CHAPTER 13
FEDERAL HABEAS CORPUS*

A. Introduction

This Chapter explains an important right—the writ of habeas corpus. Habeas corpus is guaranteed by the Constitution to incarcerated people in federal custody whose arrest, trial, or actual sentence violated a federal statute, treaty, or the U.S. Constitution. Because the Constitution is the only federal law that governs state criminal procedures, if you are incarcerated in state custody, you must show a violation of the U.S. Constitution for your habeas petition to succeed. As an incarcerated person (regardless of whether you are in state or federal prison), you can challenge your conviction or sentence by petitioning for a writ of habeas corpus in federal court. By petitioning for a writ, you are asking the court to determine whether your conviction or sentence is illegal. A writ of habeas corpus can be very powerful because if the court accepts your argument, the court can order your immediate release, a new trial, or a new sentencing hearing. This Chapter will teach you more about federal habeas corpus and how to petition for it. Part A will introduce and explain a few basic concepts about federal habeas. The rest of the Chapter will go into more detail. Please note that the term, "federal habeas corpus," refers to habeas corpus in a federal court. Though subject to different rules, incarcerated people in both state *or* federal custody may petition for a federal writ of habeas corpus.

1. What Is Habeas Corpus?

Habeas corpus is a kind of petition that you can file in federal court to claim that your imprisonment violates federal law.[2] The term "federal law" includes not only federal statutes, but also U.S. treaties and the U.S. Constitution. Whether you are incarcerated in state or federal custody, a federal habeas petition claims that your imprisonment is illegal because your arrest, trial, or sentence violated federal law. This would be true if any aspect of your arrest, trial, or actual sentence violated a federal statute, treaty, or the U.S. Constitution. If you believe that your imprisonment violates federal law, you can file a habeas petition regardless of whether your trial was in state court or federal court, and regardless of whether you are in a state prison or a federal prison. However, as you will learn in this Chapter, incarcerated people in state custody and incarcerated people in federal custody will have to go through different processes for filing habeas petitions. People incarcerated in state custody may also find it more difficult than incarcerated people in federal custody to win a habeas claim. In both cases, a federal habeas petition claims that your imprisonment is illegal because your arrest, trial, or sentence violated *federal* law.

It is important to understand what a habeas petition is not. A habeas petition is *not* a "direct appeal" of your conviction. A direct appeal asks the state or federal appeals court (the court above the trial court in which you were convicted) to review the objections you or your lawyer made during the trial. To learn more about direct appeals, read *JLM*, Chapter 9, "Appealing Your Conviction or Sentence." Federal habeas is a "collateral appeal," which is different from a direct appeal. A direct appeal challenges the merits of the judgment, but a collateral appeal challenges the *procedure* leading to the judgment. When you file a habeas petition, you are claiming that a mistake that violated federal law was made during your trial or sentencing. You will probably base this claim on evidence that you did not present at your trial. You can only make a habeas claim in federal court *after* making other appeals.

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2. A habeas challenge is a *civil* action, not a *criminal* action. It is an action that you bring against the government. Therefore, in habeas petitions, the incarcerated person is often referred to as the "plaintiff," "petitioner," or "complainant." For clarity, this Chapter often refers to the incarcerated person bringing the habeas petition as the "defendant."

If you are incarcerated for a state crime and lose your direct appeal, your state will have another procedure you can follow to challenge your conviction. This procedure is usually called either "state post-conviction proceedings" or "state habeas corpus." State habeas corpus is the same thing as a state post-conviction appeal; it is a remedy provided by the state in which you were convicted, and is based on that state's statutes.[3] It is important to remember that state post-conviction proceedings and federal habeas corpus are entirely different claims.

If you are incarcerated in state custody, you will need to "exhaust" your state remedies before being able to file a federal habeas petition. This means that you can only file a federal habeas petition if you have already lost your state direct appeal and your state post-conviction proceedings. In your federal habeas petition, you can ask the federal court to review the claims that you brought in your direct appeal and your post-conviction proceedings in state court. However, in your federal habeas petition, you can *only* include claims that are based on federal law (federal statutes, treaties, or the U.S. Constitution).

If you are incarcerated in federal custody, you will not file a state post-conviction proceeding. If you lose your direct appeal in federal court, you will be able to file a federal habeas petition right away. This Chapter will often discuss state proceedings. If you are an incarcerated person in federal custody, you should keep in mind that discussions of state proceedings in this Chapter do not apply to you unless the Chapter specifically says that they do.

2. What Will This Chapter Teach You?

Part B ("The Fundamental Elements of a Federal Habeas Corpus Argument") will teach you about the basic elements of claims you can bring in a habeas petition and how the courts will treat your claims. Since most habeas petitions include claims of constitutional violations, Section 1 explains the portions of the U.S. Constitution that you are most likely to rely on in your habeas petition. Section 1 also tells you how to discover a habeas claim in your arrest, trial, or sentence. Appendix C lists examples of successful habeas claims. These concrete examples should help you prepare your own petition. Section 2 explains how the court evaluates your claim. Section 2 will teach you how to know which standard the courts use and how to show the court that your rights were violated. Section 3 teaches you how to show the court that the violation of your rights affected your conviction or sentence. Section 3 also discusses the harmless error rule. Section 4 explains the special standard of review that federal courts must use when they review habeas claims brought by people incarcerated in state custody.

Part C ("What You Cannot Raise In Your Habeas Petition") tells you what violations or issues you cannot complain about in your habeas petition because the writ of habeas corpus is designed to only allow you to obtain relief in specific situations. Section 1 explains that you generally cannot bring habeas petitions that claim Fourth Amendment violations. Sections 2 and 3 discuss laws that are passed after your trial, called new laws. Section 2 discusses what a new law is and explains that you normally cannot bring habeas claims based on new laws. Section 3 explains the exceptions to this rule—the situations in which you *can* include claims based on a new law in your habeas petition.

Part D ("Procedures for Filing a Petition for Habeas Corpus") explains the basic requirements of your habeas petition, including that you be in custody, have exhausted state remedies, are not in procedural default, have filed within the proper time limit, and that your petition is not successive.

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3. For more information about state post-conviction proceedings, you can look at *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," and *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." State post-conviction proceedings for Florida, New York, and Texas are described in *JLM*, Chapter 21, "State Habeas Corpus: Florida, New York, and Texas." Remember, state habeas proceedings are the same as state post-conviction proceedings. In this Chapter, the term "state post-conviction proceedings" will be used to refer to both. The term "habeas" will only be used to refer to federal habeas corpus.

Part E ("The Mechanics of Petitioning for Federal Habeas Corpus") discusses the basic mechanical process surrounding habeas law: (1) when to file, (2) where to file, (3) against whom to file, (4) how to file, (5) what to expect after you file, and (6) how to appeal.

Part F ("How to Get Help from a Lawyer") discusses, as the title suggests, how to get help from a lawyer for your habeas petition. Even though you are entitled to a lawyer during your trial and direct appeals, you are not entitled to have a lawyer to help with your habeas petition. However, you should still try to get help from a lawyer if you can.

Appendix A is a chart of the appeals process, from your trial through your federal habeas petition. Appendix B provides a checklist you can refer to when putting together your federal habeas corpus petition. Appendix C lists examples of successful habeas claims.

3. When Do People File Habeas Petitions?

Usually incarcerated people file their federal habeas petitions after they have finished their direct appeals and state post-conviction proceedings:

Direct Appeal → State Post-Conviction Appeal → Federal Habeas Claim

Because you are entitled to a lawyer during your direct appeal, you should always file a direct appeal before filing anything else. If you lose your direct appeal, you have to decide whether to file a state post-conviction appeal. You do not have to file a state post-conviction appeal, but most people do in order to meet the "exhaustion" requirement. Exhaustion means that you have to give the state court the chance to hear all of the claims you will raise in your habeas petition first. If you did not raise a claim in your direct appeal, you must file the claim with the state court in a post-conviction appeal before you can file the claim in your federal habeas petition. Because you will often want to raise issues in habeas that you were unable to raise on direct appeal, you must raise them first in your state post-conviction proceeding. Exhaustion is an important requirement, and is discussed in more detail in Part D(2) ("Exhaustion of State Remedies and Direct Appeal") below.

After your direct appeal, you might find, or your lawyer might point out to you, errors that occurred during your trial that you did not know about at the time of your direct appeal. These errors may be based on outside information not in your trial transcript. If you want to bring these claims in your federal habeas petition and you are incarcerated in state custody, you must first go to state court and file a state post-conviction appeal with these claims. Then, if you are denied relief, you can bring a federal habeas petition. Your federal habeas petition will be filed after you finish all your state appeals (direct and collateral). There are strict timelines that apply to habeas petitions after you finish your state appeals, discussed in Part D(4) ("Time Limit") below.

4. Which Laws Apply to Federal Habeas Corpus?

You can find all of the laws covering federal habeas corpus in 28 U.S.C. §§ 2241–66. Section 2241 is the habeas corpus statute, which gives courts the authority to release incarcerated people who are being held in violation of the Constitution. Sections 2242 and 2253 deal with issues relating to a habeas petition, such as evidence and appeals issues. There are additional statutes that apply separately to people in state and federal custody, in Sections 2254 and 2255 respectively.[4] When an incarcerated

4. The differences between petitions filed by those in state custody and by those in federal custody are mostly procedural, not substantive. This means that regardless of whether you are incarcerated in state or federal custody, if you are discussing substantive issues, you may use cases brought under either 28 U.S.C. § 2255 or under 28 U.S.C. § 2254 as authority in your petition. *See* Davis v. United States, 417 U.S. 333, 344, 94 S. Ct. 2298, 2304, 41 L.Ed.2d 109 (1974) ("No microscopic reading of § 2255 can escape either the clear and simple language of § 2254 authorizing habeas corpus relief 'on the ground that (the prisoner) is in custody in violation of the . . . laws . . . of the United States' or the unambiguous legislative history showing that § 2255 was intended to mirror § 2254 in operative effect."); United States v. Bendolph, 409 F.3d 155, 163 (3d Cir. 2005) ("[T]o provide guidance to the district courts, as well as to avoid confusion, we . . . should treat § 2255 motions and § 2254 petitions the same absent sound reason to do otherwise."); Miller v. New Jersey Dept. of Corr., 145 F.3d 616, 619 n.1 (3d Cir. 1998) ("[W]e have followed the practice, whenever we decide an AEDPA issue that arises under § 2254 and the same holding would analytically be required in a case arising under § 2255, or vice versa, of so informing the district

person in state custody brings a habeas petition, he brings it under 28 U.S.C. § 2254.[5] When an incarcerated person in federal custody brings a habeas petition, he brings it under 28 U.S.C. § 2255.[6] In some circumstances, an incarcerated person in federal custody may bring a habeas action directly under 28 U.S.C. § 2241,[7] without using Section 2255. Additionally, in cases where the defendant faces the death penalty, special procedures in 28 U.S.C. §§ 2261–66 may be used if the state meets certain standards. See Part F ("How to Get Help from a Lawyer") of this Chapter for more information. There are also special rules governing procedures for filing and litigating habeas corpus cases. These can be found in the rules that govern each statute, called the "Rules Governing Section 2254 Cases in the United States District Courts," and the "Rules Governing Section 2255 Proceedings in the United States District Courts."[8] The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") also affects federal habeas corpus law.[9] These laws change often, and courts often decide cases changing the interpretation of these laws. So, you should *Shepardize* the cases included in this Chapter before relying on them.[10]

5. Three Rules to Know Before Filing

Habeas corpus law is very complex. Different courts follow different rules. You will need to research cases in your district to understand how your district follows each rule. You should use this Chapter as a general guide to direct more specific research. You should try to get a lawyer,[11] but if you cannot, you should not give up on your habeas claim. Although it may seem confusing at first,

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courts."). In this Chapter, the procedural differences are discussed as they arise, and you should pay careful attention to them.

5. You are incarcerated in state custody if you are imprisoned for committing a state crime. You are incarcerated in federal custody if you are imprisoned for violating a federal law. Most crimes, including murder and theft, are state crimes. Some crimes, including kidnapping and drug-related offenses, may be federal crimes. If you are detained by a tribal court, you are in neither state nor federal custody. To bring a habeas claim, incarcerated people in the custody of a tribal court should use 25 U.S.C. § 1303. This Chapter does not address habeas petitions by incarcerated people of a tribal court. Because tribes are not subject to the same provisions of the Constitution that states and the federal government are, if you are incarcerated in tribal custody, you should do outside research to find out how habeas law applies to you. A few cases dealing with habeas claims by petitioners in tribal custody are United States v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996); Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995).

6. Technically, 28 U.S.C. § 2255 is not a petition for a writ of habeas corpus, but it has the same effect. Therefore, it is still referred to as a habeas petition.

7. Note that the restrictions in § 2241(e) denying federal court jurisdiction to detainees determined to be "enemy combatants" were found to be unconstitutional. Boumediene v. Bush, 553 U.S. 723, 792, 128 S. Ct. 2229, 2274, 171 L. Ed. 2d 41, 93 (2008).

8. In the United States Code ("U.S.C."), the rules immediately follow the individual statute.

9. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C. and 21 U.S.C.). The changes this law made to the habeas statutes are all incorporated into later versions of the applicable statutes in title 28 of the United States Code. If you have a recent copy of the United States Code or recent supplements to the Code, the habeas statutes will contain the AEDPA changes. Such statutes include 28 U.S.C. §§ 2244, 2253, 2254, 2255, 2261–2266 and 21 U.S.C. § 848.

10. By using LexisNexis and *Shepardizing*, you can make sure that the law has not changed. *See* Chapter 2 of the *JLM* for an explanation of how to *Shepardize* a case.

11. Part F of this Chapter ("How to Get Help from a Lawyer") gives more information on how to get a lawyer for your habeas petition. In most cases, you are not entitled to a lawyer and have to convince the court to give you one. If the court denies your request, you can write your own habeas petition and ask for a lawyer again after the court has seen your petition. However, if you are an incarcerated person on death row, you are entitled to a lawyer under 18 U.S.C. § 3599(a)(2). At least one of your lawyers must have been able to practice before the relevant court for at least five years, and must have at least three years of experience in felony cases in that court. 18 U.S.C. § 3599(b). In McFarland v. Scott, 512 U.S. 849, 859, 114 S. Ct. 2568, 2574, 129 L. Ed. 2d 666, 676, the Supreme Court held that incarcerated people on death row can request counsel before filing a habeas petition and that the court should appoint such counsel.

after reading this Chapter, federal habeas corpus will be easier to understand. Read this Chapter very carefully, and try to understand the rules. Before you read the rest of this Chapter, there are three important rules to be aware of:

(a) File Your Petition Within One Year of the End of Your Direct Appeal.

If you file a state post-conviction appeal, the one-year deadline will be extended while your case goes through the state post-conviction process. This deadline and extension will be discussed at greater length in Part D(4) ("Time Limit") of this Chapter. It is important for you to remember that time matters, and that you must pay attention to the different time requirements.

(b) Present Any and All Claims You Bring in a Federal Court to the State Court First.

This is called "exhaustion" and is discussed more fully in Part D(2) ("Exhaustion of State Remedies and Direct Appeal") of this Chapter. The point of this requirement is to give state courts a chance to correct any violations of federal law that occurred during your trial before you complain to a federal court in your habeas petition. So, if you do not ask the state court for relief first, the federal court will not address your claims.

(c) Be Aware that It Is Almost Impossible to File More than One Habeas Petition.

Courts are very strict about this rule. Therefore, except for in very limited cases, you only have one chance to get your habeas petition right. This means that you have to meet all the deadlines, follow all the court procedures correctly, and include all the necessary information in your first habeas petition. If you make a mistake or miss deadlines, you probably will not be able to ask for habeas relief again. For more information about this, see Part D(5) ("Successive Petitions") of this Chapter.

6. Plea Agreements May Affect Habeas Corpus Relief

If your conviction was based on a plea, habeas relief may not be available to you. Some federal courts, including the Tenth Circuit and the Middle District of Pennsylvania, have found that if a defendant agreed to serve his sentence without protest, a successful post-conviction challenge such as a habeas petition violates the plea agreement. In some instances, these courts have ruled that, by appealing their sentence, defendants effectively threw away their plea arrangements. In such cases, the courts later convicted them under the charges previously dropped by the agreements.[12] In other words, if your conviction was a part of a plea agreement, your habeas relief may violate that previous arrangement. If the court voids that plea agreement as part of your habeas relief, the prosecutor can try to convict and imprison you under another charge that had been dropped under the plea arrangement. In short, you may still end up in jail on another charge.[13]

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12. *See* United States v. Bunner, 134 F.3d 1000, 1002–1005 (10th Cir. 1998) (concluding that the defendant's challenge of the plea agreement breaks the contract, so the charges that were dismissed by the plea agreement can be reinstated); United States v. Viera, 931 F. Supp. 1224, 1228–1229 (M.D. Pa. 1996) (same). *But see* United States v. Sandoval-Lopez, 122 F.3d 797, 802 (9th Cir. 1997) (determining that defendant did not break plea bargain contract by vacating conviction because plea agreement prohibited attacks on the sentence, not the conviction); United States v. Gaither, 926 F. Supp. 50, 51–52 (M.D. Pa. 1996) (holding that defendant did not breach plea agreement by moving to vacate his conviction); DiCesare v. United States, 646 F. Supp. 544, 548 (C.D. Cal. 1986) (holding that government is still bound by obligations in plea agreement when defendant's conviction was vacated because of intervening change in law). *See also* United States v. Midgley, 142 F.3d 174, 179 (3rd Cir. 1998) (holding that defendant's successful challenge of plea agreement did not entitle the government to equitable tolling of the limitations period for charges dismissed under plea agreement).

13. However, the state may be prevented from reinstating charges against you if (1) the statute of limitations has run on the dismissed charges, (2) you already served a substantial part of the sentence you received as part of the plea agreement, and (3) you did not agree to waive the statute of limitations defense in your plea agreement. *See* Rodriguez v. United States, 933 F. Supp. 279, 281–283 (S.D.N.Y. 1996) (ruling that, based on a new court ruling, the conviction should be dropped and that the other charges dropped by the plea agreement cannot be reinstated as defendant could not be returned to her position prior to the plea agreement,

But, at least one federal district court in New York has held that habeas relief does *not* violate prior plea agreements. The Southern District of New York has granted habeas relief and still held valid the previous plea arrangements. The court held that, after the federal court releases you based on a successful habeas petition, no prosecutor can try to convict you for charges that were dropped by the prior plea agreements.[14] The Ninth Circuit has also held that a grant of habeas relief does not entitle the court to set aside the entire plea agreement and let the State re-prosecute charges that had been dropped as part of the agreement.[15] If you signed a plea agreement and are challenging the validity of your conviction on only one of multiple counts, you should probably assume that the court will set aside the invalid conviction and re-sentence you on the remaining crimes for which you pleaded guilty.

