Court clarified that the restrictions of § 2254(e)(2) apply even when a prisoner seeks relief based on new evidence without an evidentiary hearing. A narrower interpretation would allow prisoners to circumvent the statute. Therefore, even if a federal habeas court reviews new evidence for a different purpose—such as determining whether the *Martinez* exception applies—it may not consider that evidence on the merits of a negligent prisoner's defaulted claim unless the § 2254(e)(2) exceptions are met. *Shinn*, 596 U.S. at 389, 142 S.Ct. 1718 (citing *Holland v. Jackson*, 542 U.S. 649, 653, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004)).

The Ninth Circuit concluded that § 2254(e)(2), as interpreted in *Shinn*, barred the district court from considering any of petitioner's new evidence regarding the merits of his trial-ineffective-assistance claim. Petitioner argued that he did not "fail to develop the factual basis" of his ineffective assistance claim in state court because he *attempted* to develop it through a successive postconviction petition that was rejected as procedurally barred. However, the Ninth Circuit ruled that, "as *Shinn* made clear, the restrictions discussed by the Court in that case—including § 2254(e)(2)—limit when a federal habeas court may 'hear a claim or consider evidence that a prisoner did not previously present to the state courts *in compliance with state procedural rules*.'" *McLaughlin*, 95 F.4th at 1249 (emphasis added) (quoting *Shinn*, 596 U.S. at 375-76, 142 S.Ct. 1718). "Under *Shinn*, therefore, a failure to present evidence to the state courts 'in compliance with state procedural rules,' *id.*, counts as a 'fail[ure] to develop the factual basis of a claim in State court,' 28 U.S.C. § 2254(e)(2)." *McLaughlin*, 95 F.4th at 1249; *see also Shinn*, 596 U.S. at 378, 142 S.Ct. 1718 (noting that it is improper "to allow a state prisoner simply to ignore state procedure on the way to federal court").

The state court firmly held that petitioner's successive petition, which included new evidence, was procedurally barred and thus declined to consider that evidence. Petitioner's failure to present this evidence to the state courts "in compliance with state procedural rules" constitutes a "failure to develop the factual basis of a claim in State court proceedings" under § 2254(e)(2), as articulated in *Shinn*, 596 U.S. at 375-76, 142 S.Ct. 1718 (citation omitted). *McLaughlin*, 95 F.4th at 1249.

Furthermore, the negligence of petitioner's first postconviction counsel did not alter this conclusion. As *McLaughlin* noted, it "makes no difference." 95 F.4th at 1249. A "failure" occurs

under § 2254(e)(2) if the prisoner is "at fault" for the undeveloped record in state court, and "under § 2254(e)(2), a prisoner is 'at fault' even when state post-conviction counsel is negligent." *Shinn*, 596 U.S. at 382, 384, 142 S.Ct. 1718. The *Shinn* Court emphasized that under AEDPA and its precedents, any ineffective assistance by state postconviction counsel in developing the state-court record is attributed to the prisoner for the purposes of § 2254(e)(2).

The Ninth Circuit concluded that, because the negligence of petitioner's first postconviction counsel in failing to develop the record in state court is attributable to petitioner, there was a "fail[ure]" within the meaning of § 2254(e)(2) and the restrictions of that section therefore apply. Petitioner conceded that he could not meet the strict requirements of § 2254(e)(2); therefore, that section barred consideration of petitioner's new evidence. Furthermore, *Shinn* also held that, when, as here, § 2254(e)(2) applies and the petitioner cannot meet its requirements, a "federal court may not ... consider new evidence[ ] to *assess cause and prejudice* under *Martinez*." *Shinn*, 596 U.S. at 389, 142 S.Ct. 1718 (emphasis added).

Further research: *Introduction to Habeas Corpus*, Chapter Twelve (2022 ed.); *Postconviction Remedies*, § 20:12, 21:6, 22:4, 24:17 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 4:5, 5:5, 9B:62, 9B:65 (Thomson Reuters 2024 ed.)

***Synopsis*: As a matter of first impression, doctrine of procedural default bars claims alleging lack of competency to stand trial raised for first time on collateral review.**

Yang v. U.S., 114 F.4th 899 (7th Cir. 2024)

In evaluating a defendant's competency to stand trial and the right to a fair trial, the key question is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Drope v. Missouri*, 420 U.S. 162, 172 (1975). The failure to uphold procedures ensuring a defendant's competency "deprives him of his due process right to a fair trial." *Id.*

The Supreme Court has not definitively determined whether the procedural default doctrine precludes competency claims first raised on collateral review. Most circuit courts address this issue by dividing competency claims into procedural and substantive types. Procedural competency claims arise from the requirement that the trial court assess a defendant's competency when evidence suggests an inquiry is warranted. This requirement was first recognized in *Pate v. Robinson*, 383 U.S. 375, 385 (1966), which held that failing to investigate competency can violate due process. Such claims generally occur when the trial court fails to hold a competency hearing as required by 18 U.S.C. § 4241. To succeed on a procedural competency claim, a petitioner must identify evidence before the trial court that raised a bona fide doubt about their competency. *See U.S. v. Flores-Martinez*, 677 F.3d 699, 706 (5th Cir. 2012); *Williams v. Woodford*, 384 F.3d 567, 603-04 (9th Cir. 2004).

Substantive competency claims stem from the principle that no defendant should stand trial if incompetent, as established in *Dusky v. U.S.*, 362 U.S. 402, 402 (1960), and *Drope*. These claims require the defendant to demonstrate an inability to comprehend or participate in the trial proceedings. *See, e.g., U.S. v. Basham*, 789 F.3d 358, 379 (4th Cir. 2015); *Flores-Martinez*, 677 F.3d at 705. For a substantive claim to succeed, the defendant must "prove an inability either to comprehend or

participate in the criminal proceedings." *Flores-Martinez*, 677 F.3d at 706. Specifically, the defendant "must show that, at the time of trial, he lacked either sufficient ability to consult with his lawyer with a reasonable degree of rational understanding, or a rational and factual understanding of the proceedings against him." *Williams*, 384 F.3d at 608 (citing *Dusky*, 362 U.S. at 402).

The issue before the Seventh Circuit in *Yang v. U.S.*, 114 F.4th 899 (7th Cir. 2024), was whether procedural default could bar a competency-based due process claim raised for the first time on collateral review. Circuit courts have differed on this question. The Eighth and Ninth Circuits hold that procedural default can bar both procedural and substantive competency claims. *Lyons v. Luebbers*, 403 F.3d 585, 593 (8th Cir. 2005); *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306-07 (9th Cir. 1996). The Fourth and Sixth Circuits, as well as the Fifth in an unpublished decision, have concluded that substantive competency claims are subject to procedural default. *U.S. v. Basham*, 789 F.3d 358, 379 n.10 (4th Cir. 2015); *Hodges v. Colson*, 727 F.3d 517, 540 (6th Cir. 2013); *Green v. Lumpkin*, 2023 WL 2941470, at *3 (5th Cir. Apr. 13, 2023).

Conversely, the Tenth and Eleventh Circuits hold that only procedural, not substantive, competency claims are barred by procedural default. *Raheem v. GDCP Warden*, 995 F.3d 895, 928 -29 (11th Cir. 2021); *Lay v. Royal*, 860 F.3d 1307, 1315 (10th Cir. 2017). Their rationale is that procedural competency claims should be raised on direct appeal "because an appellate court hearing the claim 'may consider only the information before the trial court before and during trial.'" *Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir. 1995) (quoting *James v. Singletary*, 957 F.2d 1562, 1572 (11th Cir. 1992)); *Adams v. Wainwright*, 764 F.2d 1356, 1359 (11th Cir. 1985). Substantive competency claims cannot be subject to procedural default because of the Supreme Court's determination that criminal defendants may not waive the right to be tried only while competent. *See, e.g., Adams v. Wainwright*, 764 F.2d 1356, 1359 (11th Cir. 1985), *abrogated on other grounds in Granda v. U.S.*, 990 F.3d 1272, 1294 (11th Cir. 2021).

Aligning with the majority, the Seventh Circuit concluded that procedural default can apply to a competency-based due process claim. Although the Seventh Circuit does not formally differentiate between procedural and substantive competency claims, it found that applying procedural default principles required denying petitioner's § 2255 motion. Petitioner neither raised the competency issue at trial nor pursued it on direct appeal, instead introducing it in his § 2255 motion without showing cause, prejudice, or actual innocence. The Seventh Circuit held that petitioner's § 2255 petition must therefore be dismissed. *Yang*, 114 F.4th at 910-13.

STATUTE OF LIMITATIONS

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

***Synopsis*: Petitioner cannot demonstrate actual innocence merely by calling the state's case into question.**

Hubbard v. Rewerts, 98 F.4th 736 (6th Cir. 2024)

In addressing petitioner's argument for the application of the equitable actual-innocence exception to AEDPA's one-year statute of limitations, the Sixth Circuit emphasized that this exception "is reserved for only the most extraordinary case" and concluded that allowing a petitioner to bypass procedural default solely by challenging the state's case would conflict with this standard. *Hubbard v. Rewerts*, 98 F.4th 736, 747 (6th Cir. 2024).

The court acknowledged that "at least one treatise" contends there is no obligation for a

petitioner to present direct proof of innocence, suggesting that it suffices if "post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt." Hubbard, 98 F.4th at 747 (quoting Brian R. Means, *Federal Habeas Manual* § 9B:80 (2023) (quoting *Sistrunk v. Armenakis*, 292 F.3d 669, 673 (9th Cir. 2002) (en banc))). However, the Sixth Circuit declined to adopt the Ninth Circuit's position, observing that the decision predated *House v. Bell*, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), and cited a subsequent Ninth Circuit case, *Jones v. Taylor*, 763 F.3d 1242, 1248 (9th Cir. 2014), which rejected an actual-innocence claim based solely on recantation testimony. *Hubbard*, 98 F.4th at 747.

The Sixth Circuit interpreted *House* and *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), as requiring petitioners to present new evidence aimed at demonstrating actual innocence—meaning, a gateway showing that they did not commit the crime, as opposed to merely attacking the state's evidence, which might suggest only legal innocence. *Hubbard*, 98 F.4th at 747.

Further research: *Introduction to Habeas Corpus*, Chapter Eleven (2022 ed.); *Postconviction Remedies*, § 24:19 n.12, 25:9 n.6 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 9A:146, 9B:80 (Thomson Reuters 2024 ed.)

***Synopsis*: Court of Appeals reviews relation back questions *de novo*, petitioner's newly discovered claims of ineffective assistance—based on trial counsel's failure to investigate and present a witness's testimony and failure to counter a deputy's guilt-phase testimony—did not relate back, as the original petition lacked any mention of these claims or supporting facts.**

Mulgin v. Sec'y, Fla,, Dept. of Corr., 89 F.4th 1308 (11th Cir. 2024)

The Eleventh Circuit held for the first time that it must review relation-back questions under Rule 15(c)(1) *de novo*. Rejecting its previous approach in *Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998), which reviewed relation-back determinations for abuse of discretion, the court explained that *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 553, 130 S.Ct. 2485, 177 L.Ed.2d 48 (2010), requires a *de novo* review. In *Krupski*, the Supreme Court clarified that Rule 15(c)(1) mandates relation back whenever its criteria are met, leaving no room for district court discretion.

The court noted that its conclusion was consistent with most other circuits. *Mulgin v. Sec'y, Fla., Dept. of Corr.*, 89 F.4th 1308, 1321 (11th Cir. 2024) (citing *ASARCO LLC v. Goodwin*, 756 F.3d 191, 202 (2d Cir. 2014); *U.S. v. Santarelli*, 929 F.3d 95, 100 (3d Cir. 2019); *Robinson v. Clipse*, 602 F.3d 605, 607 (4th Cir. 2010); *Durand v. Hanover Ins. Grp., Inc.*, 806 F.3d 367, 374 (6th Cir. 2015); *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014); *U.S. v. Roe*, 913 F.3d 1285, 1298 (10th Cir. 2019); *U.S. v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002); *Anza Tech., Inc. v. Mushkin, Inc.*, 934 F.3d 1359, 1367 (Fed. Cir. 2019); *but see Turner v. U.S.*, 699 F.3d 578, 585 (1st Cir. 2012) (abuse of discretion); *U.S. v. Alaniz*, 5 F.4th 632, 635 n.2 (5th Cir. 2021) (declining to decide this issue but noting that the Fifth Circuit has tended to use abuse of discretion review); *Coleman v. U.S.*, 79 F.4th 822, 827-29 (7th Cir. 2023) (abuse of discretion); *Taylor v. U.S.*, 792 F.3d 865, 869 (8th Cir. 2015) (abuse of discretion).

After determining that *de novo* review was appropriate, the Eleventh Circuit examined whether petitioner's two newly raised ineffective assistance claims related back to his original, timely habeas petition and found they did not.

The first claim alleged ineffective assistance for failing to investigate and present a witness's testimony during the capital murder trial. The court held that, although petitioner had raised a general ineffective assistance claim in his original petition, he had neither mentioned the specific witness nor included facts that could reasonably support this newly asserted claim. *Mulgin*, 89 F.4th at 1322.

The second claim alleged ineffective assistance for failing to present evidence rebutting a sheriff's deputy's guilt-phase testimony about finding shell casings inside a vehicle. The court noted that the original petition referenced the deputy's testimony only in the context of the penalty phase, with no reference to guilt-phase claims related to the shell casings. *Mulgin*, 89 F.4th at 1323.

The court also rejected petitioner's argument that the district court should have allowed him to amend the petition to include the second claim before determining its timeliness or merit. The Eleventh Circuit emphasized that district courts are not required to delay proceedings to allow petitioners to exhaust untimely claims in state court, nor are they obligated to consider time-barred amendments that would be futile. *Mulgin*, 89 F.4th at 1323.