7. Can You Petition for Someone Else in Governmental Custody?

Filing a habeas petition for someone else is often allowed. The *petitioner* (the person who files the habeas petition) is called a "next friend" and may be a relative, friend, or lawyer. To be allowed to file a petition as a "next friend" in court, you must establish that (1) the incarcerated person cannot bring the petition himself and (2) you are truly dedicated to the best interests of the incarcerated person. Sometimes the courts may require that you have some significant relationship with the incarcerated person.[16] In addition, courts seek proof that the next friend is in a better position to file the petition than the incarcerated person.[17] In general, filing a habeas petition for a competent adult incarcerated person is not allowed if it goes against his wishes.[18] However, courts usually permit parents to petition on behalf of their underage children who are in governmental custody.[19]

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having already served more than half her sentence; distinguishing this case from other cases where the dropped charges could be reinstated). *But see* United States v. Myers, No. 96 C 5725, 91 CR 463-5, 1996 U.S. Dist LEXIS 18464 at *1 (N.D. Il. Dec. 3, 1996) (*unpublished*) (holding that, after vacating a conviction, a court may resentence the defendant for other convictions that were unchallenged).

14. Rodriguez v. United States, 933 F. Supp. 279, 281–283 (S.D.N.Y. 1996) (ruling that the conviction should be dropped based on a new court ruling and that the other charges dropped by the plea agreement cannot be reinstated as defendant could not be returned to her position prior to the plea agreement, having already served more than half her sentence; distinguishing this case from other cases where the dropped charges could be reinstated). But see Gordils v. United States 943 F. Supp. 346, 3513–54 (S.D.N.Y. 1996) (holding that after a defendant successfully challenges a conviction for carrying a firearm during a drug crime, the resentencing court has jurisdiction to enhance the sentence for the other unchallenged counts). It is important to note that the Second Circuit has not addressed this issue, and that New York district courts are not in agreement about this case. You will need to examine the cases in your district to see whether this ruling is accepted there.

15. United States v. Barron, 172 F.3d 1153, 1158–1160 (9th Cir. 1999) (holding that a defendant seeking to set aside a conviction for conduct that was innocent under a statute neither breached the plea agreement nor repudiated the agreement and that, as a result, the district court could only vacate the judgment and resentence the defendant on the counts of conviction that still stood, not those counts that had been dropped).

16. *See* Whitmore v. Arkansas, 495 U.S. 149, 163–164, 110 S. Ct. 1717, 1727, 109 L. Ed. 2d 135, 150 (1990) (noting that the two prerequisites for next friend standing are (1) providing an adequate explanation, such as mental incompetence or disability as to why the real party in interest cannot appear on his own behalf, and (2) showing that the "next friend" is truly dedicated to the best interests of the person on whose behalf he seeks to litigate and has some significant relationship with the real party in interest).

17. *See* Demosthenes v. Baal, 495 U.S. 731, 735, 110 S. Ct. 2223, 2225, 109 L. Ed. 2d 762, 766 (1990) (*per curiam*) (holding that though the incarcerated person's parents filed a petition for him, he was competent to represent his own interests and therefore his parents' petition must be dismissed); Lonchar v. Thomas, 58 F.3d 588, 588–589 (11th Cir. 1995) (*per curiam*) (denying next friend petition because incarcerated person was competent and did not want a habeas petition filed, but allowing a next friend petition where incarcerated person is incompetent).

18. *See* In re Zettlemoyer, 53 F.3d 24, 28 (3d Cir. 1995) (*per curiam*) (denying next friend petition brought by both incarcerated person's former counsel and his mother because incarcerated person competently chose to waive his right to file habeas petition, but not questioning lawyer's ability to proceed on an incompetent incarcerated person's behalf).

19. *See* Amerson v. State of Iowa, Dept. of Human Serv., 59 F.3d 92, 93 n.3 (8th Cir. 1995) (concluding that although a child was placed with the state department of human services, the child's mother "was, and still is, a

B. The Fundamental Elements of a Federal Habeas Corpus Argument

This part of the Chapter will give you an idea of what types of claims you can make in a habeas petition and how to prove you are entitled to relief. It is important to remember that if you are incarcerated in state custody, you must present any claim in your habeas petition to the state court first. This requirement, called exhaustion, will be discussed in Part D(2) ("Exhaustion of State Remedies and Direct Appeal").

In arguing for federal habeas relief, you will try to show that you are being held in prison illegally because you have been wrongfully convicted in violation of your rights. Because the Constitution is the only federal law that governs state criminal procedures, *habeas claims by people incarcerated in state custody must claim a violation of the Constitution*. People incarcerated in federal custody may claim violations of other federal laws. The Constitution does not describe in detail what your set of constitutional rights includes. The U.S. Supreme Court interprets the Constitution, which means it defines constitutional rights and violations in the cases it decides.

To argue that you deserve federal habeas relief, you will first need to show which of your federal rights were violated. Section 1 of this Part explains how to find constitutional violations. Appendix C gives many examples and cases to reference. Once you have identified at least one possible violation, you will need to identify the standard the court uses to determine whether the action violated your rights. Section 2 explains both how to find the standard the court uses for your violation and how to show the court that the standard was met.

However, just showing that your rights were violated is not enough to get federal habeas relief. You must also show that the violation of your rights harmed you by having a "substantial effect" on the outcome of your trial. Section 3, therefore, explains how to show the court that the error had a substantial effect on your trial (in other words, that the violation of your rights was not a "harmless" error).

If you are *incarcerated in federal custody*, once you have shown that your rights were violated and that the violation substantially harmed your trial, you will have shown that you deserve habeas relief. However, there are many specific procedures that you must follow to successfully file for habeas corpus. These procedures are discussed in Part D ("Procedures for Filing a Petition for Habeas Corpus").

If you are *incarcerated in state custody* showing that your federal rights were violated and that the violation substantially harmed your trial is not enough to be granted habeas relief in federal court. As a person incarcerated in state custody, you have another very important element to prove in your habeas petition: that the state appellate court was unreasonable in finding either that your rights were not violated or that the outcome of your trial was not affected by the violation. This "unreasonableness" requirement is called the "standard of relief," and it is a very hard standard to meet. It is discussed in detail in Section 4 of this Part. In sum, in order for you, as a person incarcerated in state custody, to obtain federal habeas relief, you must show that your rights were violated, that the violation was not harmless, and that the state court's ruling that either 1) your rights weren't violated and/or 2) any violation was harmless, was unreasonable.

1. Examples of Constitutional Violations

To obtain a writ of habeas corpus, you must show the court that you are in custody in violation of the Constitution or laws of the United States.[20] You cannot claim that your custody violates the state constitution or state laws because federal habeas corpus relief is only granted if your federal rights have been violated. You can satisfy this requirement by showing that the police, prosecutor, defense counsel, or judge acted (or failed to act)—during your arrest, trial, or sentencing—in a way that

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proper next friend to bring this petition on behalf of [the child], notwithstanding termination of her parental rights . . . ").

20. 28 U.S.C. § 2254(a). Because there are no *federal* laws that regulate *state* criminal proceedings, as a person incarcerated in state custody you must prove that your custody violates the U.S. Constitution. Remember, you can raise state constitutional violations in your petition, but only if they amount to a denial of your rights under the federal Constitution.

violated your constitutional rights. Your constitutional rights can be found in the amendments to the Constitution. Habeas petitions often claim violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

Below is a list designed to give you a very general idea of what rights these amendments guarantee. A more detailed list in Appendix C gives some examples of habeas claims in violation of these amendments. It is hard to understand what these rights mean in real situations without looking at cases. You should look over the list below. If you think one of these amendments contains a right that may have been violated in your case, refer to the list in Appendix C of this chapter. Locate the amendment you believe was violated in Appendix C, and then read the cases in the footnotes to get a better idea of how courts understand the amendment. Also, carefully read the examples in Appendix C to see if you experienced anything similar to the violations listed there. Remember, these are just general lists, which means that the examples provide only a few of the things found to violate the Constitution. You may have experienced a violation that is not mentioned here and still may be able to get habeas corpus relief.

(a) The Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments

Fourth Amendment: This is the right to be free from unlawful search or seizure. This Amendment is why the police need to have warrants, or probable cause, to search you or take your property.

Fifth Amendment: This Amendment has more than one right in it. First, it has the right to be tried before a grand jury for certain crimes.[21] Second, it has the right to be tried only once for any specific crime. Being tried more than once for the same crime is called "double jeopardy" and is not legally allowed. Third, it has the right to be free from self-incrimination. This right means that you do not have to disclose evidence that would help the people prosecuting you, which is why you do not have to speak to the police or be a witness in your own trial. Fourth, the Fifth Amendment has the right to due process. Due process basically means a fair procedure, but the courts have identified many elements under the right to due process.

Sixth Amendment: This Amendment also has several rights in it, which apply to your right to a jury trial. First, it has the right to a speedy and public trial. Second, it has the right to an impartial jury.[22] Third, it has the right to have your trial in the state and district where the crime occurred. Fourth, it has the right to be told the crime with which you are charged. Fifth, it has the right to confront witnesses against you and to be able to obtain witnesses for your side. Sixth, it has the right to have the assistance of a lawyer.

Eighth Amendment: This is the right to be free from excessive bail, excessive fines, or cruel and unusual punishment.

Fourteenth Amendment: This Amendment again guarantees the right to due process (for an explanation of due process, see the explanation of the Fifth Amendment, above). However, this Amendment applies specifically to states. It makes the rights in the Constitution apply to both federal trials *and* state trials.

If you are incarcerated in state custody, remember that you may only raise violations of the Constitution and its amendments in your habeas petition. If you are incarcerated in federal custody, you may raise violations of the Constitution and its amendments or violations of federal criminal law.[23]

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21. This amendment gives you the right to be indicted by a grand jury before you must prove your case against a trial jury. "This amendment guarantees that prosecutions for serious crime may be instituted only by indictment; indictment serves to apprise the accused of charges against him so that he may adequately prepare his defense and to describe the crime with which he is charged with sufficient specificity to enable him to protect against future jeopardy for the same offense." U.S. v. Haldeman, C.A.D.C.1976, 559 F.2d 31, 181 U.S. App. D.C. 254 (D.C. Circ. 1976), *certiorari denied*, 97 S. Ct. 2641, 431 U.S. 933, 53 L. Ed. 2d 250, *rehearing denied*, 97 S. Ct. 2992, 433 U.S. 916, 53 L. Ed. 2d 1103.

22. An impartial jury means you have the right to a jury whose members have not made up their minds on your guilt or innocence before hearing your case and who decide your case fairly. "Constitutional standard of fairness requires that a state defendant have a panel of impartial, indifferent jurors." Murphy v. Florida, 95 S. Ct. 2031, 421 U.S. 794, 44 L. Ed. 2d 589 (1975).

23. See Title 18 of the United States Code for information on federal criminal law.

2. Standards and Tests for Claims of Violations

Once you have found at least one possible violation that you think occurred, you will need to identify the standard the court will use to determine whether or not that violation happened. A standard is a rule or a test that sets out the requirements a defendant must meet in order to prove to the court that a violation occurred. Most courts use a standard that is "well-established," and some may have multiple standards.[24]

After you have identified the applicable standard, you will need to show the court that this standard was met in your case in order to convince the court that a violation of your rights occurred. You do this by demonstrating to the court that the facts of your case match the requirements set out in the standard. This Section will explain how you find the standard and how to show the court that the violation in your case meets that standard.

After you have proven that the standard was met (that you have suffered a violation), you will still need to show that the violation harmed you. To show harm, you will need to convince the court that the violation may have negatively affected the outcome of your trial (discussed in Part B(3) of this Chapter). Also, if you are incarcerated in state court, you will need to show that the state court was incorrect in failing to find that the violation occurred. If the state court ruled there was a violation but it did not harm you, you will need to show that its finding of "no harm" was unreasonable or contrary to federal law (discussed in Part B(4) of this Chapter).

(a) Finding the Standard the Court Uses for Your Violation

To find the standard the court will use to judge your claim, you have to look at past cases in which a habeas petitioner raised the same claim. If you are complaining about a violation from the list in Appendix C, you should check the cases that appear in the relevant footnotes. When you read these cases, you will be able to get an idea of the test the court will use to judge whether a violation has occurred in your case. The court will usually say something like: "To prove a violation, the court should look to the following," "To prove a violation has occurred, the petitioner needs to satisfy the following requirements," or "In order to show the right was violated, petitioner has to meet the following test." This exact language does not appear in every case, but it gives you an idea of the language for which to look to find the standard. Once you find the test used by the courts for the claim you are making, your next step is to figure out if there is any way to argue that your claim meets the test.

Here is one example of a violation and its standard. At your trial, you have a constitutional right to an effective attorney. If you had a bad trial lawyer, you might have a claim that he or she did not represent you effectively at trial. This claim is called an "ineffective assistance of counsel" claim, and it argues a violation of the Sixth Amendment. The case *Strickland v. Washington* sets out the standard for this type of violation.[25] In *Strickland*, the court established a two-part test (now called the *Strickland* test) to determine whether your right to effective counsel was violated.

Under the first part, a court evaluates whether your lawyer's representation fell below an objective standard of reasonableness by considering all the circumstances under prevailing (current)

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24. For example, if you are arguing that your confession was obtained involuntarily in violation of the Fourteenth Amendment, you must meet the standard of proving that you confessed because your will was overtaken. Miller v. Fenton, 474 U.S. 104, 110–112, 106 S. Ct. 445, 449–451, 88 L. Ed. 2d 405, 411–412 (1985). As another example, if you are arguing that you were denied your Sixth Amendment right to a speedy trial, you must meet the standard of showing that there was a delay in your trial, that it occurred for no good reason, that you asked for a speedy trial, and that the delay prejudiced you. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972). For a final example, if you are arguing that you were not given counsel during interrogation or discussions with police officers while in custody in violation of the Fifth and Sixth Amendments, you must meet the standard of proving that you did not waive that right voluntarily, knowingly, and intelligently. Brewer v. Williams, 430 U.S. 387, 403, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424 (1977).

25. Strickland v. Washington, 466 U.S. 668, 701, 104 S. Ct. 2052, 2071 80 L. Ed. 2d 674, 702 (1984) (affirming the denial of defendant's claim that his lawyer's advice at and before his death sentencing hearing constituted ineffective assistance of counsel that would require reversal of conviction or sentencing).

professional norms.[26] This means that the court will determine the reasonableness of what you are claiming that your attorney did, or failed to do, while representing you.[27]

Under the second part of the *Strickland* test, the court will determine whether you were prejudiced as a result of your lawyer's unreasonable representation.[28] *Prejudice* is an important concept in habeas. It means that there is a "reasonable probability"[29] that the result of your trial would have been different, and more favorable to you, if the violation (in this example, your lawyer's ineffective representation) had not occurred.[30]

To meet the standard required to show ineffective assistance of counsel, you must satisfy both parts of the *Strickland* test.[31] These two parts are: (1) that your lawyer acted unreasonably and (2) that his or her actions prejudiced you.

Other constitutional violations will have different standards that you meet in order to persuade the court that a violation occurred. There are so many different tests that the *JLM* cannot explain all of them. However, you can begin to learn about the standards that matter to you by reading and *Shepardizing*[32] the cases cited in the footnotes, especially those in Appendix C.

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26. Strickland v. Washington, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 2064–2065, 80 L. Ed. 2d 674, 693–694 (1984).

27. Note that it is possible that, even if your lawyer made mistakes or failed to provide you with the best representation, the court may still find you have received *reasonable* representation. That is, the court may find that the representation you received was still above the standard the court uses to determine what is reasonableness. *See*, *e.g.*, Bell v. Cone, 535 U.S. 685, 702, 122 S. Ct. 1843, 1854, 152 L. Ed. 2d 914, 931 (2002) (holding that, when counsel is faced with a tough choice, even if his or her decision was arguably mistaken, the court reviewing that decision because of a habeas petition must start with "a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance") (quoting Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984)). Note that a habeas corpus appeal involving the same parties, Bell and Cone, was heard by the Supreme Court in 2009. The holding of that decision does not affect the holding of this one.

28. Strickland v. Washington, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 2064–2065, 80 L. Ed. 2d 674, 693–694 (1984).

29. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984) (holding that the appropriate test for prejudice is that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and defining "reasonable probability" as "a probability sufficient to undermine confidence in the outcome").

30. United States v. Lilly, 536 F.3d 190, 197 (3d Cir. 2008) (affirming the denial of an incarcerated person's habeas petition based upon ineffective assistance of counsel by finding that the incarcerated person was not prejudiced by following his attorney's advice to waive a jury trial because the court found that the prosecution offered sufficient evidence for a jury to convict the incarcerated person even if he had had a jury trial).

31. Strickland v. Washington, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 2064–2065, 80 L. Ed. 2d 674, 693–694 (1984). Though many incarcerated people may claim ineffective assistance of counsel, proving it is difficult. In Lockhart v. Fretwell, 506 U.S. 364, 369–370, 113 S. Ct. 838, 842–843, 122 L. Ed. 2d 180, 188–189 (1993), trial counsel failed to raise an objection at sentencing, but the Supreme Court held that this was not enough to meet the *Strickland* "prejudice" test because the defendant must show *both* that the outcome would have been different *and* that the defendant was deprived of a fundamentally fair trial with a "reliable result." However, in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), the Supreme Court limited the effect of *Lockhart* on the *Strickland* test. In this case, the Supreme Court held that failure to develop mitigating evidence during a capital sentencing hearing, which included severe childhood neglect and abuse, borderline mental retardation, and a favorable prison record, violated the standard of *Strickland v. Washington*. Additionally, the court held that, by applying the standard in *Lockhart* to this claim, the Virginia Supreme Court had erred by expanding the scope of when *Lockhart* applies. The Court stated that *Lockhart* applies in situations where the ineffectiveness of counsel does not deprive the defendant of a substantive or procedural right to which the defendant is entitled by law. Williams v. Taylor, 529 U.S. 362, 391–393, 120 S. Ct. 1495, 1512–1514, 146 L. Ed. 2d 389, 416–418 (2000); *see also* Stallings v. United States, 536 F.3d 624, 628 (7th Cir. 2008) (vacating and remanding to the district court a claim of ineffective assistance of counsel to determine whether there was "prejudice" as defined by *Strickland*—that is, whether the outcome at the district court level would have been different had counsel raised those claims).