Further research: *Introduction to Habeas Corpus*, Chapter Eleven (2022 ed.); *Postconviction Remedies*, §§ 18:2 n.13, 25:10, 25:11, nn. 7 & 8, 25:69 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 8:43, 9A:155, 9A:158, 9A:160 ("Opposition to Motion to Amend") (Thomson Reuters 2024 ed.)

EXHAUSTION

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

***Synopsis*: The Fifth Circuit held that ineffective assistance of state habeas counsel does not constitute "good cause" for failing to exhaust an ineffective assistance of trial counsel claim under *Rhines*.**

Tong v. Lumpkin, 90 F.4th 857 (5th Cir. 2024)

Petitioner argued that the district court abused its discretion by denying a stay under *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), which allows federal courts to stay habeas proceedings to enable petitioners to exhaust state remedies if three criteria are met: (1) "good cause" for not exhausting the claim in state court, (2) a potentially meritorious claim, and (3) no evidence of intentionally dilatory tactics. Petitioner claimed ineffective assistance of state habeas counsel provided "good cause" under *Rhines*, arguing that this standard is less stringent than the "cause" standard required for procedural default under *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). He maintained that habeas counsel's ineffective assistance should satisfy "good cause" in this context as it does in overcoming procedural default.

The Fifth Circuit rejected this argument, citing *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010), abrogated *on other grounds by Thomas v. Lumpkin*, 995 F.3d 432, 440 (5th Cir. 2021), which held that ineffective assistance of habeas counsel does not meet the *Rhines* "good cause" standard. Although *Martinez* and *Trevino* modified *Williams* regarding procedural default, the Fifth Circuit reasoned that those cases did not address *Rhines*. The Fifth Circuit upheld *Williams*, reaffirming that *Rhines* "good cause" is not satisfied by ineffective habeas counsel, notwithstanding the Ninth Circuit's position in *Blake v. Baker*, 745 F.3d 977 (9th Cir. 2014) ("good cause" showing under *Rhines* not more demanding than showing of "cause" under *Martinez*), which interpreted *Rhines* more

leniently. *Tong v. Lumpkin*, 90 F.4th 857, 863, 864 n.3 (5th Cir. 2024).

Further research: *Introduction to Habeas Corpus*, Chapter Ten (2022 ed.); *Postconviction Remedies*, § 23:22 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 9C:70 (Thomson Reuters 2024 ed.)

SECOND AND SUCCESSIVE PETITIONS

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

***Synopsis*: A motion to amend a first-in-time habeas petition on appeal cannot be used to bypass the requirement of obtaining pre-authorization for filing a second-in-time petition, and even if a petitioner discovers new grounds for relief upon accessing their attorney-client file, the second-in-time petition is still considered "second or successive."**

Rivers v. Lumpkin, 99 F.4th 216 (5th Cir. 2024)

In August 2017, petitioner filed a § 2254 habeas petition challenging his state convictions. The district court denied the petition, and the Fifth Circuit later granted a certificate of appealability (COA) on a specific ineffective assistance of trial counsel (IATC) claim related to an alleged failure to conduct a reasonable investigation. *Rivers v. Lumpkin*, 99 F.4th 216 (5th Cir. 2024).

In February 2021, nearly three years later, petitioner filed a second-in-time § 2254 petition while the appeal on his first petition was pending. This petition challenged the same convictions but added new claims based on evidence allegedly found in his recently obtained attorney-client file. He claimed he could not have raised these issues earlier due to his counsel's delay in providing the file. The district court classified this as a second or successive petition, transferring it to the Fifth Circuit to determine whether it could proceed. *Rivers*, 99 F.4th at 218-19.

On appeal, petitioner argued that the district court erred in construing his second-in-time § 2254 petition as successive because his first § 2254 petition was still pending on appeal, and thus his second-in-time petition should have been construed as a motion to amend his first-in-time petition. He further argued that the second-in-time petition should have been treated as a motion to amend his original petition, as it arose from facts he couldn't access earlier. He contended that *Rhines* stays should apply since his claims stemmed from information previously withheld by counsel, which he argued showed good cause. *See Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005).

The Fifth Circuit ruled that his new claims were successive under *In re Cain*, 137 F.3d 234 (5th Cir. 1998), which defines successive petitions as those raising issues that could have been raised in the original petition. The court also held that the existence of new evidence doesn't prevent a petition from being classified as successive; new claims still require authorization to proceed. *See Leal Garcia v. Quarterman*, 573 F.3d 214 (5th Cir. 2009) (interpreting *Cain* and clarifying that habeas petitions based on newly discovered evidence are still considered successive under AEDPA).

The court held that the second-in-time petition attacked the same conviction as petitioner's first-in-time § 2254 petition. Although a second-in-time petition may, in some cases, avoid being deemed "successive" if it challenges a subsequent proceeding or event occurring after the district court's original decision, that exception did not apply here. The court reasoned that "[i]n this case,

we cannot characterize [petitioner's] second-in-time petition as a motion to amend because he adds several new claims that stem from the proceedings already at issue in his first § 2254 petition." *Rivers*, 99 F.4th at 221. Moreover, the fact that the petitioner's later-obtained client file allegedly revealed previously unavailable information did not exempt him from meeting the authorization standards under § 2244. *Rivers*, 99 F.4th at 219 (citing *Leal Garcia*, 573 F.3d at 221-24).

The Fifth Circuit distinguished *Mendoza v. Lumpkin*, 81 F.4th 461, 470 (5th Cir. 2023) (per curiam), in which it held that the petitioner's ineffective assistance claims raised after remand for the appointment of new habeas counsel (due to a conflict with prior counsel) did not constitute a second or successive application. The court reasoned that the remand's effect for appointing conflict-free counsel was to "'reopen litigation in the district court.'" *Rivers*, 99 F.4th at 221 (quoting *Mendoza*, 81 F.4th at 470). Once reopened on the merits for limited claims, § 2242 permitted the petitioner to submit an amended filing. *Id.* (citing 28 U.S.C. § 2242, which states that an application "may be amended or supplemented as provided in the rules of procedure applicable to civil actions").

The *Mendoza* court further noted that Rule 15 has been interpreted to allow a lower court to permit new issues to be raised by an amended pleading on remand, provided the amendment is consistent with the appellate court's judgment. 81 F.4th at 470. The court reinforced its reasoning by highlighting that the government responded to the petitioner's ineffective assistance claims on their merits without challenging jurisdiction, and that "the district court entered a new final judgment when it completed its remand duties." *Id.*

The Fifth Circuit in the present case further held that the timing of petitioner's second-in-time petition did not allow him to bypass the requirements for filing successive petitions under § 2244. *Rivers*, 99 F.4th at 219. Petitioner attempted to amend his original petition with new claims and evidence from his client file by filing a second-in-time petition while the first was still on appeal. The Fifth Circuit, adopting the majority stance among circuits on this issue, held that a Rule 15 motion filed while an appeal is pending is successive, as a district court's final judgment represents a terminative point. *Rivers*, 99 F.4th at 222.

The court elaborated:

> Each of these cases leans on the Supreme Court's decision in *Gonzalez v. Crosby* which lays the foundation of the principles guiding our analysis herein. 545 U.S. 524, 532, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). In *Gonzalez*, the Court recognized that prisoners could use post-judgment motions as tools to evade the limitations on successive habeas petitions. Hence, even if a motion was "couched in the language of" a post-judgment motion, it should be construed as "successive" if it "seeks to add a new ground for relief," or if it "attacks the federal court's previous resolution of a claim on the merits." *Id.* at 531-32, 125 S.Ct. 2641 (emphasis omitted). The Court gleaned that a petition "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.

Rivers, 99 F.4th at 222. Thus, the Fifth Circuit concluded that petitioner's second-in-time habeas petition was second or successive. *Id.* at 223.

Further research: *Introduction to Habeas Corpus*, Chapter Nine (2022 ed.); *Postconviction Remedies*, §§ 27:9, 27:11 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 11:41, 11:74 (Thomson Reuters 2024 ed.)

Briefly stated . . .

JURISDICTION AND RELATED ISSUES

The Third Circuit held that supervising attorneys from the Philadelphia District Attorney's Office had standing to appeal a court's misconduct finding in a federal habeas case to protect their professional reputations, even though they did not seek to overturn the district court's Rule 11 sanctions order. *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140, 146 (3d Cir. 2024); *see Postconviction Remedies*, § 9:2 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 1:84 (Thomson Reuters 2024 ed.).

The Ninth Circuit held that the state's failure to timely provide counsel to indigent pretrial detainees—contravening *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)—constituted an extraordinary circumstance necessitating federal intervention and precluding *Younger* abstention, even if all factors supporting abstention were met, as the delay in counsel provision prolonged pretrial detention and caused irreparable harm. *Betschart v. Oregon*, 103 F.4th 607, 617 (9th Cir. 2024); *see Postconviction Remedies*, § 10:3 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 1:111 (Thomson Reuters 2024 ed.).

The Supreme Court in *Trump v. Anderson*, 601 U.S. 100, 144 S.Ct. 662, 218 L.Ed.2d 1 (2024), observed that states lack the powers to grant habeas corpus relief to persons in federal custody. *Id.* at 111, 144 S.Ct 662 (citing *McClung v. Silliman*, 6 Wheat. 598, 603-60 (1821); *Tarble's Case*, 13 Wall. 397, 405-10 (1872)); *see Postconviction Remedies*, § 5:5 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 1:28 (Thomson Reuters 2024 ed.).

The Fourth Circuit held that petitioner was precluded from obtaining *coram nobis* relief for his tax fraud convictions because he lacked valid reasons for not raising his ineffective assistance of counsel claim earlier through a motion to vacate while still in custody. The court noted that the basis for petitioner's ineffective assistance claim—that counsel failed to call witnesses who would testify that wire transfers from a company owned by his sister were loans, not taxable income—was known to him by the time of trial and at sentencing. Despite this, he waited nearly a year after his release, when a motion to vacate was no longer available, before filing his challenge. *U.S. v. Sutherland*, 103 F.4th 200, 211-12 (4th Cir. 2024); *see Postconviction Remedies*, § 5:10 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 1:30 (Thomson Reuters 2024 ed.).

The Third Circuit in *Voneida v. Johnson*, 88 F.4th 233 (3d Cir. 2023), held that petitioner's argument—that a recent Supreme Court decision rendered his actions non-criminal and overruled prior circuit precedent allowing negligence alone to support his federal conviction—did not justify filing a second or successive § 2255 motion. Therefore, his § 2255 motion was deemed neither inadequate nor ineffective for challenging the legality of his detention. Although he was no longer on supervised release and did not meet the custody requirement for a successive motion to vacate, petitioner was barred from raising his claim through a § 2241 habeas petition. *Id.* at 237.

Prior to *Jones v. Hendrix*, 599 U.S. 465, 143 S.Ct. 1857, 216 L.Ed.2d 471 (2023), most circuit courts

had concluded that the saving clause permits a prisoner to challenge his detention when a change in statutory interpretation raises the potential that he was convicted of conduct that the law does not make criminal, though they based their holdings on "widely divergent rationales." *Bruce v. Warden Lewisburg USP,* 868 F.3d 170, 180 (3d Cir. 2017) (citing *Trenkler v. U.S.*, 536 F.3d 85, 99 (1st Cir. 2008); *Poindexter v. Nash*, 333 F.3d 372, 378 (2d Cir. 2003); *In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000); *Reyes-Requena v. U.S.*, 243 F.3d 893, 903-04 (5th Cir. 2001); *Wooten v. Cauley*, 677 F.3d 303, 307-08 (6th Cir. 2012); *Brown v. Caraway*, 719 F.3d 583, 586–87 (7th Cir. 2013); *Abdullah v. Hedrick*, 392 F.3d 957, 963-64 (8th Cir. 2004); *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002)).

But the Supreme Court in *Jones* held that § 2255(h)'s limitation on second or successive motions does not make § 2255 "inadequate or ineffective" such that a petitioner asserting a change in statutory law effected after his conviction was final and after his initial § 2255 motion was rejected should be able to proceed with a claim under § 2241. The Court reasoned that § 2255(h) "specifies the two circumstances under which a second or successive collateral attack on a federal sentence" via § 2241 "is available, and those circumstances do not include an intervening change in statutory interpretation." *Jones*, 599 U.S. 465, 143 S.Ct. at 1876.

Thus, the Third Circuit acknowledged that *Jones* abrogated the circuit court's earlier decision in *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997). *Voneida*, 88 F.4th at 237; *see Postconviction Remedies*, § 5:7 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 1:29 (Thomson Reuters 2024 ed.).

The Sixth Circuit held that the district court correctly construed the pro se state petitioner's notice of appeal as a motion to reopen the time to appeal from the denial of his federal habeas petition, even though the notice did not explicitly address potential prejudice to the prison warden. The notice detailed the delay, explaining that petitioner received the district court's judgment more than two months after it was entered and filed the appeal within 14 days of learning of the decision. The appellate court then treated the notice of appeal as a request for a certificate of appealability. *Winters v. Taskila*, 88 F.4th 665, 671-72 (6th Cir. 2023); *see also Sanders v. U.S.*, 113 F.3d 184, 187 (11th Cir. 1997) (per curiam) (construing notice of appeal as motion to reopen); *U.S. v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011); *but see Parrish v. U.S.*, 74 F.4th 160, 163 (4th Cir. 2023) (one document cannot serve as both a notice of appeal and a motion to reopen); *see Federal Habeas Manual*, §§ 12:35, 12:88 (Thomson Reuters 2024 ed.).

The First Circuit held that petitioner's motion for an extension of time to file a memorandum of law in support of the application for a certificate of appeal (COA), though explicitly requesting the district court to facilitate later filing of the notice of appeal without specifying the appellate court and despite being represented by counsel, effectively served as the functional equivalent of a notice to appeal by seeking an extension beyond the deadline to "complete" the COA memorandum, naming the parties to appeal, and with only one court available for the appeal. *Cruzado v. Alves*, 89 F.4th 64, 70-71 (1st Cir. 2023); *see Federal Habeas Manual*, § 12:35 (Thomson Reuters 2024 ed.).