32. By *Shepardizing*, you can make sure that the law has not changed. See Chapter 2 of the *JLM* for an explanation of how to Shepardize a case.

(b) Showing the Court Your Rights Have Been Violated

Once you have identified the standard that must be satisfied to prove your violation, you will need to show the court that your situation meets that standard. You must explain how your federal rights were violated in the court proceedings being challenged. To get federal habeas relief, the facts must support each violation you claim. For example, if you claim that your right to counsel was violated, you should use the *Strickland*[33] standard. Under the *Strickland* standard, you must show (1) that you had a right to counsel at the time,[34] and (2) that adequate counsel was not provided. If you do not tell the court about the facts[35] of the violation and how they relate to the relevant standard, your allegations will not entitle you to relief and your claim may be dismissed.[36] Remember to give as many details about the violation as you can, but make sure that the facts that you choose to include are relevant to the violation. If a statement relevant to the violation you have claimed was made during your trial, find those exact words in the trial transcript and include them as supporting evidence in your habeas petition. Note in your petition the line and page in the transcript where the words can be found.

You may need to obtain additional information through public records and other means in order to support the facts of your case. This process is called discovery and is generally described in Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery." While a non-capital habeas petitioner is usually not entitled to discovery, you may obtain discovery under the Federal Rules of Civil Procedure by showing "good cause" that it is needed.[37] You can show good cause when the facts you are alleging, if correct, would entitle you to habeas relief.[38]

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33. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). For a discussion of habeas petitions based on a violation of your right to counsel, see Part B(2)(a) of this Chapter.

34. If, for example, a statement you gave to an agent of the prosecution (police, marshals, jailers, bailiffs, etc.) was used against you at trial and you are claiming that the statement was illegal because you did not have counsel present, you must first show that you had a right to counsel at the time the information was given to that agent. *See* United States v. Henry, 447 U.S. 264, 274–275, 100 S. Ct. 2183, 2189, 65 L. Ed. 2d 115, 124–125 (1980) (holding that the prosecution's use of a statement made by defendant to an undercover informant after the defendant was indicted violated his 6th Amendment right to counsel); Massiah v. United States, 377 U.S. 201, 205–206, 84 S. Ct. 1199, 1202–1203, 12 L. Ed. 2d 246, 250 (1964) (ruling that an incarcerated person's statements to a government informant, where a situation was intentionally created to induce incriminating statements after the incarcerated person's indictment and without counsel, should not be admitted at trial because it violated his right to counsel). *But see* Illinois v. Perkins, 496 U.S. 292, 299, 110 S. Ct. 2394, 2399, 110 L. Ed. 2d 243, 253 (1990) (ruling that a defendant's 6th Amendment rights are not violated by admission of confession he made to undercover agent while in jail because no charges had been filed on the subject of the confession and there was no right to counsel).

35. Courts refer to these facts as "elements" of the violation.

36. *See* McFarland v. Scott, 512 U.S. 849, 860, 114 S. Ct. 2568, 2574, 129 L. Ed. 2d 666, 676 (1994) (O'Connor, J., concurring in part and dissenting in part) ("[T]he habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claim."). Note that a dissenting opinion is an opinion disagreeing with the majority opinion. Where a dissenting opinion disagrees with the majority opinion of the court, it does not have the force of law. It can be influential, however, and provide you some ideas on how to distinguish your case from the law and facts in the majority opinion. A concurring opinion agrees with the basic holding of the majority opinion, but may decide the case on different grounds, or provide alternative explanations for the basis of the holding. Again, concurring opinions can sometimes be very influential and provide different arguments that might help your case, but they do not have as much weight or persuasive force as majority opinions.

37. *See* Rules Governing § 2254 Cases, Rule 6, 28 U.S.C. § 2254; Rules Governing § 2255 Cases, Rule 6, 28 U.S.C. § 2255; Bracy v. Gramley, 520 U.S. 899, 908–909, 117 S. Ct. 1793, 1799, 138 L. Ed. 2d 97, 106 (1997) (holding that the petitioner made a sufficient factual finding of "good cause" as required by Habeas Corpus Rule 6(a) to entitle him to discovery).

38. *See* Bracy v. Gramley, 520 U.S. 899, 908–09, 117 S. Ct. 1793, 1799, 138 L. Ed. 2d 97, 106 (1997) (finding that it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry if petitioner's allegations when fully developed may demonstrate that the petitioner is entitled to relief); United States v. Armstrong, 517 U.S. 456, 468–470, 116 S. Ct. 1480, 1488–1489, 134 L. Ed. 2d 687, 701–702 (1996) (explaining what a defendant alleging racially discriminatory prosecutorial practices must do to establish entitlement to discovery); United States v. Bass, 536 U.S. 862, 863–864, 122 S. Ct. 2389, 2391–2392, 153 L. Ed.

3. The Harmless Error Rule

(a) General

Once you have established that there was a violation, you will also need to show that you were *actually* harmed by the violation. When you present your habeas petition, the State will likely argue that even though a violation occurred, the violation did not actually harm you in your trial, and therefore was a "harmless error." If the court finds that the violation did not cause "actual prejudice" to your case, it will conclude that the error was harmless, and habeas relief will not be granted. [39]

While the "actual prejudice" standard applies to all federal habeas claims, people incarcerated in state custody will also need to overcome the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") standard. AEDPA limits federal courts' ability to grant habeas relief when reviewing claims from people incarcerated by the state. This standard is described in further detail in Section (h) below.

(b) The State will likely say that the error was harmless in a clear and timely manner

While you will likely have to overcome the State's defense that the error was harmless, the court will not automatically assume that the State has made this argument. Rather, the State must come forward and affirmatively plead (come forward and say) that the violation was a "harmless error."[40] This is called "raising the 'harmless error' issue" or "raising the 'harmless error' defense." If the prosecution does not raise the harmless error issue in a *clear* and *timely* manner, it is "waived" (lost), and the court will assume that the violation caused you actual harm. This generally means that the State must raise the "harmless error" defense in its response to your habeas petition.[41] Ultimately, however, it is likely that the State will raise this defense, so you should be sure to explain in your petition how the error harmed you and show how it affected the jury's decision-making.

(c) Standard of review

The "standard of review" is the level that the trial court's error must reach in order for the habeas court to overturn its verdict. To determine whether the error was harmless, courts will generally ask whether the error "had a substantial and injurious effect or influence in determining the jury's verdict."[42] In other words, the court will ask whether the error substantially influenced the jury's decision that you were guilty, either by keeping you from defending yourself or by convincing them of your guilt. If the court finds that it did, it will likely grant habeas relief. If, on the other hand, the court finds that it had only a "slight effect" on the jury, no relief will be granted.[43] The only

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2d 769, 771–772 (2002) (reaffirming the *Armstrong* requirements to show entitlement to discovery and adding that raw statistics about overall arrest and charge patterns say nothing about charges brought against similarly situated defendants).

39. Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 1713 (1993). This test is sometimes referred to as the *Kotteakos* test. Before *Brecht*, the *Kotteakos* test had been the test used in federal habeas proceedings of people incarcerated in federal custody to determine whether a non-constitutional error was harmless. In *Brecht*, the court applied the *Kotteakos* test to all violations including constitutional violations. *See* Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

40. *See* United States v. Dominquez Benitez, 542 U.S. 74, 81 n.7, 124 S. Ct. 2333, 2339 n.7, 159 L. Ed. 2d 157, 167 n.7 (2004) (stating that using the *Brecht* standard means that the government has "the burden of showing that constitutional trial error is harmless"); Sanders v. Cotton, 398 F.3d 572, 582 (7th Cir. 2005) (holding that the harmless error rule was waived because the state did not raise it in district court); Holland v. McGinnis, 963 F.2d 1044, 1057–1058 (7th Cir. 1992) (holding that the state waived the harmless error defense by waiting until oral argument before the Court of Appeals to present the defense).

41. RANDY HERTZ AND JAMES LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (7th ed., 2016) (citing Miller v. Stovall, 608 F.3d 913, 926–927 (6th Cir. 2010) ("Joining other courts that have considered the question, we now hold that a State waives harmless error when it fails to raise the issue in its response to the habeas petition in federal district court.").

42. Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 1711 (1993).

43. Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 40 L. Ed. 1557 (1946).

exception to this is if your petition is subject to the AEDPA standard (if you are incarcerated in state custody), which is described in further detail in Section (h) below.

(d) Burden of proof and degree of certainty

The State "bears the burden" of demonstrating that the error was harmless.[44] This means that, if the State cannot come forwards and convince the judge that the error was harmless, relief must be granted. The key question is: how certain must the judge be that the error caused you actual harm in order to grant relief? How certain the judge must be is called the "degree of certainty." It is helpful to think of the required degree of certainty along a spectrum, from "possible" that the error was harmful at the low end, to "beyond a reasonable doubt" at the high end. In *Davis v. Ayala*, the Court notes that it is not enough for you to show that there was a "reasonable possibility" that the error was harmful.[45] On the other hand, it is not necessary for you to prove that the error was harmful beyond a reasonable doubt, or even that it was "more probable than not" that it was harmful.[46]

Instead, the minimum threshold that courts will use is the "grave doubt" standard, which is somewhere towards the middle of that spectrum. This test says that if the judge reviewing your case is in "grave doubt," meaning he cannot decide if an error had a "substantial and injurious effect," then he must find that the error was not harmless.[47] In other words, if in the judge's mind, the matter is ties and he is unsure whether the error is harmless or not, he must rule in your favor (that the state has not met its burden of proof). Since the State bears the burden of proving that the error was harmless, the judge must grant you relief in this case.[48] Of course, any degree of certainty above this threshold (for instance, if the judge believes it is "highly likely" that the error was harmful) will also win you relief. However, anything below this threshold (for instance, if there is merely a "reasonable possibility" that the error was harmful) will not be sufficient.

(e) Factors to be considered

Judges are likely to consider the context when making a harmless error determination. Factors that might be considered are: [49]

(1) The nature of the right you claim has been violated;
(2) How much violations of that right are likely to affect the jury's deliberations;
(3) What is at stake;
(4) The phase of the trial that was affected by the error;
(5) The seriousness of the violation;
(6) The centrality of the error to the case (how big of a role the error played in your trial);
(7) The frequency of the violation during trial,
(8) Whether the error resulted in the exclusion or omission of evidence that could have influenced the jury's deliberations or whether the absence of that evidence misled the jury about the facts;

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44. Davis v. Ayala, 135 S. Ct. 2187, 2187, 192 L. Ed. 2d 323 (2015) ("in the absence of the 'rare type of error' that requires automatic reversal, relief is appropriate only if the prosecution cannot demonstrate harmlessness.")

45. Davis v. Ayala, 135 S. Ct. 2187, 2198, 192 L. Ed. 2d 323 (2015).

46. RANDY HERTZ & JAMES LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 1819 (7th ed., 2016).

47. O'Neal v. McAninch, 513 U.S. 432, 436, 115 S. Ct. 992, 994, 130 L. Ed. 2d 947, 952 (1995) ("When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win."). However, the federal judge does not need to be convinced beyond a reasonable doubt that the error was harmless. *See* Fry v. Pliler, 551 U.S. 112, 121–22, 127 S. Ct. 2321, 2328, 168 L. Ed. 2d 16, 24 (2007) (holding that a court must assess the prejudicial impact of state court's constitutional error under the "substantial and injurious effect" standard regardless of whether the state appellate court applied the "harmless beyond a reasonable doubt" standard).

48. O'Neal v. McAninch, 513 U.S. 432, 435, 115 S. Ct. 992, 994, 130 L. Ed. 2d 947, 952 (1995).

49. RANDY HERTZ & JAMES LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 1828–1846 (7th ed., 2016).

(9) If there were multiple errors, the total effect of the errors; and
(10) Whether the court failed to give "curative instructions" or took other remedial measures to prevent the error from substantially affecting the jury's deliberations.[50]

Additionally, if your case involves evidence that should not have been admitted, the court will look how much:

(1) The prosecutor emphasized improper evidence in his closing argument or the judge emphasized improper evidence in jury instructions,
(2) The improperly admitted evidence was likely to influence the jury's deliberations, and
(3) The improperly admitted evidence was not the same as other evidence that was lawfully presented to the jury.

(f) Examples of "harmless error" cases

Below are examples of errors that courts have found to be harmless (cases where the petitioner could not win relief because the error did not harm him). Keep in mind that similar errors will not always be held harmless, as the context of the error (all of the factors listed above) mattered to the court's decision in these cases. Errors were found to be harmless:

(1) When the defendant alleged the prosecutor used racial discrimination in selecting the jury, and the state court did not allow the defendant or his attorney to attend the later scheduled hearing on this matter, nor provide transcripts of the hearing.[51]
(2) When the defendant's right to cross-examine the victim was limited, but not completely denied.[52]
(3) When the trial court failed to issue a jury instruction on unlawful imprisonment as a lesser included offense to kidnapping in a felony murder case.[53]
(4) When the federal trial court failed to inform the defendant of his right to appeal his conviction, but the defendant was already aware of this right.[54]
(5) When the trial court admitted evidence that was obtained in violation of the defendant's Fifth Amendment rights, but the evidence was unrelated to the charges the defendant was appealing.[55]

The following are some situations where courts have found errors to be *not harmless* (the petitioner could win relief because the error harmed him):

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50. Kotteakos v. United States, 328 U.S. 750, 762, 66 S. Ct. 1239, 1246, 90 L. Ed. 1557 (1946). *Brecht* also included an exception, stating that a deliberate and especially serious error, or one combined with a pattern of prosecutorial misconduct, might warrant habeas relief even if it did not "substantially influence" the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 638 n.9, 113 S. Ct. 1710, 1722 n.9, 123 L. Ed. 2d 353, 373 n.9 (1993); *see also* Duckett v. Mullin, 306 F.3d 982, 993 n.3 (10th Cir. 2002) (finding that misconduct of the prosecutor does not put error into *Brecht*'s "footnote nine exemption"); Hardnett v. Marshall, 25 F.3d 875, 879–880 (9th Cir. 1994) (holding that the key consideration to whether the *Brecht* "footnote nine exemption" will be applicable is whether the integrity of the proceeding was so infected that the entire trial was unfair). As of 2015, however, no court has found for a defendant based on these details.

51. Davis v. Ayala, 135 S. Ct. 2187, 2207, 192 L. Ed. 2d 323 (2015). ("The most that Ayala can establish is that reasonable minds can disagree about whether the prosecution's fears [concerning jury selection] were well founded, but this does not come close to establishing "actual prejudice" under Brecht.").

52. Pettiway v. Vose, 100 F.3d 198, 202 (1st Cir. 1996) (finding that a trial judge's limitation of the defendant's right to cross-examine the victim in a child molestation sexual assault case did not have a "substantial and injurious" effect because other evidence in the case was so overpowering).

53. Villafuerte v. Stewart, 111 F.3d 616, 624–625 (9th Cir. 1997) (stating that the lower court's error did not have a "substantial or injurious" effect on the verdict and adding that the error "was at most harmless and more likely irrelevant").

54. Peguero v. United States, 526 U.S. 23, 24, 119 S. Ct. 961, 963, 143 L. Ed. 2d 18, 22 (1999) (holding that no harm is caused when a district court fails to advise a defendant of his right to appeal if the defendant knew of his right, and ruling that the court's error did not entitle defendant to habeas relief).

55. United States v. Suarez, 263 F.3d 468, 484 (6th Cir. 2001).

(1) When the defense attorney represented two defendants charged with possession of drugs. Both defendants wanted to assert that someone else owned the drugs. The two defendants had conflicting interests because they each may have argued that the other defendant was guilty as part of their defense strategy. The error was not harmless because the attorney had a conflict of interest when he represented the habeas petitioner.[56]
(2) When a juror lied about his background to get on the jury and made numerous comments that called into doubt the juror's objectivity.[57]
(3) When the trial court allowed testimony from a co-defendant about his understanding of the defendant's knowledge of fraudulent behavior. The appellate court reversed, finding the admission of this testimony was not harmless error because the testimony related to the case's "central disputed issue" and because of the government's weak case. The testimony of the co-defendant was found to be "vitally important."[58]

(g) Structural Errors

In a few situations, the court will make an exception to the harmless error rule and will automatically assume that you were harmed because of the nature of the violation. These violations are called "*per se* prejudicial," or "structural errors."[59] Structural errors are errors that the court will always consider to have violated your right to a fair trial. Therefore, these errors are not subject to the harmless error rule, and you do not have to prove to the court that you were actually harmed.[60] Structural errors include:[61]

(1) the total denial of the right to counsel,[62]
(2) the denial of the right to an impartial judge,[63]
(3) unlawful discrimination in the grand jury selection process,[64]

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56. McFarland v. Yukins, 356 F.3d 688, 713–714 (6th Cir. 2004) (holding that the court's error was prejudicial where the defendant "was forced, over her objection, to go to trial with counsel who was actively representing a co-defendant").

57. The juror in question lied about having a prior felony conviction, which made him ineligible to serve as a juror in California. Green v. White, 232 F.3d 671, 677–678 (9th Cir. 2000).

58. United States v. Kaplan, 490 F.3d 110, 123–124 (2d Cir. 2007).

59. A court rarely finds a violation *per se* prejudicial. If you find a case where a court described the violation you are claiming as a *per se* prejudicial violation, a structural violation, or an automatic reversal violation, you should cite the case and show the court how your violation is similar and why it deserves the same treatment as the violation described in that case. Here are some examples of when courts have found violations *per se* prejudicial: Roe v. Flores-Ortega, 528 U.S. 470, 484, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985, 999 (2000) (finding *per se* prejudice when the petitioner is effectively denied the right to an appeal due to ineffective assistance of counsel); Edwards v. Balisok, 520 U.S. 641, 647, 117 S. Ct. 1584, 1588, 137 L. Ed. 2d 906, 914 (1997) (finding *per se* prejudice when the trial judge is not impartial); Bell v. Cone, 535 U.S. 685, 695–696, 122 S. Ct. 1843, 1851, 152 L. Ed. 2d 914, 927 (2002) (finding *per se* prejudice when petitioner is denied counsel at a "critical stage" of the proceedings).

60. *See* Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302, 332 (1991) ("[S]tructural defect[s] affect[] the framework within which the trial proceeds, rather than simply…error[s] in the trial process.").

61. This list is not complete. There are other instances where the court will find the error *per se* prejudicial (a structural error), and your federal appeals court may include more instances than the Supreme Court.

62. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (upholding a habeas petition due to Florida's refusal to grant assistance of counsel in a criminal proceeding).