The Fifth Circuit held that a state pretrial detainee's double jeopardy claims, challenging a possible acquittal by a non-unanimous jury on four of five counts, were not cognizable in a § 2241 habeas proceeding, stating that even if there was a valid acquittal on certain charges, this did not impact the detainee's custody

status because he remained in custody on the unacquitted conspiracy to commit second-degree murder charge. Importantly, the detainee did not seek relief based on any effect a favorable ruling might have on his custody status, as he could afford bail on the conspiracy charge alone but not for all five charges. *Robinson v. Lopinto*, 87 F.4th 652, 657 (5th Cir. 2023); *see Postconviction Remedies*, § 5:2 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 1:34 (Thomson Reuters 2024 ed.).

In *Neiss v. Bludworth*, 114 F.4th 1038 (9th Cir. 2024), the Ninth Circuit clarified that under Rule 4 of the Rules Governing Section 2254 Cases, a federal habeas court cannot summarily dismiss a habeas claim brought by a state prisoner solely because it believes the claim lacks merit. Instead, summary dismissal at this preliminary screening stage is restricted to claims that are procedurally defective, frivolous, or fail to raise a legally cognizable issue. *Id.* at 1047. The Ninth Circuit explained that district courts must only assess whether a claim is patently frivolous, not whether it is ultimately likely to succeed, thereby reserving merit-based assessments for later stages in the proceedings. Here, petitioner's claim—arguing ineffective assistance of counsel due to failure to contest the specificity of a search warrant—was not clearly without merit, and the court ruled that summary dismissal was inappropriate since ineffective assistance claims can hinge on counsel's performance in handling Fourth Amendment issues. *Id.*

Furthermore, the Ninth Circuit addressed the scope of evidence considered at the Rule 4 stage, concluding that district courts must review the state court record relevant to the claim to make an informed determination. When necessary, the district court may also conduct an evidentiary hearing to clarify issues central to the state court's ruling. This decision emphasizes that regardless of initial filings, the court bears a duty to secure pertinent records to fulfill its independent review responsibilities. *Neiss*, 114 F.4th at 1048; *see Postconviction Remedies*, § 15:2 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 8:4 (Thomson Reuters 2024 ed.).

HECK BAR

The Seventh Circuit, addressing the issue for the first time, held that the reasoning in *Heck v. Humphrey* applies to challenges by civil detainees concerning state-law-based civil commitments. Specifically, in *Bell v. Raoul*, 88 F.4th 1231, 1234 (7th Cir. 2023) (per curiam), the court found that the *Heck* doctrine barred a detainee's federal § 1983 action against state officials, which contended that his civil commitment extended beyond the limits set by the Illinois Sexually Violent Persons Commitment Act. The court's decision aligns with the Eighth Circuit's reasoning in *Thomas v. Eschen*, 928 F.3d 709, 711 (8th Cir. 2019), reinforcing *Heck*'s applicability in civil commitment contexts. *See Postconviction Remedies*, § 11:18 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 2:21 (Thomson Reuters 2024 ed.).

The Ninth Circuit held that defendant's failure to plead *Heck* as an affirmative defense resulted in a forfeiture of the defense, rather than a waiver. "A finding of waiver requires evidence of a party's actions that evince his intentional relinquishment of a known right." *Hebrard v. Nofziger*, 90 F.4th 1000, 1006 (9th Cir. 2024). Plaintiff failed to identify any of defendant's actions that even remotely suggested he "intentionally relinquished" his *Heck* defense. Therefore, the district court did not err when it *sua sponte* resurrected defendant's forfeited *Heck* defense at the summary judgment stage and dismissed the complaint under the Prison Litigation Reform Act, 28 U.S.C. 1915(e)(2)(B)(ii), which

provides that dismissals for failure to state a claim are obligatory, even when the legal basis for the dismissal is raised *sua sponte*. *Id.*; *see Postconviction Remedies*, § 11:2 n.8 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 2:7 (Thomson Reuters 2024 ed.).

The Ninth Circuit held that a state prisoner's 42 U.S.C. § 1983 claim was barred under *Heck v. Humphrey* because the claim implicated the validity of the disciplinary decision that led to the revocation of his earned-time credits, which extended his sentence. *Hebrard v. Nofziger*, 90 F.4th 1000, 1006 (9th Cir. 2024). The court cited *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), emphasizing that the plaintiff's decision not to seek relief for the loss of credits did not mean his challenge avoided the impact on his confinement's duration. If his procedural challenge succeeded, it would imply the illegality of the discipline imposed, including the revocation of earned-time credits, thus requiring prior habeas relief under *Heck*.

One judge dissented, questioning whether Oregon law would ensure the plaintiff's immediate or expedited release if his earned-time credits were restored, casting doubt on whether *Heck* should apply in this context. *Hebrard*, 90 F.4th at 1014 (Sung, J., dissenting); *see Postconviction Remedies*, § 11:14 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 2:17 (Thomson Reuters 2024 ed.).

The Fifth Circuit held that a 42 U.S.C. § 1983 action brought by a former state inmate seeking damages for 41 days of overdetention beyond his release date was not barred by *Heck v. Humphrey*. In *Hicks v. LeBlanc*, 81 F.4th 497, 506 (5th Cir. 2023), the court had established that *Heck* does not bar claims from overdetained prisoners who do not contest the validity of their sentence but instead the execution of their release. Thus, a § 1983 claim based solely on a period of detention that extends beyond the sentence does not implicate the conviction or sentence's validity. In *McNeal v. LeBlanc*, 90 F.4th 425, 431 (5th Cir. 2024) (per curiam), the court reaffirmed that, since the plaintiff challenged only his 41-day overdetention, not his conviction or sentence, *Heck* did not preclude his claims. *Id.*; *see Postconviction Remedies*, § 11:20 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 2:25 (Thomson Reuters 2024 ed.).

AEDPA REVIEW STANDARDS

The Seventh Circuit clarified that a federal habeas claim is deemed adjudicated on the merits in state court even if the state court did not consider the claim in the same form as presented in the federal habeas petition. In this context, the court emphasized that it is not essential for the federal claim to be identical to the one adjudicated by the state court, provided the state court addressed the underlying issues substantively. *Wilson v. Neal,* 108 F.4th 938, 948 (7th Cir. 2024); *see also Flint v. Carr*, 10 F.4th 786, 796-97 (7th Cir. 2021) (state-court determination on ineffective assistance of counsel claim premised on failure to object on double jeopardy grounds was enough to find petitioner's double jeopardy claim was adjudicated on the merits); *Murdock v. Dorethy*, 846 F.3d 203, 208-09 (7th Cir. 2017) (state court determination affirming denial of suppression of pretrial statements was enough to find petitioner's ineffective assistance of counsel claim based on a failure to file a motion to suppress pretrial statements was adjudicated on the merits); *see Postconviction Remedies*, § 29:11 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 3:14 (Thomson Reuters 2024 ed.).

The Supreme Court in *Wilson v. Sellers*, 584 U.S. 122, 138 S.Ct. 1188, 200 L.Ed.2d 530 (2018), stated: "Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision. This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court simply reviews the specific reasons given by the state court and refers to those reasons if they are reasonable." *Id.* at 125, 138 S.Ct. 1188 (internal citation and quotation marks omitted).

The Fifth Circuit ruled in *Wooten v. Lumpkin*, 113 F.4th 560, 567 (5th Cir. 2024), that *Wilson* mandates that federal courts must examine not only the final outcome of the state court's decision but also its reasoning. This requirement contrasts with the approach in *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002) (en banc), which allowed federal habeas courts to consider only the state court's conclusion under § 2254(d), without delving into the opinion's underlying rationale. *Wooten*, 113 F.4th at 569. But the court noted that "[i]n a case where the state court reaches the correct result, but provides inadequate reasons, habeas relief will be inappropriate because the error in reasoning will be harmless under *Brecht* [*v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)]." *Wooten*, 113 F.4th at 570; *but see Pye v. Warden, Georgia Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022) (en banc).

But in *Bowden v. Sec'y, Fla. Dept. of Corr.*, 92 F.4th 1328 (11th Cir. 2024), the Eleventh Circuit reaffirmed its en banc stance that, under the "look through" approach, federal courts must defer to the ultimate ruling of the state court rather than examining the reasoning behind that ruling. Citing its prior en banc decision in *Pye v. Warden, Georgia Diagnostic Prison*, 50 F.4th 1025, 1035-41 (11th Cir. 2022), the Eleventh Circuit clarified that state-court decisions should be upheld unless no reasonable basis exists for the court's action. The *Bowden* decision emphasizes that federal habeas review gives state rulings the "benefit of the doubt," ensuring that the primary focus remains on the outcome rather than the detailed reasoning. *Bowden*, 92 F.4th at 1333 (internal quotation marks omitted); *see Postconviction Remedies*, § 29:48 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 3:70 (Thomson Reuters 2024 ed.).

A federal court conducting a review under AEDPA should refrain from finding inconsistencies in a state court's decision unless such discrepancies are necessary to resolve the case. *Kelley v. Bohrer*, 93 F.4th 749, 757 (4th Cir. 2024); *see also Ferguson v. Sec'y, Fla. Dept. of Corr.*, 716 F.3d 1315, 1340 (11th Cir. 2013) (federal courts "should avoid finding internal inconsistencies and contradictions in the decisions of state courts where they do not necessarily exist"); *see Holland v. Jackson*, 542 U.S. 649, 654, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004) (per curiam) (finding that the court of appeals erred when it interpreted a state-court decision to "needlessly create internal inconsistency"); *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) ("[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law. It is also incompatible with § 2254(d)'s highly deferential standard for evaluating state-court rulings[.]" (cleaned up)); *Elmore v. Ozmint*, 661 F.3d 783, 869 n.51 (4th Cir. 2011) (giving a state-court order the benefit of the doubt when its decision was ambiguous); *see Postconviction Remedies*, §§ 28:2, 29:38, 29:48 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 3:53, 3:70, 3:84 (Thomson Reuters 2024 ed.).

The Eleventh Circuit held that the state court's analysis of petitioner's claim of ineffective assistance of counsel indicated that the state court had erroneously applied a preponderance of evidence standard on the prejudice prong of the claim and, therefore, the ruling was "contrary to" clearly established federal law under *Strickland*. However, the Eleventh Circuit cautioned that federal precedent "should not be misread to mean that a state court decision isn't entitled to AEDPA deference unless the opinion quotes with precision, without shorthand references, and with flawless consistency the proper federal standard of reasonable probability of a different result. The Supreme Court has made it clear that a perfectly articulated, non-flub, ambiguity-free discussion of the prejudice component is not required in a state court opinion for AEDPA deference to be due." *Calhoun v. Warden, Baldwin State Prison*, 92 F.4th 1338, 1348 (11th Cir. 2024); *see Postconviction Remedies*, §§ 29:33, 29:35 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 3:46, 3:49 (Thomson Reuters 2024 ed.).

The Ninth Circuit held that petitioner did not demonstrate the requisite diligence under 28 U.S.C. § 2254(e)(2) to pursue a claim of ineffective assistance of counsel for failing to investigate and present mitigating evidence at sentencing. The court reasoned that an evidentiary hearing was unwarranted since petitioner had not pursued this claim in state court proceedings and only raised it in the federal habeas petition. A mitigation investigator had failed to complete the investigation before the postconviction evidentiary hearing, and petitioner's postconviction counsel took responsibility for this failure. However, the court attributed the investigator's oversight to petitioner, noting that petitioner did not offer specific information to support his request for an additional investigator. *Lee v. Thornell*, 108 F.4th 1148, 1161-61 (9th Cir. 2024); *see Postconviction Remedies*, § 22:7 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 4:7 (Thomson Reuters 2024 ed.).

PROCEDURAL DEFAULT

The First Circuit rejected petitioner's argument that he had not procedurally defaulted his confrontation right claim because it was implicitly presented to the state courts through a citation to the Supreme Court's decision in *Ohio v. Roberts* in his appellate brief. The court noted that the citation "itself failed to specify that the ground of challenge was to the finding of unavailability itself, as opposed to the 'reliability' prong of *Ohio v. Roberts*, and nothing in the surrounding discussion in the brief in question suggest[ed] that the unavailability ground was being pressed by [petitioner]." *Hudson v. Kelly*, 94 F.4th 195, 201 (1st Cir. 2024). Because the confrontation claim was not "fairly presented" to the state court, it was procedurally defaulted. *Id.* at 202; *see Postconviction Remedies*, §§ 23:16, 23:17 n.26 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 9C:32, 9C:39 (Thomson Reuters 2024 ed.).

Petitioner presented a claim of actual innocence, both substantively and as a procedural gateway to allow the court to review otherwise barred constitutional claims. However, the Seventh Circuit held that petitioner did not meet the high threshold necessary to demonstrate that no reasonable juror would have convicted him given the new evidence. *Dixon v. Williams*, 93 F.4th 394, 403-07 (7th Cir. 2024). Although the police detective who testified regarding petitioner's alleged confession was later found to have systematically violated other defendants' rights—including physically abusing them, coercing confessions, and committing perjury—there was no specific claim that this

detective had coerced petitioner's own confession. Therefore, even if a reasonable juror knew about the detective's history of misconduct and deceit, it would not necessarily preclude a conviction in petitioner's case. *Id.*; *see Postconviction Remedies*, §§ 24:19, 25:9, 27:7 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 9:A:146, 9B:80, 11:30 (Thomson Reuters 2024 ed.).

STATUTE OF LIMITATIONS

The Seventh Circuit held that the Indiana Supreme Court's decision to reduce petitioner's original 181-year sentence to 100 years qualified as a new, intervening state-court judgment under *Magwood v. Patterson*, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010), effectively resetting the one-year statute of limitations for federal habeas relief. This was based on the court's consideration of new arguments and a fresh assessment of sentencing factors following comprehensive briefing and oral argument, even though no new evidence was introduced. Although *Magwood* pertained to a separate provision of 28 U.S.C. § 2244(b) concerning second or successive petitions, its reasoning extended to subsection (d), which governs AEDPA's one-year statute of limitations. *Wilson v. Neal*, 108 F.4th 938, 944 (7th Cir. 2024); *see Postconviction Remedies*, §§ 25:13, 27:10 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, §§ 9:A:18, 11:47 (Thomson Reuters 2024 ed.).