63. *But see* Richardson v. Quarterman, 537 F.3d 466, 478 (5th Cir. 2008) (denying a habeas petition alleging that a judge had to remove himself from a murder prosecution because the appearance of bias arising from his wife's acquaintance with the victim was only a harmless error and not a structural error requiring automatic reversal).

64. Vasquez v. Hillery, 474 U.S. 254, 262–264, 106 S. Ct. 617, 623, 88 L. Ed. 2d 598, 609 (1986) (upholding a habeas petition alleging that the defendant was denied equal protection because blacks were systematically excluded from the grand jury that indicted him).

(4) the denial of the right to self-representation at trial,[65]
(5) the denial of the right to a public trial,[66] and
(6) giving flawed jury instructions in a case where the jury must find guilt beyond a reasonable doubt to find the defendant guilty.[67]

While the court does occasionally find that a structural error has occurred, these cases are rare. Therefore, you should always show the court how you suffered actual harm, even if you believe that a structural error occurred. You should only use the argument that a violation was structural to *strengthen* your argument that you were harmed by the violation.[68]

(h) AEDPA

As mentioned, the "substantial or injurious effect" standard does not always apply in federal courts when the court is reviewing a state court's determination that an error was harmless. Generally speaking, if you are a person incarcerated by the state, the federal court will apply the AEDPA standard when reviewing your habeas claim. Specifically, AEDPA states that, if the state court adjudicated your habeas claim *on the merits* of your case, then the federal court cannot grant relief unless the state court's decision was *unreasonable*.[69] This means that if the state court held that the constitutional error in your case was harmless, your habeas petition will have to convince the federal court that the state court's decision that the violation was harmless was unreasonable.[70] Federal courts will generally hold that a state court decision was not unreasonable "if fair-minded jurists could disagree on its correctness."[71] This task is more difficult than just convincing a court that the error caused harm.

To learn more about the standard that AEDPA imposes for federal habeas review of state court decisions (including whether or not it applies to your case), see Part B(4) of this Chapter.

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65. McKaskle v. Wiggins, 465 U.S. 168, 177–178, n.8, 104 S. Ct. 944, 950–951, n.8, 79 L. Ed. 2d 122, 133, n.8 (1984) (denying a habeas petition alleging that the court-appointed standby counsel interfered with the defendant's presentation because he was allowed to make his own appearances); *see also* Johnstone v. Kelly, 808. F.2d 214, 218 (2d Cir. 1986) ("[V]iolation of a defendant's right to proceed *pro se* requires automatic reversal of a criminal conviction.").

66. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (holding that the closure of an entire suppression hearing to the public violated the defendant's right to a public trial).

67. United States v. Allen, 406 F.3d 940, 944 (8th Cir. 2005) (citing Arizona v. Fulminante, 499 U.S. 279, 309, 111 S. Ct. 1246, 1264, 113 L. Ed. 2d 302, 331 (1991)); *see also* Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 1834, 144 L. Ed. 2d 35, 45 (1999) (noting structural errors subject to automatic reversal are (1) a complete denial of counsel, (2) biased trial judge, (3) racial discrimination in selection of grand jury, (4) denial of self-representation at trial, (5) denial of public trial, and (6) defective reasonable-doubt instruction).

68. For example, after you show the court that the error was harmful, you might say, "Even if this error were harmless, I would still be entitled to relief because the error was a *per se* prejudicial violation that affected my substantial rights." *See*, *e.g.*, Neder v. United States, 527 U.S. 1, 7, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35, 46 (1999) (stating that there is a "limited class of fundamental constitutional errors that…are so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to their effect on the outcome").

69. Davis v. Ayala, 135 S. Ct. 2187, 2198, 192 L. Ed. 2d 323 (2015) (citing AEDPA, 28 U. S. C. §2254(d)). An unreasonableness standard means that the court will only look at whether the lower court's decision was unreasonable. This means that if the lower court did not find a constitutional error, but the reviewing court does find a constitutional error, the reviewing court cannot reverse the lower court's decision unless the lower court was unreasonable in not finding an error.

70. *See* Mitchell v. Esparza, 540 U.S. 12, 18, 124 S. Ct. 7, 12, 157 L. Ed. 2d 263, 271 (2003) ("[The federal court] may not grant [a] habeas petition . . . if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner.") (quoting Lockyer v. Andrade, 538 U.S. 63, 75–77, 123 S. Ct. 1166, 1174, 155 L. Ed. 2d 144, 158 (2003)).

71. Davis v. Ayala, 135 S. Ct. 2187, 2199, 192 L. Ed. 2d 323, 334 (2015) (citing Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 786, 178 L. Ed. 2d. 624, 640 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 2149, 158 L. Ed. 2d 398, 407 (2004))).

4. AEDPA Standard of Relief: Showing the Federal Court that the State Court Was Incorrect in Refusing to Grant You Relief[72]

If you are a person incarcerated by the state, once you have shown the court that your rights were violated and the violation was harmful, you will also need to convince the federal court that the state court was incorrect in failing to find that your rights were violated or that the violation did not harm you when it reviewed your habeas petition. In some cases, where the state court ruled on both of these elements, you will have to show the federal court that the state court was incorrect on both counts. (Remember, you must present your claims to a state court first, so you will only be filing a federal habeas petition if the state court has denied you relief).

In 1996, AEDPA altered 28 U.S.C. § 2254 and set a new "standard of review" for habeas relief for people incarcerated by the state court. A standard of review is the test that the federal court will use to decide whether to overrule the state court's decision denying you relief. Under AEDPA, you must prove that the state court decision rejecting your habeas petition was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"[73] or that it was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[74] *This is a very high standard* and it is not easy to prove. The federal courts do not like to overturn state court decisions. This means that to get federal habeas relief, you cannot just show the federal court that the state court was wrong—you must show that the state court's ruling was "unreasonable" or "contrary" to the Supreme Court's interpretation of federal law.

How the federal court will apply the AEDPA standard of review will depend on how the state court handled your state collateral attack.[75] If the state court made a determination about certain issues, then the federal court will apply the AEDPA standard of review to the state court's decision-making process. The federal court will look to see if the state court's decision was "unreasonable" or "contrary" to the Supreme Court's interpretation of the law. In addition to demonstrating that the state court's decision-making process was incorrect, you still need to provide facts that show that the state court's ultimate determination was incorrect as well.

For example, if the state court rejected your collateral attack because it found that a constitutional violation did not occur, and it did not discuss the issue of harmless error, then the AEDPA standard of review will only apply to proving the constitutional violation. Showing that the state court was incorrect will be subject to the AEDPA standard of review, so you will have to prove that the state court was "unreasonable" or "contrary" to the Supreme Court's interpretation of federal law. In order to do this, you must do two things: (1) show the federal court that the state court was incorrect in failing to find that the violation occurred; (2) show the federal court that a constitutional violation occurred by showing the standard used by the state court was met as discussed in Part B(2) of this Chapter.

If the state court did not rule on the next element of the habeas petition, harmless error, then you will not need to apply the AEDPA standard of review to the harmless error issue. In this example, because the state court never ruled on the harmless error issue, the federal court will look at the harmless error issue "*de novo*", which means that the federal court will look at the issue as if it was the first time the issue was raised. The federal court will not consider whether the state court's decision

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72. The standard of review discussed in this Section only applies to people incarcerated in state custody. For people incarcerated in federal custody, appellate courts review questions of law *de novo*, and questions of fact for clear error. This means that reviewing courts will apply their own judgments to questions of law, but "the factual findings of [the courts] are presumed to be correct." Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999) (citing Nelson v. Walker, 121 F.3d 828, 833 (2d. Cir. 1994) (quoting Green v. Scully, 850 F.2d 894, 900 (2d. Cir 1998)); *see*, *e.g.*, Dorsey v. Chapman, 262 F.3d 1181, 1185, n. 4 (11th Cir. 2001) (stating that a factual finding in an ineffective assistance of counsel claim is accorded a presumption of correctness).

73. 28 U.S.C. § 2254(d)(1).

74. 28 U.S.C. § 2254(d)(2).

75. Harrington v. Richter, 562 U.S. 86, 97–104, 131 S. Ct. 770, 783–787, 178 L. Ed. 2d 624, 638–642 (2011). See Part A(1) of this Chapter for an explanation of "collateral attack."

was unreasonable. This would mean an easier or less stringent standard of review. If, on the other hand, the state court found that a violation occurred, but that it was harmless, the federal court will apply AEDPA's unreasonableness standard of review to the harmless error issue. Also, the state court may have found that there was no constitutional violation but may have ruled on the harmless error issue anyway. Because in such a situation the state court ruled on both elements of the habeas petition, the federal court has to apply the AEDPA unreasonableness standard of review to both elements.

Sometimes people incarcerated by the state present habeas claims to federal courts that have not been previously presented to state courts. This happens when the claim falls under one of the exceptions to the 'exhaustion rule'. You should see Part D(2) of this Chapter below for a discussion of the state exhaustion rule. In these rare circumstances, the AEDPA standard of review will not be used at all. If your claim falls under one of the exceptions to the exhaustion rule, you only need to show the federal court that your rights were violated and that the violation affected the outcome of the trial. Once you have shown this, you will have completed the substantive part of your habeas claim. However, there are still many procedural issues you will have to address to be granted habeas relief. These procedural issues are discussed below in Part D ("Procedures for Filing a Petition for Habeas Corpus") of this Chapter.

Assuming the state court has ruled on your claim, it will be subject, at least in part, to the AEDPA standard of review. This Section discusses this standard in more detail. Subsection (a) of this Section will discuss how to use the first AEDPA test—"contrary to, [or an] unreasonable application of, clearly established Federal law as determined by the Supreme Court." Subsection (b) will discuss the second AEDPA test—"unreasonable determination of facts in light of the evidence presented." To give your petition the best chance of success, you should always argue that your situation meets both the "contrary" standard and the "unreasonable application" standard.

(a) "Contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"[76]

The Supreme Court explained this test in *Williams v. Taylor*.[77] In *Williams*, the petitioner claimed his attorney had provided ineffective assistance of counsel. The Court held that Mr. Williams had shown his counsel's performance was ineffective and went on to consider whether habeas relief should be granted under this standard.[78] The Court first held that to be successful, a petitioner must show that the claimed violation was based on federal law that was clearly established by the Supreme Court *at the time* the state court decided these claims. This means that before the court will consider your claim, you must show that the law you are relying on is not new and that the Supreme Court itself has reviewed the law at some point in the past.[79] Most of the examples of constitutional violations listed above are not new laws and would be considered for relief. There are some very limited exceptions that allow new law to be used. To learn more about these exceptions read Part C(3) ("Exceptions to the New Laws Rule") of this Chapter.

If you can show that you are relying on clearly established federal law, your next step is to show either that the state or trial court's decision was contrary to that federal law, or that the state or trial court applied the law in an unreasonable manner. Remember, the point of the federal habeas petition is to give the federal court a chance to correct a wrong decision by the state or trial court.

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76. 28 U.S.C. § 2254(d)(1).

77. Williams v. Taylor, 529 U.S. 362, 384–390, 120 S. Ct. 1495, 1508–1511, 146 L. Ed. 2d 389, 412–416 (2000).

78. In determining that Mr. Williams' counsel was ineffective, the Court found that Mr. Williams had met the *Strickland* standard. Strickland v. Washington, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 2064–2065, 80 L. Ed. 2d 674, 693–694 (1984). Mr. Williams showed a violation of clearly established federal law and/or the Constitution, found the right standard, and showed the Court that he had suffered harm from this violation. To learn more about the *Strickland* standard, see Part B(2) of this Chapter. For a discussion of the "clearly established" standard, see Part B(1) of this Chapter. To learn how to find the correct standard, see Part B(2) of this Chapter, and for an explanation of how to establish that a violation caused harm, see Part B(3) of this Chapter.

79. For an explanation of how to establish that the law you are relying on is not new, see Part C(2) ("New Laws: The *Teague* Rule") of this Chapter.

(i) "Contrary" Standard

The first way to show that the court's decision was wrong is to show that the court's decision was contrary to (conflicting with) clearly established federal law.[80] This is a difficult standard to prove. In *Williams*, the Court held that the contrary standard meant that habeas relief is deserved if the court "applies a rule that contradicts the governing law set forth in [its] cases."[81] This means that the court must have either applied the wrong standard in a case or interpreted the standard incorrectly. For example, in a case on ineffective assistance of counsel, the *Strickland* standard governs.[82] If the court applied a standard that was different from the *Strickland* standard, then it has applied a standard "contrary" to clearly established law. In this case, relief may be appropriate. Likewise, if the court interpreted the *Strickland* standard incorrectly, then the decision would also be contrary to federal law, and relief could be granted.[83] However, it is difficult to persuade an appeals court that a state court applied the law in a contrary way.[84]

The other way to show that your state court's decision was contrary to federal law is to show that the Supreme Court considered a case very similar to yours, and it reached a different conclusion from the one reached by your state court.[85] This means that if you can find a Supreme Court case with similar facts to your case, and the state court ruled differently from the Supreme Court, you might be entitled to relief.[86] This only applies when you are able to point to a case with similar enough facts.

In order to show that the decision rejecting your claim was contrary to federal law under this part of the test, you must do one of three things: you must (1) show that the court relied on the wrong standard in determining whether a violation had occurred;[87] (2) show that the court chose the right standard, but then applied it incorrectly to your case; or (3) point to a Supreme Court case with similar facts and claims to your case, in which the Supreme Court ruled differently from how the state court in your case ruled. Put another way, to prove that you deserve relief under this "contrary" standard

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80. It is important to note that *dicta* (plural of *dictum*) are not considered clearly established federal law. Only Supreme Court holdings are considered law clearly established by the Supreme Court. Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389, 429 (2000).

81. Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 1519, 146 L. Ed. 2d 389, 425 (2000) (O'Connor, J., concurring).

82. Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984) (declaring that the standard for establishing ineffective assistance of counsel is whether the attorney's performance was objectively reasonable and whether deficient performance prejudiced the defense). To learn more about the *Strickland* standard, see Part B(2) of this Chapter.

83. In *Williams*, the Court found that the state court decision was contrary to federal law because the court used the test for ineffective assistance of counsel found in Lockhart v. Fretwell, 506 U.S. 364, 366, 113 S. Ct. 838, 841, 122 L. Ed. 2d 180, 187 (1993), instead of the *Strickland* standard, which should have been used. Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct. 1495, 1512, 146 L. Ed. 2d 389, 416–417 (2000); Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984).

84. *See*, *e.g.*, Bell v. Cone, 535 U.S. 685, 693, 122 S. Ct. 1843, 1849, 152 L. Ed. 2d 914, 926 (2002) (noting that AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under the law").

85. Williams v. Taylor, 529 U.S. 362, 406, 120 S. Ct. 1495, 1519–1520, 146 L. Ed. 2d 389, 426 (2000) ("A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."); *see also* Ramdass v. Angelone, 530 U.S. 156, 165–166, 120 S. Ct. 2113, 2119–2120, 147 L. Ed. 2d 125, 135–136 (2000) (stating that "a state court acts contrary to clearly established federal law if it applies a legal rule that contradicts our prior holdings or if it reaches a different result from one of our cases despite confronting indistinguishable facts.").

86. *See* Cockerham v. Cain, 283 F.3d 657, 663 (5th Cir. 2002) (finding jury instructions were contrary to federal law because the same instructions had been found to be unconstitutional by the Supreme Court in Cage v. Louisiana, 498 U.S. 39, 41, 111 S. Ct. 328, 329, 112 L. Ed. 2d 339, 342 (1990)).

87. To find out what standard the court should have applied, see Part B(2) ("Standards and Tests for Claims of Violations") of this Chapter.

you must point to a violation of a federal right,[88] identify the standard that applies to that violation,[89] show the court that the violation in your case meets that standard,[90] and then argue that the state court used the wrong standard or applied the standard incorrectly to the facts in your case.

(ii) Unreasonable Application Standard

If the state court used the correct standard and was not contrary to federal law in deciding to reject your claim of a federal rights violation, you may still be able to get relief under the second part of the test. This part of the test applies either if the state court used the right standard but applied it to the facts of your case in an unreasonable (unfair) way, or if the state court did not use the correct standard for your violation.[91] There are times when this standard will overlap with the "contrary to" standard,[92] and *you should always argue that your case meets both standards*. To show that the state court decision was an unreasonable application of federal law, you have to show that the state court was "objectively unreasonable" in the way it applied the standard.[93] Here, "objectively unreasonable" means that the standard was applied to your case in an unfair way, or that the wrong standard was used unfairly.

You should show that there is specific Supreme Court case law that requires the state court to reach a result that it did not reach. State courts will follow Supreme Court case law depending on how similar, specific, and recent the case law is.[94] You will strengthen your argument that the state court was unreasonable by showing the federal court that the Supreme Court case law was specific and required a specific outcome in your case. The Supreme Court has said that an "unreasonable" application of federal law is more than just an "incorrect" application of federal law.[95] State courts can go so far as to be "imprecise" and yet still apply the law reasonably.[96] Therefore, you cannot just show

88. See Part B(1) ("Examples of Constitutional Violations") of this Chapter.

89. See Part B(2) ("Standards and Tests for Claims of Violations") of this Chapter.

90. See Part B(4) ("AEDPA Standard of Getting Relief: Showing the Federal Court that the State Court Was Incorrect in Refusing to Grant You Relief") of this Chapter.

91. Williams v. Taylor, 529 U.S. 362, 409, 120 S. Ct. 1495, 1521, 146 L. Ed. 2d 389, 427 (2000) (explaining that the "unreasonable application" standard is met when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case"); *see* Wiggins v. Smith, 539 U.S. 510, 520, 123 S. Ct. 2527, 2534–35, 156 L. Ed. 2d 471, 484 (2003) (stating that unreasonable application of federal law is when a state court "has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced'") (quoting Lockyer v. Andrade, 538 U.S. 63, 76, 123 S. Ct. 1166, 1175, 155 L. Ed. 2d 144, 158 (2003)); Ramdass v. Angelone, 530 U.S. 156, 166, 120 S. Ct. 2113, 2120, 147 L. Ed. 2d 125, 136 (2000) ("The statute also authorizes federal habeas corpus relief if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case. A state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled.").

92. Williams v. Taylor, 529 U.S. 362, 384–386, 120 S. Ct. 1495, 1508–1509, 146 L. Ed. 2d 389, 412–413 (2000) (explaining that the two standards are not mutually exclusive and anticipating that claims will be brought that implicate both).

93. Williams v. Taylor, 529 U.S. 362, 409–410, 120 S. Ct. 1495, 1521–1522, 146 L. Ed. 2d 389, 428 (2000) (explaining that a showing of "objective[] unreasonable[ness]" is not defeated by the fact that one jurist has applied the law in the same manner as the state court); *see also* Woodford v. Visciotti, 537 U.S. 19, 24–25, 123 S. Ct. 357, 360, 154 L. Ed. 2d 279, 286 (2002) (holding that it is not enough for a federal court to find a state court applied federal law incorrectly, rather, the incarcerated person must show that the state court applied federal law "in an *objectively unreasonable* manner") (emphasis added).

94. *See* Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 2149, 158 L. Ed. 2d 938, 951 (2004) (concluding the more general the rule being applied, the more leeway the state courts have in making their decisions in case-by-case determinations).

95. Williams v. Taylor, 529 U.S. 362, 410–411, 120 S. Ct. 1495, 1522, 146 L. Ed. 2d 389, 428–429 (2000).

96. *See* Woodford v. Visciotti, 537 U.S. 19, 23–24, 123 S. Ct. 357, 359, 154 L. Ed. 2d 279, 285–286 (2002) (holding that while the California Supreme Court was not precise in applying the *Strickland* test, its decision was not unreasonable).

the federal court that the state court was wrong—you must show them something more, that it was unreasonable.[97]

It is hard to define what you would need to show to prove that a state court's application of Supreme Court case law was unreasonable. You should try to show that the state court's analysis of your case and reasoning were flawed, as well as its conclusion. You should show that the court's point of view is different from how most people would see the situation, and that it would be hard for a reasonable person to understand how the state court came to its decision. If you can show a significant error in the court's reasoning, you may be able to show that its actions were unreasonable.[98]

Federal Circuit court have different interpretations as to what this "unreasonable" standard means. You should check how your circuit defines "unreasonable" in this context by Shepardizing the main Supreme Court case on this point, *Williams v. Taylor*,[99] and finding a case in your circuit that discusses *Williams.*

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97. *See* Phoenix v. Matesanz, 233 F.3d 77, 83 (1st Cir. 2000) ("We cannot say that [the state court's] finding was objectively unreasonable, even if we might have found differently."); Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000) (stating that "[s]ome increment of incorrectness beyond error is required" but "the increment need not be great"); Hameen v. Delaware, 212 F.3d 226, 235 (3d Cir. 2000) (stating that a federal court may not grant habeas relief simply because the state court applied federal law erroneously or incorrectly). *See also* Harrington v. Richter, 562 U.S. 86, 102, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624, 641 (2011) (stating that a federal court may find a state court's ruling unreasonable only "where there is no possibility fair minded jurists could disagree that the state court's decision conflicts with this Court's precedents"); Middleton v. McNeil, 541 U.S. 433, 437–438, 124 S. Ct. 1830, 1832–1833, 158 L. Ed. 2d 701, 707 (2004) (holding that the state court was not unreasonable when it upheld jury instructions, even though an incorrect instruction was given, because the jury was given the correct instructions at least three other times).

98. *See* Wiggins v. Smith, 539 U.S. 510, 528, 123 S. Ct. 2527, 2539, 156 L. Ed. 2d 471, 489 (2003) (finding that a "clear factual error" in a state court's analysis "highlight[ed] the unreasonableness of the court's decision"). *See also* Rompilla v. Beard, 545 U.S. 374, 389, 125 S. Ct. 2456, 2467, 162 L. Ed. 2d 360, 376 (2005) (finding that the state court's "fail[ure] to answer the considerations [the Supreme Court] ha[s] set out" amounted to an unreasonable decision on a claim of ineffective assistance of counsel); Mask v. McGinnis, 233 F.3d 132, 140 (2d Cir. 2000) (concluding that the state court's decision was a "unreasonable application" of the test in *Strickland*, because it required petitioner to meet a higher standard—certainty that the results of the proceeding would have been different—to establish an ineffective assistance of counsel claim, rather than the "reasonable probability" standard required under *Strickland*); Washington v. Hofbauer, 228 F.3d 689, 707 (6th Cir. 2000) (concluding that the state court's application of *Strickland* was objectively unreasonable where, among other things, the state court erroneously cited Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) to support its incorrect conclusion that counsel was not ineffective when it failed to object to prosecutorial misconduct in the closing argument).

99. Williams v. Taylor, 529 U.S. 362, 409–414, 120 S. Ct. 1495, 1521–1524, 146 L. Ed. 2d 389, 427-31 (2000). The following is a list of sample cases, by circuit, interpreting the unreasonable application standard. *See* Byrd v. Lewis, 566 F.3d 855, 866 (9th Cir. 2009) (finding that an error in jury instructions is not "structural" when it "affects only an element of the offense, a permissible evidentiary inference, or a potential theory of conviction," rather than "the overarching reasonable doubt standard of proof"); Jackson v. Edwards, 404 F.3d 612, 628 (2d Cir. 2005) (holding that a trial court applied the law unreasonably by not instructing the jury about a justification defense); McFarland v. Yukins, 356 F.3d 688, 714 (6th Cir. 2004) (finding that requiring the defendant to go to trial with an attorney with a conflict of interest was contrary to clearly established federal law); Miller v. Dormire, 310 F.3d 600, 604 (8th Cir. 2002) (finding that the state court's application of the harmless error rule to defense attorney's waiver of jury trial without defendant's consent was contrary to clearly established federal law because federal law holds that denial of a jury trial is a "structural" error and always harmful); Brown v. Head, 272 F.3d 1308, 1313–1315 (11th Cir. 2001) (holding that the lower court decision was not objectively unreasonable and noting that it is the "objective reasonableness, not the correctness *per se*, of the state court decision that [the reviewing court is] to decide"); Davis v. Strack, 270 F.3d 111, 133 (2d Cir. 2001) (finding that the Appellate Division's decision was "egregiously at odds with the standards of due process propounded by the Supreme Court" and fit within either the "unreasonable application" clause or the "unreasonable determinations of fact" clause); Kibbe v. Dubois, 269 F.3d 26, 37, 39 (1st Cir. 2001) (finding that the state court's decision was objectively reasonable because it fell within "the universe of plausible, credible outcomes," and stating that multiple contradictory, reasonable interpretations are likely when there are unresolved legal issues) (quoting O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998)); Jermyn v. Horn, 266 F.3d 257, 312 (3d Cir. 2001) (finding that defendant's counsel had been ineffective for failing to conduct adequate investigation and that the state court's decision to the

(b) "Unreasonable determination of facts in light of the evidence presented in the State court proceeding"

This Subsection discusses a different standard for getting habeas relief. As you will recall, Part B(4)(a) of this Chapter reviews how to get habeas relief if the state court determination of your claim rested on incorrect law or law that was unreasonably applied. This Subsection is not for when the state court gets the *law* wrong, but rather when the state court gets the *facts* of your case wrong. This means that the state court determined the right standard for your case, but (1) did not believe some of the evidence that was presented; (2) understood some of that evidence incorrectly and based a ruling on this misunderstood evidence; or (3) ignored legally relevant facts that it needed to consider in order to reach the correct result.

If the federal court decides that the state court's understanding of the facts in your case is unreasonable and the state court based its decision on this unreasonable interpretation, then it can grant habeas relief.[100] On the other hand, if the federal court decides that the state court was reasonable in its determination of the facts, it cannot grant relief. A reviewing court will defer to the trial court and start with the assumption that the state court based its decision on a correct reading of the facts.[101] It is up to you to prove that the court did not read the facts correctly because it either ignored some evidence or interpreted some evidence incorrectly. You must then prove that the state court decision would have been different if the court had properly considered and applied all of the relevant facts.

The first step is to show the federal court that there *was* a determination of facts—for example, at an evidentiary hearing or at credibility determinations where the court chose to believe one witness over another. You may not be able to rely on this standard for relief if no facts were determined by the state court. However, if the state court did not determine any facts, but should have, you might obtain relief by arguing that a failure to find facts at all is actually an unreasonable determination of facts.[102]

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contrary was objectively unreasonable); Boss v. Pierce, 263 F.3d 734, 742 (7th Cir. 2001) (holding that the appellate court's decision was unreasonable and noting that to determine unreasonableness, the court asks "whether the decision is 'at least minimally consistent with the facts and circumstances of the case' or 'if it is one of several equally plausible outcomes,' . . . [and only granting habeas] if the determination is 'at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary' as to be unreasonable") (first quoting Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997); then quoting Hall v. Washington, 106 F.3d 742, 749 (7th Cir. 1997); and then quoting Hall v. Washington, 106 F.3d 742, 749 (7th Cir. 1997)); Martinez v. Johnson, 255 F.3d 229, 243–245 (5th Cir. 2001) (distinguishing the objective standard of unreasonableness from the subjective "debatable among reasonable jurists" standard, and holding that the court's decision was not objectively unreasonable because a rational trier of fact could come to the same conclusion) (quoting Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996)); Bell v. Jarvis, 236 F.3d 149, 162 n.9, 175 (4th Cir. 2000) (holding that the state court's rejection of the plaintiff's ineffective counsel claim was not objectively unreasonable, and explicitly stating that the "unreasonable" standard should not be equated with the "clearly erroneous" standard); Thomas v. Gibson, 218 F.3d 1213, 1220 (10th Cir. 2000) (applying the Supreme Court's distinction between erroneous and unreasonable); Hameen v. Delaware, 212 F.3d 226, 235 (3d Cir. 2000) (following *Williams* by requiring more than error to find unreasonableness).

100. *See* Torres v. Prunty, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (finding that "the state courts' factual determinations were unreasonable" and that the defendant "rebutted the presumption of correctness of [the state courts'] findings by clear and convincing evidence.") (citation omitted) (internal quotation marks omitted).

101. 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."); *see also* Weeks v. Snyder, 219 F.3d 245, 258 (3d Cir. 2000) (holding that the presumption of correctness applies to the state court's implicit factual findings as well as express findings); Bottoson v. Moore, 234 F.3d 526, 534 (11th Cir. 2000) (finding that "[w]hen there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact" to which the presumption of correctness is applied).

102. *See* Taylor v. Maddox, 366 F.3d 992, 1000–1001 (9th Cir. 2004) (finding that a state court's determination of facts is unreasonable if no finding was made and the court "should have made a finding of fact but neglected to do so") (overruled on alternate grounds); Nunes v. Mueller, 350 F.3d 1045, 1054–1055 (9th Cir. 2003) (finding that the state court's "factual" findings were unreasonable when the court made the findings without holding an evidentiary hearing); Mask v. McGinnis, 233 F.3d 132, 140 (2d Cir. 2000) (refusing to give the

The second step is to prove that the state court determinations of fact were unreasonable. One way to do this is to show that the fact-finding procedure the court used was inadequate.[103] This means that the court made conclusions without looking at the evidence you presented or did not consider some of the important evidence you presented. In other words, this step deals with *how* the state court went about making factual determinations, not what those determinations were.

The third step in proving that the state court determinations of fact were unreasonable is to show that the determinations the state court made were substantively unreasonable. This means you have to show that the state court's determination of facts was unreasonable and not at all supported by the evidence in the record.[104] The standard for doing this is "clear and convincing" evidence.[105] This means you cannot just assert that the state court determined the facts unreasonably—you actually have to demonstrate to the court, with specific examples, why the state's determination of facts was unreasonable.[106]

C. What You Cannot Raise in Your Habeas Petition

Federal law is very particular about what you can raise as a violation of your rights in your federal habeas petition. As stated in Parts A and B of this Chapter, you must show that your imprisonment violates the U.S. Constitution, the federal laws, or the treaties of the United States. Remember, this means that you cannot discuss violations of state constitutions, state laws, or prison conditions, unless your prison condition or sentence amounts to cruel and unusual punishment.[107] You generally may not raise habeas complaints based on illegal search and seizure or based on new law. This section discusses these two situations, as well as the exceptions to these rules.

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state court's "factual findings" a presumption of correctness because they were not factual findings but only conclusions).

103. *See* Caliendo v. Warden of Cal. Men's Colony, 365 F.3d 691, 698 (9th Cir. 2004) (deciding that there is no deference given to a state court's fact findings when those findings were "arrived at through the use of erroneous legal standards"); Nunes v. Mueller, 350 F.3d 1045, 1054–1055 (9th Cir. 2003) (finding that without an evidentiary hearing, there was no need to defer to the "facts"" found by the state courts); Bottoson v. Moore, 234 F.3d 526, 533–536 (11th Cir. 2000) (determining that 10 days of evidentiary hearings and contradicting expert witnesses are adequate to support findings of fact); Francis S. v. Stone, 221 F.3d 100, 116 (2d Cir. 2000) (finding an "extensive" record is adequate to credit one expert witness over another).

104. *See* Miller-El v. Dretke, 545 U.S. 231, 240–265, 125 S. Ct. 2317, 2325–2340, 162 L. Ed. 2d 196, 214–230 (2005) (finding that the state court's finding of no racial discrimination in jury selection was an unreasonable determination of facts "in light of the evidence presented"); Miller v. Dormire, 310 F.3d 600, 603–604 (8th Cir. 2002) (determining that the state court's finding that defendant had waived his right to a jury was unreasonable when the record was "devoid of any direct testimony from [defendant] regarding his consent to waive trial by jury"); Torres v. Prunty, 223 F.3d 1103, 1109 (9th Cir. 2000) (concluding that state court's factual determination of competency was unreasonable because it was "conclusionary and not fairly supported by evidence on the record"); Thomas v. Gibson, 218 F.3d 1213, 1228–1229 (10th Cir. 2000) (determining that the court's assumption that "a murderer would not continue to inflict blows after a victim fell unconscious" to support a finding that defendant had inflicted the blows while the victim was conscious was an unreasonable factual finding because other uncontradicted evidence in the record indicated that the victim had been stabbed after death).

105. 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

106. *See* Fisher v. Lee, 215 F.3d 438, 446 (4th Cir. 2000) (holding that petitioner failed to demonstrate to the court that the state's factual findings were unreasonable); Torres v. Prunty, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (finding that the state courts' factual determinations were unreasonable and defendant rebutted the "presumption of correctness" of the state courts' findings "by clear and convincing evidence"); Hooks v. Ward, 184 F.3d 1206, 1231 (10th Cir. 1999) (holding that petitioner rebutted the presumption of correctness by demonstrating through clear and convincing evidence that the state court's conclusion, that the evidence admitted at trial was insufficient to raise a reasonable doubt as to defendant's intent to kill, was incorrect).

107. The 8th Amendment of the Constitution prohibits cruel and unusual punishment. The Supreme Court defines "cruel and unusual punishment" as the "unnecessary and wanton infliction of pain" that is "grossly out of proportion to the severity of the crime." Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976).

1. Illegal Search and Seizure

The Fourth Amendment of the U.S. Constitution addresses searches and seizures. Evidence that is gathered in violation of the Fourth Amendment is not allowed to be introduced at trial.[108] Even though introducing illegally gathered evidence into trial violates federal law, the habeas court will rarely listen to complaints about this problem. The Supreme Court has created a different standard of review for this particular kind of federal violation. In *Stone v. Powell*, the Supreme Court held that you cannot complain about the introduction of illegally obtained evidence in a habeas petition if the state provided you with a "full and fair" opportunity to raise this error at trial and on appeal.[109] All courts have procedures for deciding whether there has been a "full and fair" opportunity to litigate a claim. Because different states may have different standards, you should check the law of the state where you stood trial.

In some lower courts, the "full and fair" opportunity standard is not met when: (1) the state's procedures do not allow any petitioner in your situation to raise a claim; or (2) the procedures were used incorrectly in your case.[110] You should focus your claims on the ways the procedures failed to let you challenge the use of illegally obtained evidence in your trial.[111] If the state court never considered this claim "on the merits" (i.e., your claim was dismissed for procedural reasons before the court heard or considered your evidence), most courts will find you were denied your "full and fair" opportunity. In other words, you can complain about an illegal search and seizure problem in your habeas petition if the court: (1) never considered *whether* your factual arguments were right or wrong; or (2) never considered *why* your factual arguments were right or wrong.[112]

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108. The 4th Amendment of the Constitution bars illegal searches and seizure. The "exclusionary rule" says that evidence seized by the police illegally may not be introduced in the criminal trial of the victim of the unreasonable search and seizure. *See* Weeks v. United States, 232 U.S. 383, 393–395, 34 S. Ct. 341, 344–345, 58 L. Ed. 652, 656 (1914) (applying the exclusionary rule only to a federal officer in a federal court); *see also* Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961) (applying the exclusionary rule to states through the 14th Amendment).

109. Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 3052, 49 L. Ed. 2d 1067, 1088 (1976).

110. *See* Capellan v. Riley, 975 F.2d 67, 70 (2d Cir. 1992) ("Review of fourth amendment claims in habeas petitions [is] undertaken . . . : (a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process."). This standard has been adopted in other circuits. *See* Willett v. Lockhart, 37 F.3d 1265, 1271–1272 (8th Cir. 1994) (adopting the standard in *Capellan*); Palmer v. Clarke, 408 F.3d 423, 437 (8th Cir. 2005) (applying *Willett* and therefore the *Capellan* standard); *see also* Machacek v. Hofbauer, 213 F.3d 947, 952 (6th Cir. 2000) (finding that if a state has adequate procedural mechanisms for reviewing illegally seized evidence, the federal court may only review an illegal search and seizure claim if those mechanisms failed and the incarcerated person was prevented from litigating his claim); United States *ex. rel.* Bostick v. Peters, 3 F.3d 1023, 1027–1029 (7th Cir. 1993) (finding that state review of 4th Amendment claims was deficient where defendant was denied the opportunity to testify at a suppression hearing about his version of an encounter with drug enforcement officers).

111. *See* Capellan v. Riley, 975 F.2d 67, 71 (2d Cir. 1992) (explaining that the focus as to whether a federal court may review a 4th Amendment claim in a habeas petition is the "existence and application of the [state's] corrective procedures," not the outcome of those procedures) (emphasis omitted).

112. Here are three examples of cases where the federal habeas court decided that the state court failed to provide a full and fair opportunity to litigate an illegally-seized evidence claim:

(1) In *United States ex rel. Bostick v. Peters*, the petitioner sought habeas relief from a conviction of drug possession. The police had searched his bags without a warrant or probable cause. The petitioner raised this issue in a pretrial hearing, but the judge told him he did not have to testify in order to make his claim. The evidence was then admitted, and the petitioner was convicted. The petitioner raised the illegal evidence claim again on appeal, but the appellate court affirmed the conviction without considering the petitioner's claim. The petitioner then filed a federal habeas petition raising the same claim. The federal appeals court held that the petitioner was not at fault because he reasonably relied on the trial court's ruling that his testimony was not necessary. United States *ex rel.* Bostick v. Peters, 3 F.3d 1023, (7th Cir. 1993).