SECOND OR SUCCESSIVE PETITIONS

The Ninth Circuit dismissed a death-row inmate's third federal habeas petition, which challenged his death sentence under the Eighth Amendment on grounds of evolving standards of decency. This challenge argued for unconstitutionality based on a shift away from executing individuals sentenced by judges—a shift highlighted by *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which required juries rather than judges to find facts essential to imposing the death penalty under the Sixth Amendment. Petitioner contended that a national trend toward eliminating judge-imposed death sentences, along with Arizona's moratorium on executions, supported his claim.

However, the Ninth Circuit held that this claim was untimely because it could have been raised in an earlier petition. The court reasoned that the gradual decrease in judge-imposed executions was foreseeable and did not hinge on Arizona's moratorium, making the claim ripe at the time of the inmate's second petition. Accordingly, the court dismissed the petition as successive. *Creech v. Richardson*, 94 F.4th 847, 850 (9th Cir. 2024) (per curiam); *see Postconviction Remedies*, § 27:11 (Thomson Reuters 2024 ed.); *Federal Habeas Manual*, § 11:74 (Thomson Reuters 2024 ed.).

APPEALS

The Eleventh Circuit ruled that no reasonable jurist could find that the district court abused its discretion in denying relief under Rule 60(b)(6) when petitioner sought relief on the same grounds he had already used to seek relief under Rule 60(b)(2) and (b)(3). Rule 60(b)(6) allows courts to grant relief only for reasons that differ from those specified in clauses (b)(1) through (b)(5). The court explained that if it accepted petitioner's interpretation, the one-year time limit in Rule 60(c)(1) would become irrelevant, rendering clauses (b)(1) through (b)(5) effectively "pointless." *Mills v. Comm., Alabama Dept. of Corr.*, 102 F.4th 1235, 1240-41 (11th Cir. 2024). "As a leading treatise on federal civil practice puts it, 'much

authority' establishes that 'clause (6) and the first five clauses [of Rule 60(b)] are mutually exclusive' and that 'relief cannot be had under clause (6) if it would have been available under the earlier clauses.'" *Mills*, 102 F.4th at 1240-41 (quoting 11 Wright, Miller & Kane, *Federal Practice & Procedure* § 2864 (3d ed. Apr. 2023)); *see Federal Habeas Manual*, § 12:14 (Thomson Reuters 2024 ed.).

The Fourth Circuit held that "if a party, including the government, timely raises a certificate of appealability's failure to indicate a constitutional issue satisfying 28 U.S.C. § 2253(c)(2), the circuit court must address the defect." *Cox v. Weber*, 102 F.4th 663, 673-74 (4th Cir. 2024); *see Gonzalez v. Thaler*, 565 U.S. 134, 146, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012) ("[a] timely objection can[not] be ignored"); *accord U.S. v. Castro*, 30 F.4th 240, 247 (5th Cir. 2022) ("When we spot a defective [certificate of appealability], on our own initiative or otherwise, it should be vacated."); *Spencer v. U.S.*, 773 F.3d 1132, 1138 (11th Cir. 2014) (en banc) ("[A] certificate of appealability ... must specify what constitutional issue jurists of reason would find debatable.... A failure to specify that issue would violate the text enacted by Congress ... and will result in the vacatur of the certificate."); *Phelps v. Alameda*, 366 F.3d 722, 728 (9th Cir. 2004) ("[T]he pursuit of efficiency alone does not support an absolute bar against examining the validity of a [certificate of appealability]."); *Khaimov v. Crist*, 297 F.3d 783, 786 (8th Cir. 2002) ("[C]ircumscribing, and even revoking, a certificate [of appealability], especially one we have issued, is ... well within our authority"); *Ramunno v. U.S.*, 264 F.3d 723, 725 (7th Cir. 2001) ("Vacating a certificate of appealability is an unusual step, ... but the possibility of review is essential if the statutory limits are to be implemented"); *Porterfield v. Bell*, 258 F.3d 484, 485 (6th Cir. 2001) ("Under these circumstances, we believe a review of the district court's decision [to grant a certificate of appealability] is appropriate, if only to provide guidance to district courts faced with the task of certifying claims for appeal."); *see also U.S. v. Bentley*, 49 F.4th 275, 284 n.6 (3d Cir. 2022) (exercising its "discretion to disregard an improvidently granted certificate of appealability and affirm on the merits for the sake of judicial economy"); *but see Lucidore v. N.Y. State Div. of Parole*, 209 F.3d 107, 112 (2d Cir. 2000) (holding that a certificate of appealability issued by a district court is "presumptively valid and may not be challenged as improvidently granted"); *LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir. 1999) (holding that the court of appeals "must review the merits of each claim" following a district court's grant of a certificate of appealability); *see Federal Habeas Manual*, § 12:86 (Thomson Reuters 2024 ed.).

INEFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court held that "the Ninth Circuit substantially departed from the well-established standard articulated by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984)" when it determined that petitioner's Sixth Amendment right to effective assistance of counsel was violated during the sentencing phase of his capital trial, specifically noting that the Ninth Circuit (1) "failed adequately to take into account the weighty aggravating circumstances in this case," (2) "applied a strange Circuit rule that prohibits a court in a *Strickland* case from assessing the relative strength of expert witness testimony," and (3) wrongly "held that the District Court erred by attaching diminished persuasive value to the petitioner's mental health conditions because it saw no link between those conditions and the petitioner's conduct when he committed the three murders," *Thornell v. Jones*, 602 U.S. 154, 165, 144 S.Ct. 1302, 218 L.Ed.2d 626 (2024), concluding that petitioner could not show prejudice as there

was "no reasonable probability that the evidence on which the petitioner relies would have altered the outcome at sentencing." *Id.* at 165, 144 S.Ct. 1302; *see Postconviction Remedies*, § 35:4 n.151 (Thomson Reuters 2024 ed.).

The Fourth Circuit held that the state court's determination that petitioner was not deprived of effective assistance of counsel at his murder trial, despite his counsel's decision not to introduce jail records allegedly showing that petitioner and a jailhouse informant were not in the same area of the jail on the day of the alleged confession, was not an unreasonable application of *Strickland*, even though the state's case relied heavily on the jury believing that the two were in the same room. The court noted that petitioner, while justified in seeing the logs as potentially beneficial and low-risk, faced unpredictability regarding how the jury might respond if the defense's primary evidence was called into question. "*Strickland* requires that reviewing courts afford counsel wide latitude to make strategic decisions," and "[s]ome strategic decisions fare better than others." *Cox v. Weber*, 102 F.4th 663, 676 (4th Cir. 2024). Here, defense counsel's investigation into the logs led to concerns about their reliability, making the decision to avoid using them—and instead to undermine the informant's credibility through cross-examination—a reasonable strategic choice. *Id.*; *see Postconviction Remedies*, § 35:4 n.69 (Thomson Reuters 2024 ed.).