(2) In *Agee v. White*, the petitioner sought habeas relief from a murder conviction. The police had brought him to the station twice, first under illegal arrest and then voluntarily a week later. During the

Defendants in New York generally have the opportunity to raise illegal search and seizure claims at several different stages during a trial. For example, the defendant may notify the judge of this problem during pretrial hearings and during the trial.[113] The defendant may also raise this type of claim on appeal as long as the claim was properly preserved[114] during the trial.[115] Full and fair opportunity to raise claims concerning illegally gathered evidence is almost always provided. Therefore, in New York, unless something unusual occurred at your trial, you probably cannot complain about illegal search and seizure in your habeas petition.

Stone's full and fair opportunity test applies only when you claim that the trial court allowed the prosecutor to use evidence that should have been kept out under the Fourth Amendment. So far, this standard has not been applied to other constitutional claims based on amendments other than the Fourth Amendment.[116] The *Stone* rule is a defense that the state can raise to your petition for habeas relief. This means that it is the state's responsibility to raise it in your habeas proceedings and state that you had a full and fair opportunity to litigate your Fourth Amendment claim. If the state does not raise the issue, the rule will not apply. Once *Stone* has been raised, it is your burden to prove that you did not have a full and fair opportunity to litigate your Fourth Amendment claim. However, it is unlikely that the state will fail to raise the *Stone* rule, so you should *always* be sure to show that you did not have a full and fair opportunity to raise the claim in state court. Remember that your lawyer's failure to raise a Fourth Amendment issue might also be grounds for an ineffective assistance of counsel claim.[117]

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second visit, the petitioner made incriminating statements that were later admitted as evidence. At his trial and on state appeal, the petitioner argued that the information given in the second interrogation was "tainted." Both courts, however, ignored the claims. Petitioner argued in his habeas petition that he had not had a "full and fair opportunity" to present the illegal evidence claim because the appellate court ignored his argument. The habeas court agreed that the petitioner did not have a full and fair opportunity to bring this claim earlier, and therefore agreed that the claim was properly before the court in the habeas petition. But after considering the petitioner's argument, the habeas court decided that the second interrogation was not illegal because it occurred a week after the first illegal arrest and was itself voluntary. Agee v. White, 809 F.2d 1487 (11th Cir. 1987).

(3) In *Riley v. Gray*, the petitioner raised his claim of illegally seized evidence on appeal. The evidence had been taken under a warrant that was based on other evidence obtained in a warrantless search. The appellate court affirmed the conviction on the basis of a procedural rule without considering the facts of the illegal evidence claim. The appeals court granted habeas relief based on the same claim because an "unforeseeable application of a procedural rule" had prevented the petitioner from fully presenting his claim earlier. Riley v. Gray, 674 F.2d 522 (6th Cir. 1982).

113. N.Y. CRIM. PROC. LAW § 710.40 (McKinney 2009) allows a defendant to raise this claim in a pretrial motion or at trial if the defendant was unaware of the illegal seizure.

114. To preserve your claim, you must make a motion to suppress the evidence and object to its inclusion if your motion does not succeed. See Chapter 9 of the *JLM* for more information on properly preserved claims.

115. O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732, 144 L. Ed. 2d 1, 9 (1999) (holding that "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"). See Part C(2) ("New Laws: The *Teague* Rule") of this Chapter for more information on 28 USC § 2254 and its effect on procedural default.

116. *See* Kimmelman v. Morrison, 477 U.S. 365, 373–375, 106 S. Ct. 2574, 2582–2583, 91 L. Ed. 2d 305, 318–319 (1986) (refusing to extend the *Stone* rule to claims of ineffective assistance of counsel based on counsel's failure to file a timely suppression motion); Rose v. Mitchell, 443 U.S. 545, 560–561, 99 S. Ct. 2993, 3002–3003, 61 L. Ed. 2d 739, 752–753 (1979) (refusing to extend the *Stone* rule to an equal protection claim of racial discrimination in the selection of a state grand jury foreman); Jackson v. Virginia, 443 U.S. 307, 320–325, 99 S. Ct. 2781, 2790–2792, 61 L. Ed. 2d 560, 574–577 (1979) (refusing to extend the *Stone* rule to claims of due process violations alleging insufficiency of evidence supporting conviction); Withrow v. Williams, 507 U.S. 680, 682–683, 113 S. Ct. 1745, 1748, 123 L. Ed. 2d 407, 413 (1993) (refusing to extend the *Stone* rule to a claim of *Miranda* violations). *Miranda* requires police to take certain precautions when interrogating suspects in their custody, such as informing the suspect that he has a right to remain silent. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966).

117. Failure to raise 4th Amendment claims of illegally obtained evidence may amount to ineffective assistance of counsel if the claim of illegal evidence is meritorious and there is a reasonable probability that the defendant would not have been convicted if his 4th Amendment rights had been respected. Kimmelman v.

2. Exceptions to the New Law Rule

Although you should avoid basing your habeas petition on new law, there are some exceptions that allow you to use new law. Remember, you only need to defend your petition as not based on new law or show that your claims fit into an exception if the government raises the issue.

The first exception to the new law rule is retroactive application. If the Supreme Court makes a new law and clearly states that the law applies retroactively, the law will apply to your case even if the law was established after your conviction. For Supreme Court rulings, this will be true regardless of whether you are incarcerated in state or federal custody. Examples of retroactive laws will be given below. However, it is rare for the Supreme Court to declare a new law retroactive.

The Court in *Teague v. Lane* also mentions specific exceptions to the *Teague* rule that allow you to bring a habeas petition based on new law.[118] It is not yet clear if these exceptions necessarily apply to people incarcerated in state custody. Although AEDPA does not explicitly mention the exceptions to the "clearly established" requirement that *Teague* sets out, the Supreme Court has suggested that Section 2254 of AEDPA implicitly contains the *Teague* retroactivity analysis.[119] If you are incarcerated in state custody, you should research whether your district has ruled that Section 2254 of AEDPA contains exceptions and whether they are the same exceptions as in *Teague*. If you are an incarcerated person in a state that has not recognized the *Teague* exceptions, you most likely *cannot* use the exceptions below.

There are two exceptions to the *Teague* rule. The first exception includes two kinds of new law: (1) new laws prohibiting certain types of punishment, and (2) new laws decriminalizing certain behavior. The second exception is for new laws that ensure fundamental fairness at trial. If the law you are relying on is new law, *and* the new law fits within one of these exceptions, then you may base your habeas claim on the new law.

(a) Exception: Prohibited Punishments and Decriminalized Behavior

(i) Prohibited Punishments

You may raise a new rule of law if it bars a certain type of punishment for a certain crime or for certain defendants.[120] For example, in *Ford v. Wainwright*, the Supreme Court prohibited states from imposing the death penalty on insane defendants.[121] In *Roper v. Simmons*, the Supreme Court held that incarcerated people who were under eighteen years old when their crimes were committed must not receive the death penalty.[122] If a court decision states that the punishment you received is unconstitutional, you should raise this decision in your petition for federal habeas corpus. Because this is one of the exceptions to the "new law" rule, you can use the decision even if it is a new rule of law. In other words, even if the Court changed the law after your conviction, you can use it.

Morrison 477 U.S. 365, 375, 106 S. Ct. 2574, 2582–2583, 91 L. Ed. 2d 305, 319 (1986). See Part B(2) ("Standards and Tests for Claims of Violations") of this Chapter for more information on ineffective assistance of counsel claims.

118. Teague v. Lane, 489 U.S. 288, 310–312, 109 S. Ct. 1060, 1075–1076, 103 L. Ed. 2d 334, 355–357 (1989).

119. *See* Williams v. Taylor, 529 U.S. 362, 380 n.12, 120 S. Ct. 1495, 1506 n.12, 146 L. Ed. 2d 389, 410, n.12 (2000) ("We are not persuaded by the argument that because Congress used the words 'clearly established law' and not 'new rule,' it meant in this section to codify an aspect of the doctrine of executive qualified immunity rather than *Teague*'s antiretroactivity bar.").

120. *See, e.g.*, Sawyer v. Smith, 497 U.S. 227, 241, 110 S. Ct. 2822, 2831, 111 L. Ed. 2d 193, 211 (1990) (noting the first *Teague* exception applies to new rules that decriminalize an entire category of conduct, or to new rules that prohibit a certain kind of punishment for a class of defendants because of their status or offense); Penry v. Lynaugh, 492 U.S. 302, 330, 109 S. Ct. 2934, 2953, 106 L. Ed. 2d 256, 285 (1989) (remanding case for resentencing in light of defendant's mental disability as a mitigating circumstance.

121. Ford v. Wainwright, 477 U.S. 399, 409–410, 106 S. Ct. 2595, 2602, 91 L. Ed. 2d 335, 346 (1986).

122. Roper v. Simmons, 543 U.S. 551, 568, 125 S. Ct. 1183, 1194, 161 L. Ed. 2d 1, 21 (2005).

(ii) Decriminalized Behavior

Another exception allows you to use a new rule of law if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[123] What this means is that if the behavior for which you were convicted is no longer criminal under the new rule of law, you can use this new law to petition for habeas relief. For example, in *Griswold v. Connecticut*, the Supreme Court ruled that the Connecticut law against using contraception violated the constitutional right to marital privacy.[124] Therefore, the Court reversed the conviction of a Connecticut doctor who was convicted of the crime for giving advice about birth control to a married couple.[125] Like the other *Teague* exceptions, this exception rarely applies. For this reason, you should avoid using new rules whenever possible.

(b) Exception: Fundamental Fairness at Trial

You can also raise a new rule of law that requires the police, prosecutor, or judge to follow a procedure in order to ensure the "fundamental fairness" of your trial,[126] and "without which the likelihood of an accurate conviction is seriously diminished."[127] To fit into this exception, the new rule has to involve a "bedrock procedural element."[128] For example, in *Gideon v. Wainwright*, the Court ruled, on due process grounds, that the state needed to appoint counsel for poor defendants facing criminal charges.[129] This rule might fall under the fundamental fairness exception. By contrast, in *Crawford v. Washington*, the Supreme Court changed the standard for when out-of-court testimony may be allowed in trial.[130] However, the Supreme Court recently decided that the *Crawford* rule may not be applied retroactively.[131]

Keep in mind that it is rare that a new rule of law comes within the fundamental fairness exception. The Supreme Court has suggested that it believes that courts have already discovered most of the procedures essential to a fair trial and conviction.[132] For instance, in 1988, in *Arizona v. Roberson*, the Supreme Court decided that police interrogation after an incarcerated person had requested a lawyer during interrogation for a separate charge violated the Constitution.[133] In 1990, however, the Supreme Court decided that forbidding such interrogations was not essential to the

123. Teague v. Lane, 489 U.S. 288, 311, 109 S. Ct. 1060, 1075, 103 L. Ed. 2d 334, 356 (1989) (quoting Mackey v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165, 28 L. Ed. 2d 404, 420 (1971)).

124. Griswold v. Connecticut, 381 U.S. 479, 485–486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–516 (1965).

125. *See* Griswold v. Connecticut, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 516 (1965); *see also* Richardson v. United States, 526 U.S. 813, 815, 119 S. Ct. 1707, 1709, 143 L. Ed. 2d 985, 991 (1999) (requiring a jury to unanimously agree on which specific violations make up a continuing series of violations for conviction of a continuing criminal enterprise under 18 U.S.C. § 848, and therefore vacating a conviction in which the jury was not unanimous in deciding which specific violations were committed).

126. Teague v. Lane, 489 U.S. 288, 312, 109 S. Ct. 1060, 1076, 103 L. Ed. 2d 334, 357 (1989).

127. Teague v. Lane, 489 U.S. 288, 313, 109 S. Ct. 1060, 1077, 103 L. Ed. 2d 334, 358 (1989).

128. Teague v. Lane, 489 U.S. 288, 315, 109 S. Ct. 1060, 1078, 103 L. Ed. 2d 334, 359 (1989).

129. Gideon v. Wainwright, 372 U.S. 335, 342–344, 83 S. Ct. 792, 795–796, 9 L. Ed. 2d 799, 804 (1963).

130. Crawford v. Washington, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004).

131. The Court held that because the Crawford rule does not impose an "impermissibly large risk of an inaccurate conviction," Whorton v. Bockting, 549 U.S. 406, 418, 127 S. Ct. 1173, 1182, 167 L. Ed. 2d 1, 12 (2007) (quoting Schriro v. Summerlin, 542 U.S. 348, 356, 124 S. Ct. 2519, 2525, 159 L. Ed. 2d 442, 451 (2004)), and does not "constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding", Whorton v. Bockting, 549 U.S. 406, 421, 127 S. Ct. 1173, 1183, 167 L. Ed. 2d 1, 14 (2007), it may not be applied to cases that occurred before the Crawford decision was made.

132. *See, e.g.*, Beard v. Banks, 542 U.S. 406, 417, 124 S. Ct. 2504, 2513–14, 159 L. Ed. 2d 494, 506 (2004) (noting that the Court has "yet to find a new rule that falls under the second *Teague* exception"); Saffle v. Parks, 494 U.S. 484, 495, 110 S. Ct. 1257, 1264, 108 L. Ed. 2d 415, 429 (1990) (deciding that habeas petitioner's contention, that the 8th Amendment required that the jury be allowed to base its sentencing decision in a capital case upon the sympathy it felt for the defendant after hearing his mitigating evidence, did not constitute a watershed right or rule).

133. Arizona v. Roberson, 486 U.S. 675, 677–678, 108 S. Ct. 2093, 2096, 100 L. Ed. 2d 704, 710–711 (1988).

fairness of the trial or to obtaining an accurate conviction.[134] Since this "new rule" did not involve any "bedrock" procedural element, the Court concluded it could not be a basis for habeas relief for any incarcerated persons whose conviction became final before *Roberson* was decided. As another example, in 2005, the Supreme Court decided in *United States v. Booker* that the federal mandatory sentencing guidelines were unconstitutional.[135] However, several circuit courts have held that this new rule does not fit under the fundamental fairness exception and may not be applied retroactively.[136]

As you have seen, the *Teague* exceptions are hard to meet. You should always try to base your habeas claim on old and clearly established law. If you make your claim on new law with a *Teague* exception, remember that even when you are basing your claim on an exception to the *Teague* rule, the *Teague* rule itself is an affirmative defense that the government must assert. You should not raise the *Teague* rule in your petition. Instead, you should wait to defend the government's claim that your habeas petition is based on new law. Once the government has argued your petition is based on new law, you should defend your claim by showing the law is either not new law or fits into one of the *Teague* exceptions just described.

D. Procedures for Filing a Petition for Habeas Corpus

A successful habeas claim will allow the court to vacate, set aside, or correct your present sentence. However, there are strict procedural rules you must follow in order to be successful in a habeas petition. This Part explains these procedural rules.

Although this Part explains the federal habeas corpus procedures for both people incarcerated in state custody and people incarcerated in federal custody, it focuses on the process for person incarcerated in New York State custody. When the procedure differs for people incarcerated in federal custody, this Section will explain the different procedure. People incarcerated in state custody in other states will need to research their state's procedures. However, you should still read and understand this Section, as many of the procedures will be the same in every state. People incarcerated in state custody will use 28 U.S.C. § 2254 to file a habeas claim. People incarcerated in federal custody will use 28 U.S.C. § 2255 to file a habeas claim.[137]

You must prove some important conditions in your petition. These conditions are complicated and require a great deal of attention. The conditions are:

(1) you must be in custody;
(2) you must have exhausted all state procedures before petitioning to a federal court if you are incarcerated in state custody, or you must have given the direct appeals court a chance to hear your petition if you are incarcerated in federal custody;

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134. Butler v. McKellar, 494 U.S. 407, 416, 110 S. Ct. 1212, 1218, 108 L. Ed. 2d 347, 357 (1990) (noting that interrogating an incarcerated person despite his request for counsel during interrogation for a separate charge might in fact increase the likelihood of an accurate conviction).

135. United States v. Booker, 543 U.S. 220, 245–246, 125 S. Ct. 738, 756–757, 160 L. Ed. 2d 621, 651 (2005) (holding that federal sentencing guidelines are recommendations and that the sentencing court can take into account a variety of factors when deciding whether to depart from the guidelines).

136. *See, e.g.*, Lloyd v. United States, 407 F.3d 608, 611–616 (3d Cir. 2005) (determining that the rule announced in *United States v. Booker* was new and not subject to either *Teague* exception); Never Misses A Shot v. United States, 413 F.3d 781, 783–784 (8th Cir. 2005) (following other Circuits in determining that the rule announced in *Booker* was a new rule and not subject to either *Teague* exception); United States v. Bellamy, 411 F.3d 1182, 1186–1188 (10th Cir. 2005) (holding *Booker* rule does not apply retroactively because it is a new rule and doesn't fall into *Teague* exceptions); Guzman v. United States, 404 F.3d 139, 141–144 (2d Cir. 2005) (holding *Booker* rule does not apply retroactively because it is a new rule and doesn't fall into *Teague* exceptions); Varela v. United States, 400 F.3d 864, 867–868 (11th Cir. 2005) (holding *Booker* rule does not apply retroactively because it is a new rule and doesn't fall into *Teague* exceptions); Humphress v. United States, 398 F.3d 855, 861–863 (6th Cir. 2005); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005) (holding *Booker* rule does not apply retroactively because it is a new rule and doesn't fall into *Teague* exceptions).

137. Occasionally, a a person incarcerated in federal custody will file under 28 U.S.C. § 2241, instead of § 2255. See Part A(4) ("Which Laws Apply to Federal Habeas Corpus?") for information on when a person incarcerated in federal custody would file under § 2241.

(3) you must follow all state rules and procedures correctly before petitioning to a federal court if you are incarcerated by the state; and
(4) the petition must be filed in federal court within a specific time frame.

These conditions are explained in detail in this Part. Section 5 of this Part will also discuss when you can file a second ("successive") petition.

1. In Custody

When you file your petition for a writ of habeas corpus, you must be "in custody" for the conviction or sentence that you are attacking.[138] This rule makes sure that you have enough of an interest in the habeas relief.[139] This is not a difficult condition to fulfill. Courts have interpreted "in custody" broadly. Actual physical custody is not necessary. You are "in custody" as long as you are presently restrained in ways that are not shared by the general public.[140] You are "in custody" if you are in prison, on parole, or on probation.[141]

If you are claiming that your sentence is illegal, you do not have to be currently serving that sentence in order to meet the "in custody" requirement. You are also considered "in custody" if: (1) you are contesting a consecutive sentence that you have not yet begun to serve,[142] (2) you are contesting a sentence that has been temporarily postponed because you have been released on your own recognizance,[143] or (3) you are out on bail pending trial or appeal.[144] In fact, you may have already

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138. 28 U.S.C. § 2241(c)(1)–(3); 28 U.S.C. 2254(a)–(b); *see, e.g.,* Carafas v. LaVallee, 391 U.S. 234, 238, 88 S. Ct. 1556, 1560, 20 L. Ed. 2d 554, 559 (1968) (noting that the federal habeas corpus statute requires that the applicant be "in custody" when the application for habeas corpus is filed); Finkelstein v. Spitzer, 455 F.3d 131, 133 (2d Cir. 2006) (finding that federal courts will consider a habeas corpus petition from a state court judgment only when the petitioner's custody is in violation of the Constitution or laws or treaties of the United States at the time his petition is filed).

139. *See* Hensley v. San Jose-Milpitas Mun. Ct., 411 U.S. 345, 351, 93 S. Ct. 1571, 1574, 36 L. Ed. 2d 294, 299–300 (1973) ("The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty.").

140. *See, e.g.*, Jones v. Cunningham, 371 U.S. 236, 242–243, 83 S. Ct. 373, 376–377, 9 L. Ed. 2d 285, 290–291 (1963) (holding that petitioner, as a parolee, was in custody within the meaning of the habeas corpus statute); Harvey v. City of New York, 435 F. Supp. 2d 175, 177 (E.D.N.Y. 2006) (finding that a petitioner who is on parole or serving a term of supervised release is "in custody" for purposes of federal habeas corpus statutes).

141. *See, e.g.*, Rumsfeld v. Padilla, 542 U.S. 426, 437, 124 S. Ct. 2711, 2719, 159 L. Ed. 2d 513, 529 (2004) ("[W]e no longer require physical detention as a prerequisite to habeas relief."); Garlotte v. Fordice, 515 U.S. 39, 45, 115 S. Ct. 1948, 1952, 132 L. Ed. 2d 36, 43 (1995) (quoting Peyton v. Rowe, 391 U.S. 54, 67, 88 S. Ct. 1549, 1556, 20 L. Ed. 2d 426, 435 (1968)) ("[A] prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of the habeas statute."); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 498–499, 93 S. Ct. 1123, 1131–1132, 35 L. Ed. 2d 443, 454–455 (1973) (discussing "custody" in one state when the incarcerated person is held in another); Jones v. Cunningham, 371 U.S. 236, 239–240, 83 S. Ct. 373, 375–376, 9 L. Ed. 2d 285, 289 (1963) (noting that aliens seeking entry, persons subject to enlistment in the military, and paroled incarcerated persons are all "in custody"); Jackson v. Coalter, 337 F.3d 74, 78–79 (1st Cir. 2003) (holding that custody includes supervised probation).

142. *See* Peyton v. Rowe, 391 U.S. 54, 67, 88 S. Ct. 1549, 1556, 20 L. Ed. 2d 426, 435 (1968) (holding that an incarcerated person serving consecutive sentences is "in custody" under any one of them for purposes of the federal habeas corpus statute, even where he is scheduled to serve one of them); Frazier v. Wilkinson, 842 F.2d 42, 44–45 (2d Cir. 1988) (finding that habeas corpus may be used to challenge a sentence that is consecutive to a sentence currently being served where there is reason to believe that the jurisdiction that obtained the consecutive sentence will seek its enforcement).

143. *See* Hensley v. San Jose-Milpitas Mun. Ct., 411 U.S. 345, 351, 93 S. Ct. 1571, 1575, 36 L. Ed. 2d 294, 300 (1973) (holding that a person is "in custody" for habeas purposes when subject to restraints and rules not shared by the general public); *see also* Maleng v. Cook, 490 U.S. 488, 491, 109 S. Ct. 1923, 1925, 104 L. Ed. 2d 540, 545 (1989) (*per curiam*) (noting that a person is in custody when "release from physical confinement . . . was not unconditional").

144. *See* Lefkowitz v. Newsome, 420 U.S. 283, 286 n.2, 95 S. Ct. 886, 888 n.2, 43 L. Ed. 2d 196, 200 n.2 (1975) (noting that petitioner was recognized as "in custody" when he was released on bail pending final disposition of his case); *see also* United States v. Arthur, 367 F.3d 119, 121–122 (2d Cir. 2004) (finding that

served the sentence imposed for the conviction being challenged. You are still "in custody" as long as you are serving a sentence that is ordered to run consecutively to your challenged sentence.[145] In addition, you are restrained, and so "in custody," if you must appear in court for trial and cannot leave without permission.[146] At least one court has extended the definition of "in custody" to minors who may suffer future collateral consequences.[147]

2. Exhaustion of State Remedies and Direct Appeal

Before filing a habeas petition, if you are incarcerated in state custody, you must "exhaust" all available state procedures that can correct your unconstitutional conviction or sentence.[148] To "exhaust state remedies" means you must do all that you can to get the state courts to change your conviction or sentence before you can petition a federal court. The purpose of this exhaustion requirement is to give the state courts a chance to correct any mistakes of federal law and to respect the state court's ability to conduct judicial proceedings.[149] Federal habeas petitions are based on federal law. This exhaustion requirement allows the state court to correctly apply federal law before the federal court steps in. People incarcerated in federal custody do not need to meet any state court exhaustion requirements. However, people incarcerated in federal custody cannot pursue habeas remedies before they have finished the direct appeal process in federal court.

If you are incarcerated in state custody, to meet the exhaustion requirement, you must do two things: (1) give the highest court of the state an opportunity to hear your federal claims; and (2) present these claims fairly to the highest court of the state (called "fair presentation"). The following two sections discuss these two exhaustion requirements. Remember, there are very few exceptions to exhaustion, and these will be discussed below only as a brief outline. It is not safe to rely on these exceptions to exhaustion; you must exhaust state remedies for all your federal claims or you risk losing the chance to bring your federal claims!

While exhausting your claims in state court, it is important to keep in mind the one-year time limit for bringing federal habeas claims.[150] Your state may allow you more than one year to file the state procedures necessary to exhaust a claim, but a longer state time limit *does not* affect the federal time

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defendant who was free on bail awaiting surrender date on sentence for federal convictions for mail fraud was in custody and therefore able to seek habeas relief).

145. *See* Garlotte v. Fordice, 515 U.S. 39, 45–46, 115 S. Ct. 1948, 1952, 132 L. Ed. 2d 36, 43 (1995) (deciding that petitioner who is serving consecutive state sentences is "in custody" and may attack the sentence scheduled to run first, even after it has expired, until all sentences have been served).

146. *See* Hensley v. San Jose-Milpitas Mun. Ct., 411 U.S. 345, 348–349, 93 S. Ct. 1571, 1573–1574, 36 L. Ed. 2d 294, 298–299 (1973) (holding that a person is in custody when they are released on bail and required to return to court); *see also* United States v. Arthur, 367 F.3d 119, 121–122 (2d Cir. 2004) (finding that defendant who was free on bail awaiting surrender date on sentence for federal convictions for mail fraud was in custody and therefore able to seek habeas relief).

147. *See* A.M. v. Butler, 360 F.3d 787, 790 (7th Cir. 2004) (finding that a declaration of juvenile delinquency without any further restrictions does not bar a habeas petition when the juvenile will continue to face adverse consequences stemming from that declaration); *see also* D.S.A. v. Circuit Court, 942 F.2d 1143, 1145–1150 (7th Cir. 1991) (holding that a minor's release from custody did not bar consideration of habeas petition even though the sentence had already been served where underlying conviction had sufficient collateral consequences such as consideration of the conviction in future juvenile proceedings). *But cf.* Spencer v. Kemna, 523 U.S. 1, 14–16, 118 S. Ct. 978, 986–987, 140 L. Ed. 2d 43, 54–55 (1998) (determining that a revocation of parole, where defendant has since been released, does not have sufficient collateral consequences to warrant consideration of habeas petition).

148. 28 U.S.C. § 2254(b)–(c).

149. *See* Rose v. Lundy, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379, 387 (1982) ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings."), *abrogated in part by* Rhines v. Weber, 544 U.S. 269, 273–279, 125 S. Ct. 1528, 1532–1536, 161 L.Ed.2d 440, 449–452 (2005) (allowing district courts to stay "mixed petitions," where some claims have been exhausted and others have not).

150. For more information about time limits for bringing federal habeas claims, see Part E(1) ("When to file") of this Chapter.

limit. You will still have only one year to file your federal petition.[151] You must exhaust *all* of the claims in your habeas petition in state court first. If you fail to exhaust the process for just one of the claims in state court, and then proceed to federal court, the federal court may dismiss your *entire* habeas petition.[152] But if your petition is dismissed, it will be dismissed without prejudice. This means that you can leave the federal court to exhaust your claims in state court. Then, once your claims are exhausted, you may resubmit your petition in federal court, and you will not be prejudiced (meaning that you won't have any legal consequences for filing your claim again) for filing a second or successive petition.[153] But most often, such a dismissal still affects your one-year time limit.

Most courts have found that a state court challenge on a specific claim will "toll"[154] the time limit for your entire habeas petition.[155] This means that, in most cases, the clock will temporarily be stopped on all the claims in your habeas petition, not just for the claims you are making in your present case. In addition, in rare circumstances, the court may issue a "stay and abeyance" order for your dismissed petition,[156] which means you will have a short amount of time to present your unexhausted claims to the state court while your time limit is tolled for your entire petition.[157] If the district court says that your petition contains exhausted and unexhausted claims, you should request a stay and abeyance and explain to the district court that you are concerned that your one-year time limit will expire before you are able to resubmit your fully exhausted petition. In some circumstances you may also be able to delete the unexhausted claims from your petition and proceed only with the exhausted claims.[158] You will need to decide whether proceeding in federal court immediately without the unexhausted claims is a better option than leaving to exhaust the claims in state court and risking the time limit running out for all of your claims in federal court.

(a) Opportunity for Highest State Court to Hear Your Federal Claims[159]

Before you can petition for federal habeas corpus in federal court, you must first present each claim you want to include in your petition to the highest court in your state, either through the state

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151. The Supreme Court has been strict in enforcing time limits on federal habeas petitions. *See, e.g.*, Holland v. Florida, 560 U.S. 631, 649, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130, 145 (2010) (holding that a court may excuse a late habeas petition only in extraordinary circumstances).

152. *See* Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (noting that courts may dismiss entire petitions in some circumstances); Rose v. Lundy, 455 U.S. 509, 518–519, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379, 387 (1982) (requiring "total exhaustion" of claims in state courts).

153. See Part D(4) ("Successive Petitions") of this Chapter for more information on successive petitions.

154. "Tolling" means that the running of the time period is paused. Time that is tolled does not count toward the one-year time limit. See Part E(1) ("When to file") for more information on time limits and tolling.

155. *See* Sweger v. Chesney, 294 F.3d 506, 520 (3d Cir. 2002) (holding that "a properly filed state post-conviction proceeding challenging the judgment tolls the AEDPA statute of limitations during the pendency of the state proceeding"); Carter v. Litscher, 275 F.3d 663, 665 (7th Cir. 2001) ("Any properly filed collateral challenge *to the judgment* tolls the time to seek federal collateral review").

156. *See* Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (holding that federal courts should issue a stay and abeyance for a mixed petition if petitioner had "good cause" for failing to exhaust the unexhausted claims, the unexhausted claims are "potentially meritorious," and there is no indication that the petitioner has engaged in tactics with the purpose of delaying the proceedings).

157. *See* Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (determining that if a stay and abeyance is issued, district courts should "place reasonable time limits on a petitioner's trip to state court and back"). See Part E(1) ("When to file") for more information on tolling and time limits.

158. *See* Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) ("[I]f a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief").

159. The Supreme Court held that, even when a state's appellate rules do not automatically give you the right to a hearing in your state's highest court, you must still present all of your claims to that court in order to exhaust your state remedies. In Illinois, for example, a party must petition the Illinois Supreme Court for leave

appellate process (often called "direct appeal") or through a state post-conviction procedure (often called "collateral attack").[160] The difference between a direct appeal and a collateral attack is explained more in Part A(1) ("What Is Habeas Corpus?") of this Chapter. A key point is that you must provide the state court with the opportunity to rule on each of your claims before you submit them to federal court. It is not enough that you presented each claim just to the intermediate appellate court in your state. This process, in which you pursue all state remedies available before you can have access to federal court, is called "exhaustion." You only have to present your federal claims to the highest state court once—you do not have to do it both on direct appeal and in state post-conviction procedures. Most states call their highest court the "State Supreme Court." However, in New York, the "New York Supreme Court" is actually a lower court, and the "New York Court of Appeals" is the highest state court.[161]

You can present your claim to the highest state court in one of two ways. First, if you have not appealed your conviction yet and still have time to do so, you can contest your conviction through the state appellate process.[162] You have a right to appeal to an intermediate appellate court.[163] If the appellate court rejects your claim, you should then "request leave"[164] to appeal to the state's highest court. Whether the highest state court grants your leave to appeal and then rejects your claim, or simply denies your leave to appeal, you have satisfied the exhaustion requirement by allowing the state court a chance to rule on your claim. You do not need to petition the U.S. Supreme Court for certiorari. In other words, your petition can be reviewed by a lower federal court without having to petition the Supreme Court on direct review first,[165] and you do not need to pursue your claim through a state post-conviction remedy as long as that claim was raised on direct appeal.[166]

If you missed the deadline for a direct appeal, or if you neglected to raise a claim in your direct appeal, you must pursue your claim through a state post-conviction procedure to satisfy the exhaustion requirement.[167] In New York, you can choose between two post-conviction remedies: an Article 440

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to appeal a decision of the intermediate appellate court. Even though the granting of such a petition for review is not guaranteed, the Supreme Court held that petitioner had not exhausted his claims because the Illinois Supreme Court had not been able to review them. *See* O'Sullivan v. Boerckel, 526 U.S. 838, 847–848, 119 S. Ct. 1728, 1733–1734, 144 L. Ed. 2d 1, 10–11 (1999) (holding that claims not submitted to the state's court of last resort in a petition for discretionary review are deemed to be procedurally defaulted).

160. *See* O'Sullivan v. Boerckel, 526 U.S. 838, 847–848, 119 S. Ct. 1728, 1733–1734, 144 L. Ed. 2d 1, 10–11 (1999) (holding that claims not submitted to the state's court of last resort in a petition for discretionary review are deemed to be procedurally defaulted); Roberts v. LaVallee, 389 U.S. 40, 42–43, 88 S. Ct. 194, 196, 19 L. Ed. 2d 41, 44 (1967) (determining that repetitious appeals applications to state courts are not required when defendant has already exhausted his remedies to the state courts); *see also* Grey v. Hoke, 933 F.2d 117, 119–121 (2d Cir. 1991) (holding that petitioner's failure to specifically raise his sentencing and prosecutorial misconduct claims in state court appeals barred him from making these claims in federal habeas proceedings).

161. See Chapter 2 of the *JLM*, "Introduction to Legal Research," for more information on the court system.

162. See Part B(1) of Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for an explanation of the time limits for appealing your conviction.

163. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for a discussion of state appeals.

164. To "request leave" means to ask for permission.

165. *See*, *e.g.*, Cty. Court v. Allen, 442 U.S. 140, 149 n.7, 99 S. Ct. 2213, 2220 n.7, 60 L. Ed. 2d 777, 787 n.7 (1979) (determining that petitioner did not lose federal power of review by failing to seek *certiorari* from the Supreme Court).

166. *See* Castille v. Peoples, 489 U.S. 346, 350, 109 S. Ct. 1056, 1059, 103 L. Ed. 2d 380, 386 (1989) (quoting Brown v. Allen, 344 U.S. 443, 447, 73 S. Ct. 397, 402, 97 L. Ed. 469, 484 (1953)) ("[O]nce the state courts have ruled upon a claim, it is not necessary for a petitioner 'to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review.'"); *see also* Daye v. Attorney Gen., 696 F.2d 186, 190 n.3 (2d Cir. 1982) ("[A] petitioner need not give the state court system more than one full opportunity to rule on his claims; if he has presented his claims to the highest state court on direct appeal he need not also seek state collateral relief.").

167. For example, if you raise a claim of ineffective assistance of counsel, which is usually brought in post-conviction proceedings, rather than on direct appeal, you must bring that claim in state court post-conviction proceedings. *See*, *e.g.*, Murray v. Carrier, 477 U.S. 478, 488–489, 106 S. Ct. 2639, 2645–2646, 91 L. Ed. 2d 397, 408–09 (1986) (holding that the exhaustion doctrine generally requires that a habeas petitioner raise an

motion[168] or a petition for state habeas corpus.[169] You should generally use an Article 440 motion because it is the most modern and has the best-developed state post-conviction procedure.[170] If a New York Supreme Court (the state trial court) denies the claim presented in your Article 440 motion, you should ask for leave to appeal to an intermediate appellate division. Then, if the appellate division does not allow you to appeal, or grants leave to appeal but then rejects your claim, you still have given the highest state court an opportunity to decide your claim and you have fulfilled this part of the exhaustion requirement.[171]

(b) Fair Presentation

To exhaust your state remedies, you must "reasonably inform" the state court about your federal claim and thus provide the court with a "fair presentation" of the federal claim. This means you must clearly say that you are raising a federal claim or an alleged violation of the Constitution in your state action.[172] When you file a direct appeal or collateral attack in state court, your appeal/attack must mention the same relevant facts and legal theory that you will later include in your petition for federal habeas corpus.[173] While it is important to provide both the factual basis and legal principles on which your claim relies, some courts have been flexible on the factual requirement.[174] It is not enough to discuss a state claim that is similar to a federal claim.[175] Rather, the Supreme Court has held that you must make specific references to the federal law that forms the basis of each of your claims.[176] Thus, the Court has held that a petitioner does not fairly present a claim if the petition or brief does not tell the state court that the claim is federal in nature.[177]

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ineffective assistance of counsel claim as an independent claim in state court before it may be raised in federal court).

168. Article 440 motions are discussed in Chapter 20 of the *JLM.*

169. New York State habeas corpus procedure is explained in Chapter 21 of the *JLM.*

170. The New York legislature designed the Article 440 motion to simplify and to combine all of the previously existing post-conviction remedies, including state habeas corpus. See Chapter 20, Part B, of the *JLM* for a discussion of why New York courts prefer Article 440 motions over petitions for state habeas corpus. See also Chapter 14, "The Prison Litigation Reform Act," for a discussion of exhausting your administrative remedies.

171. *See* Edkin v. Travis, 969 F. Supp. 139, 141 (W.D.N.Y. 1997) (finding that petitioner had exhausted all state court remedies when the New York State Court of Appeals had denied his leave to appeal).