The Eleventh Circuit found that defense counsel's performance during the penalty phase of petitioner's state capital murder trial was not deficient, even though counsel did not conduct an extensive background investigation or secure supporting witnesses for mitigation. The court emphasized that defense counsel's actions were based on petitioner's own representation that there was nothing in his background that would support mitigation, leading counsel to reasonably conclude that further investigation would not be fruitful. Defense counsel had arranged for family members to testify during the penalty phase, but their sudden decision not to testify caught counsel by surprise. Petitioner's criticism that counsel should have subpoenaed his family in advance was deemed unfounded, as there was no prior indication that subpoenas were necessary or that family members would refuse to testify. *Carruth v. Comm., Ala. Dept. of Corr.,* 93 F.4th 1338, 1361 (11th Cir. 2024); *see Postconviction Remedies*, § 35:7 (Thomson Reuters 2024 ed.).

In his § 2255 motion, petitioner's statement that he "swears he instructed" his attorney to file a notice of appeal required the district court to conduct a fact-finding investigation. This statement alone was sufficient to warrant an inquiry into whether petitioner's counsel may have provided ineffective assistance by failing to file the requested notice of appeal. The lack of specific details about when and how petitioner made this request should not serve as grounds for dismissing the motion without fact-finding; rather, it underscores the need for such an investigation. However, the district court retains flexibility in determining how to conduct this inquiry and is not necessarily required to hold a formal testimonial hearing. In many instances, the district court can fulfill its duty by obtaining affidavits from the petitioner's former counsel, potentially as part of the government's opposition materials. This approach allows the court to efficiently gather the necessary information without imposing an undue burden. *Thomas v. U.S.*, 93 F.4th 62, 66 (2d Cir. 2024) (per curiam); *see Postconviction Remedies*, § 35:26 (Thomson Reuters 2024 ed.).

UNITED STATES SUPREME COURT
GRANT OF CERTIORARI and RULING

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Glossip v. Oklahoma, 22-7466. The Court will review several questions regarding the validity of petitioner Richard Glossip's capital murder conviction, which the state has confessed was obtained improperly. At Glossip's urging, the Court will review: (1) whether the state's suppression of the key prosecution witness' admission that he was under psychiatric care, and the state's failure to correct his misleading testimony about that, violate due process under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), respectively; and (2) whether the entirety of the suppressed evidence in a case must be considered when assessing the materiality of *Brady* and *Napue* claims. At both Glossip's and Oklahoma's urging, the Court will review: (3) whether due process requires reversal of a capital conviction where the state's chief law enforcement officer has confessed error based on prosecutorial misconduct and no longer seeks to defend it. The Court has additionally directed the parties to brief and argue: (4) whether the Oklahoma Postconviction Procedure Act is an "adequate and independent" state law ground supporting the judgment.

In 1997, 19-year-old Justin Sneed murdered Barry Van Treese, the manager of a Best Budget Inn in Oklahoma City. In exchange for avoiding the death penalty, Sneed confessed and told police that Glossip, the manager of the Inn, had instructed him to commit the murder. After refusing a plea bargain and insisting on his innocence, Glossip was convicted and sentenced to death, with Sneed's testimony being the only evidence inculpating Glossip in the murder. In 2023, the Oklahoma Attorney General obtained and released material from the District Attorney's case file to Glossip, including information that Sneed had been receiving treatment for a serious psychiatric disorder while in jail prior to Glossip's first trial. This contradicted Sneed's testimony at trial that he was not under any psychiatric care and had been prescribed lithium by mistake because he had "a cold." The Attorney General's Office also initiated its own independent investigation of the case, which led to its conclusion that the prosecution's withholding of information about Sneed's mental health and its failure to correct his false testimony, in addition to several other errors, violated due process and undermined confidence in Glossip's trial and conviction.

Glossip filed a state postconviction petition; Oklahoma filed a response conceding that a due process violation had occurred and urging the Oklahoma Court of Criminal Appeals (OCCA) to reverse Glossip's conviction. Nevertheless, the OCCA rejected the state's concession and denied relief. The OCCA found no violation under *Napue*, reasoning that Sneed's testimony was "not clearly false" because he was "more than likely in denial" about his own mental health disorders, and that the new information about Sneed's mental health was "not material" in any event because it would not have changed the jury's verdict. The OCCA also held that the Oklahoma Postconviction Procedure Act barred Glossip's claim. The Act bars claims that could have been raised in a previous proceeding, unless the petitioner presents "clear and convincing" evidence that, but for the alleged error, no reasonable fact finder would have found the defendant guilty. The OCCA held that because Sneed had testified at trial that he had been prescribed lithium, this claim could have been presented in one of Glossip's earlier proceedings, and the jury could still have found Glossip guilty had the additional information been disclosed.

Glossip's petition reiterates his argument that the state's suppression of Sneed's mental health disorder and its failure to correct his false testimony violated due process under *Brady* and *Napue*. Glossip also argues that the OCCA erred in analyzing his *Brady* and *Napue* claims by limiting its consideration to only the most recent disclosures about Sneed's mental health, rather than considering the entirety of the suppressed evidence in the case, including separate *Brady* violations Glossip had alleged in a previous petition. (Those separate *Brady* violations are the subject of a still-pending U.S. Supreme Court petition for certiorari in case number 22-6500.) And, in light of Oklahoma's support, Glossip argues that due process requires reversal where a capital conviction is so infected with errors that the state no longer seeks to defend it.

Oklahoma filed a response in support of Glossip's petition, arguing that the OCCA's analysis contradicted *Napue* by considering whether Sneed, rather than the prosecution, knew his testimony was false, and by downplaying the critical importance of Sneed's testimony. And unlike its opposition brief in No. 22-6500, Oklahoma here disclaims that any independent and adequate state ground bars review, because (1) the OCCA's application of the state law procedural bar was "intertwined with the merits of the federal question" under *Napue* and was therefore not independent; and (2) the OCCA's determination that Glossip could have brought his *Napue* claim earlier lacked record support and was therefore not adequate. Oklahoma also agrees with Glossip that its own concessions required reversal of Glossip's conviction, pointing to the Court's order vacating judgment upon Texas' confessions of error in *Escobar v. Texas*, 143 S.Ct. 557 (2023).

Held: On February 25, 2025, by a 5-1-2 vote (with Justice Gorsuch recused), the Court held that capital prisoner Richard Glossip is entitled to a new trial because the state failed to correct the key witness's false testimony about his being prescribed lithium by a psychiatrist, as required by *Napue*. In the course of reaching that decision—which was consistent with the Oklahoma Attorney General's confession of error—the Court held that the Oklahoma Court of Criminal Appeals' ruling rejecting Glossip's claim was not based on an adequate and independent state law ground. On that score, the Court held that the Oklahoma court's application of the state's post-conviction law "depended on its determination that no *Napue* violation had occurred."