172. *See* Duncan v. Henry, 513 U.S. 364, 365–366, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865, 868 (1995) (*per curiam*) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."); *see also* Schneider v. Delo, 85 F.3d 335, 339 (8th Cir. 1996) (noting that in order to fairly present a habeas claim in state court, the factual arguments and legal theories must be present in the state claim).

173. *See* Picard v. Connor, 404 U.S. 270, 278, 92 S. Ct. 509, 513, 30 L. Ed. 2d 438, 445 (1971) (holding that the substance of a federal habeas corpus claim must first be presented to the state courts).

174. *See, e.g.*, Davis v. Silva, 511 F.3d 1005, 1010–1011 (9th Cir. 2008) (holding that a claim was fairly presented when the factual basis of the petitioner's claim was not presented in a clear narrative, but could be determined from the legal materials provided, including citations to relevant cases, statutes, and regulations and a basic factual description).

175. *See, e.g.*, Casey v. Moore, 386 F.3d 896, 911–914 (9th Cir. 2004) (holding that the incarcerated person did not fairly present federal claims to state court when he only cited state cases in his appellate brief).

176. *See* Baldwin v. Reese, 541 U.S. 27, 32, 124 S. Ct. 1347, 1351, 158 L. Ed. 2d 64, 71 (2004) (rejecting the idea that judges, on appeal, can find for themselves the claims based on federal law, and holding that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim").

177. *See* Baldwin v. Reese, 541 U.S. 27, 32, 124 S. Ct. 1347, 1351, 158 L. Ed. 2d 64, 71 (2004) ("[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim.").

These facts and legal principles must show the court that your claim rests, either entirely or partially, on the Constitution.[178] This puts the state court on notice that you are raising a federal claim. You may satisfy this requirement by:

(1) Citing a specific provision of the Constitution,[179]
(2) Relying on federal constitutional precedents,[180]
(3) Alerting the state court of the claim's federal nature through your claim's substance,[181]
(4) Claiming a particular right guaranteed by the Constitution.[182]

To provide a fair presentation to the state, you must clearly show you are claiming a violation of the Constitution.[183] For example, one petitioner claimed in state court that the admission of certain evidence "infringed on his right to present a defense and receive a fair trial" but mentioned only a state evidentiary law without mentioning any federal constitutional rights.[184] While the petitioner's federal due process rights may have been violated, the court held that because the federal law part of his claim was not "fairly presented" to the state court, the federal court was required to dismiss his habeas

178. *See* Picard v. Connor, 404 U.S. 270, 277–278, 92 S. Ct. 509, 513, 30 L. Ed. 2d 438, 444–445 (1971) (dismissing habeas claim because petitioner failed to specify that his claim stems from the Constitution, even though he raised all of the facts of his claim in state court). You must clearly tell the state court the constitutional, and therefore, federal nature of the claim and permit the state court to decide the federal issue squarely. *See* Verdin v. O'Leary, 972 F.2d 1467, 1474–1475 (7th Cir. 1992) (alteration in original) (citation omitted) (quoting Dougan v. Ponte, 727 F.2d 199, 201 (1st Cir. 1984)) ("What is important is that the *substance of* the federal claim be presented fairly. It is incumbent on the petitioner to 'raise the red flag of constitutional breach.'").

179. *See* Scarpa v. DuBois, 38 F.3d 1, 6–7 (1st Cir. 1994) (finding that petitioner's reference to the 6th Amendment "sufficiently alerted the state courts to the substance of the constitutional claim"); *see also* Daye v. Attorney Gen., 696 F.2d 186, 192 (2d Cir. 1982) (en banc) ("Obviously if the petitioner has cited the state courts to the specific provision of the Constitution relied on in his habeas petition, he will have fairly presented his legal basis to the state courts."). *But see* Gray v. Netherland, 518 U.S. 152, 163, 116 S. Ct. 2074, 2081, 135 L. Ed. 2d 457, 471 (1996) ("[I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance of such a claim to a state court.").

180. *See* Gagne v. Fair, 835 F.2d 6, 7 (1st Cir. 1987) ("[A] petitioner may satisfy the exhaustion requirement by . . . reliance on federal constitutional precedents."); *see also* Abdurrahman v. Henderson, 897 F.2d 71, 73 (2d Cir. 1990) (finding that defendant's citation to *Strickland v. Washington* in a brief to the Appellate Division was sufficient to alert the court that defendant was raising a federal claim regarding ineffective assistance of counsel, since *Strickland* is the leading Supreme Court case on that issue).

181. *See* Gagne v. Fair, 835 F.2d 6, 7 (1st Cir. 1987) ("[A] petitioner may satisfy the exhaustion requirement by . . . presenting the substance of a federal constitutional claim in such manner that it likely alerted the state court to the claim's federal nature."); *see also* Jackson v. Edwards, 404 F.3d 612, 619 (2d Cir. 2005) (finding petitioner had fairly presented his claim to the state court because "the substance of the federal habeas corpus claim [was] clearly raised and ruled on in state court" even though petitioner had failed to explicitly name it as a federal claim). In other words, if a state court rules on the substance of the federal claim, it is considered fairly presented and sufficient for federal exhaustion purposes. However, you must indicate in your petition that the state court ruled on the substance of your federal claim, and therefore, found it to be fairly presented. It is your job to alert the reviewing federal court that the state court knew of your federal claims and ruled on your federal claims. *See* Baldwin v. Reese, 541 U.S. 27, 32, 124 S. Ct. 1347, 1351, 158 L. Ed. 2d 64, 71 (2004) (holding that the federal nature of the claim must be apparent from the brief or petition, not hidden in the opinion of a lower court).

182. *See* Scarpa v. DuBois, 38 F.3d 1, 6–7 (1st Cir. 1994) (finding that petitioner's reference to ineffective assistance of counsel "sufficiently alerted the state courts to the substance of the constitutional claim"); *see also* Janosky v. St. Amand, 594 F.3d 39, 44 (1st Cir. 2010) (holding that "the petitioner assiduously pursued a constitutionally focused ineffective assistance claim before all the affected state courts, thus satisfying the exhaustion requirement").

183. *See* Duncan v. Henry, 513 U.S. 364, 365–366, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865, 868 (1995) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.").

184. Johnson v. Zenon, 88 F.3d 828, 830–831 (9th Cir. 1996).

petition.[185] While you do not need to cite the Constitution word for word,[186] you must be specific in showing why the claim is federal.[187] You should be as specific as possible in explaining the violation of a federal law to the state court.

Federal courts generally say state remedies are exhausted when you have fairly presented a claim one time to the highest state court.[188] For example, if you raised a particular claim on direct appeal to the highest state court, you do not have to raise it again in state post-conviction proceedings.[189] In short, be sure that you present the same factual arguments and legal theories regarding a federal claim in both your state claims and federal habeas claims, and be sure to state that you are raising a federal claim.

So, what do you do if you discover new evidence about your claim or learn more of the law concerning your claim after presenting your claim to the state court? You can, and should, strengthen your claim by adding this new factual and legal material to your federal petition. Explain to the court that you are only *supplementing* your pending claim, not adding a new claim. This may also help by giving you more time to file your habeas petition.[190] However, be aware that supplementing a federal petition with new information may lead to the dismissal of your original habeas claim. If the new information that you wish to include in your habeas petition was not presented to the state courts, and state relief is now available to you, then the federal courts will probably dismiss your federal claim.[191]

It is important to remember to go to state court first in order to exhaust all claims before filing in federal court. If you file first in federal court, go back to exhaust, and then try to amend the federal petition, you risk having the petition dismissed as untimely. Remember, you have a one-year time limit to file your federal habeas petition. Furthermore, your state petition could be your only opportunity to have a judge thoroughly review your claims on the merits. AEDPA, a federal law dealing with federal habeas corpus claims, only allows federal courts to overturn state court decisions in rare circumstances. AEDPA forbids federal courts from granting a writ of habeas corpus unless the state court's consideration of your claims was "contrary to, or involved an unreasonable application of, clearly established Federal law" or if the decision was based on an "unreasonable determination of the facts."[192]

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185. Johnson v. Zenon, 88 F.3d 828, 830–831 (9th Cir. 1996).

186. *See* Picard v. Connor, 404 U.S. 270, 277–278, 92 S. Ct. 509, 513, 30 L. Ed. 2d 438, 445 (1971) (quoting Daugharty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958) ("[W]e do not imply that respondent could have raised the equal protection claim only by citing 'book and verse on the federal constitution.").

187. *See* Beauchamp v. Murphy, 37 F.3d 700, 704 (1st Cir. 1994) (emphasizing that in reviewing for exhaustion, the substance of the fair presentment of the federal issue is more important than the form of the presentment).

188. *See* O'Sullivan v. Boerckel, 526 U.S. 838, 838, 119 S. Ct. 1728, 1729, 144 L. Ed. 2d 1, 9 (7th Cir. 1999) ("State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.").

189. However, if you raise a claim for the first and only time in a petition for discretionary review to a state appellate court, you will not meet the exhaustion requirement. *See* Castille v. Peoples, 489 U.S. 346, 349–351, 109 S. Ct. 1056, 1059–1060, 103 L. Ed. 2d 380, 385–387 (1989) (stating that presentation of a new claim to a state's highest court on discretionary review does not constitute "fair presentation" for purposes of determining that claim's exhaustion).

190. *See* 28 U.S.C. § 2244(d)(1)(D). See Part (D)(3)(b)(iii) ("Time Limit") of this Chapter for more information on the one-year time limit in which you must file your federal habeas corpus petition. The time limit may also run from the time that new facts could have been discovered through due diligence.

191. *See*, *e.g.*, Graham v. Johnson, 94 F.3d 958, 970–71 (5th Cir. 1996) (determining that, even though the state waived the exhaustion requirement, the petitioner's extensive new evidence was mostly factual and needed to be presented to state courts).

192. 28 U.S.C. § 2254(d)(1)–(2). The standard that federal courts use to review habeas petitions is contained here. For more information about this standard, see Part B(4) ("Standard for Getting Relief") of this Chapter.

(c) Exceptions to Exhaustion

There are few narrow exceptions to the exhaustion requirement. First, you do not need to go to state court if state remedies are unavailable or ineffective.[193] For example, in North Carolina, a state statute did not allow a defendant who had been convicted to raise an issue in a post-conviction proceeding if he could have raised the issue earlier.[194] Since the state statute did not allow him to raise the issue, there was no state remedy available to him. Because there was no state remedy, the exhaustion requirement did not apply, and the Fourth Circuit Court of Appeals held that the defendant was not barred from seeking habeas corpus relief.[195] In another case, a court found that state remedies were ineffective to protect the rights of an incarcerated person because he would be raising the same constitutional issue to the state supreme court that a fellow incarcerated person had already raised and lost.[196] In this situation, bringing the same issue before the court would most likely be unsuccessful and would have wasted the resources of the state system. So, the court ruled that he did not need to exhaust his state court remedies.[197]

Another exception to the exhaustion requirement may occur after an unusually long and unjustified delay in receiving a ruling in state court.[198] Some federal courts do not require exhaustion when the state courts have unconstitutionally delayed hearing the incarcerated person's appeal for a few years or more.[199] Finally, in at least one case, exhaustion of state remedies was not required because the incarcerated person's jury misconduct claim needed to be heard as soon as possible because it hinged on the testimony of a juror who was elderly, somewhat incompetent, and in poor health.[200]

Despite these exceptions, federal courts do not usually excuse the exhaustion requirement; they expect the state courts to deal with all of your claims. And even if a court excuses your failure to exhaust state remedies, you will likely end up with another problem known as "procedural default."[201] In one case, a person incarcerated in New York state custody was found to have exhausted state remedies even though he did not clearly raise the issue on direct appeal.[202] In this case, New York

193. 28 U.S.C. § 2254(b)(1)(B).

194. Stem v. Turner, 370 F.2d 895, 897 (4th Cir. 1966).

195. Stem v. Turner, 370 F.2d 895, 897–898 (4th Cir. 1966).

196. Evans v. Cunningham, 335 F.2d 491, 492–494 (4th Cir. 1964).

197. Evans v. Cunningham, 335 F.2d 491, 492–494 (4th Cir. 1964).

198. *See* Lowe v. Duckworth, 663 F.2d 42, 43 (7th Cir. 1981) (holding that if the lower federal court determined that the state court delay of over three and a half years was not justified, state court remedies were to be considered exhausted and the lower federal court was required to hear the merits of the habeas corpus petition); Dozie v. Cady, 430 F.2d 637, 638 (7th Cir. 1970) (holding that if the lower federal court determined that the state court's seventeen-month delay was not justified, state court remedies were to be considered exhausted and the lower federal court was required to hear the merits of the habeas corpus petition).

199. Federal courts have not required exhaustion when the state courts have unconstitutionally delayed hearing the incarcerated person's appeal. The delay must be unusually long in order to fit within this exception. It is unlikely that a one-year delay would be enough to waive the exhaustion requirement, but a two-year delay might be. *See* Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994) (determining that a "delay in adjudicating a direct criminal appeal beyond two years from the filing of the notice of appeal gives rise to a presumption that the state appellate process is ineffective"); Calhoun v. Farley, 913 F. Supp. 1218, 1221 (N.D. Ind. 1995) (holding that sufficient time had passed to excuse the need for exhausting state remedies where no action had been taken by the state or by the incarcerated person for almost two years on his petition for post-conviction relief); Geames v. Henderson, 725 F. Supp. 681, 685 (E.D.N.Y. 1989) (finding that a delay of three and a half years is excessive when the "[c]ourt views the issues on appeal as no more complex than in most criminal appeals").

200. Simmons v. Blodgett, 910 F. Supp. 1519, 1524 (W.D. Wash. 1996) ("Because petitioner's ability to prove his claim continues to diminish rapidly over time, and is at risk of being lost, justice requires that his habeas petition be heard expeditiously").

201. Procedural default is explained in Part D(3) ("Procedural Default") of this Chapter.

202. The incarcerated person filed a petition for federal habeas corpus on the ground that his confession was involuntary, even though he had not raised the issue of voluntariness on direct appeal. However, he was found to have adequately exhausted his state remedies because the judge had indirectly ruled on that issue through an evidentiary determination. Quartararo v. Mantello, 715 F. Supp. 449, 464 (E.D.N.Y. 1989), *aff'd*, 888 F.2d 126, 126 (2d Cir. 1989).

state law did not allow the incarcerated person to raise a claim in a collateral attack (Article 440 motion) if he failed to raise the claim on direct appeal in state court.[203] Since the incarcerated person did not raise the claim in a collateral attack, he did not have any other remedies in state court. The federal court therefore excused his failure to exhaust the claim. However, the federal court will probably still bar his habeas petition because he committed procedural default by failing to raise the claim on direct appeal as required by state law.[204] So even though this failure helped the incarcerated person avoid the exhaustion requirement, the same failure could still prevent him from getting his writ of habeas corpus.[205] In short, you should not rely on exceptions to the exhaustion requirement because they are rarely granted.

(d) What Happens If You Do Not Exhaust State Remedies

If you present your claim to a federal court before you have exhausted all of your state remedies, the court may still look at the merits of your claim. However, you are taking a risk if you do this: if the court believes that your claim is without merit, it may deny you relief once and for all, even though you have not finished presenting your claim to the lower courts.[206] Otherwise, the court will reject your petition for not exhausting state remedies, either with or without looking at the merits. You will need to finish presenting it to the state courts in order to fulfill the exhaustion requirement. This Subsection describes what you should do if a federal court dismisses your petition without prejudice due to the fact that you have not exhausted your state remedies. When this happens, you can still exhaust your claim in state court.

Upon dismissal, first you should check to see if the state has waived the exhaustion requirement in your case.[207] A federal court will never assume that the state waived the exhaustion requirement in your case just because the state did not insist on exhaustion.[208] There must be a clear statement by an authorized state attorney saying that the exhaustion requirement in your case has been waived; otherwise, there is no waiver.

If the state has not given you a waiver, you must return to state court and seek relief there. *Remember the one-year time limit!* To ensure that your claims will not later be barred from federal review because of the limitations period, you can ask the federal district court to hold your habeas petition in "abeyance" (delay the federal proceeding) while you return to state court to exhaust your state remedies. You should explain to the federal court that you are concerned that you will pass the statute of limitations, so you want a "stay and abeyance" order to make sure that you will be able to return to federal court after exhausting your state remedies. You also have to offer to dismiss your unexhausted claims in federal court.[209] Often, courts issue a stay and abeyance order that will allow

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203. *See* Quartararo v. Mantello, 715 F. Supp. 449, 464 (E.D.N.Y. 1989), *aff'd*, 888 F.2d 126, 126 (2d Cir. 1989) (holding that "[b]ecause there are no remedies available for petitioner to exhaust, the petition is not subject to dismissal even if petitioner had otherwise failed to exhaust his state remedies."). See Chapter 20 of the *JLM* for a discussion of N.Y. CRIM. PROC. LAW § 440.10(2)(c).

204. *See* Daye v. Attorney Gen. of New York, 696 F.2d 186, 190 n.3 (2d Cir. 1982) (en banc) (explaining that failure to comply with a state rule, resulting in a procedural default that bars, under state law, the subsequent assertion of a challenge to the conviction, may also preclude federal habeas through the doctrine of procedural forfeiture unless the petitioner can demonstrate that there was "cause" for his failure to comply with the state procedure and that "prejudice" resulted).

205. *See*, *e.g.*, Castille v. Peoples, 489 U.S. 346, 351–52, 109 S. Ct. 1056, 1060, 103 L. Ed. 2d 380, 386–87 (1989) (stating that a claim must be fairly presented in a procedural context to the state courts to meet the exhaustion requirement).

206. 28 U.S.C. § 2254(b)(2).

207. "Waived" means "decided not to apply." A state waiver of a requirement means that you do not have to fulfill the requirement.

208. 28 U.S.C. § 2254(b)(3); *see* Lurie v. Wittner, 228 F.3d 113, 123 (2d Cir. 2000) (noting that state waivers of exhaustion are disfavored and that such a waiver must be made expressly).

209. Pliler v. Ford, 542 U.S. 225, 230–31, 124 S. Ct. 2441, 2445, 159 L. Ed. 2d 338, 347 (2004) (describing the Ninth Circuit's procedure for granting a stay and abeyance, under which the unexhausted claims are

you to return to state court to exhaust remedies without fear of the one-year limitations period running out.[210] Without cause for equitable tolling (see the explanation of tolling in Part D(3)(b)(iii) of this Chapter), the court is not required to warn a *pro se* litigant that his federal claims would be time-barred upon his return to federal court if he opted to dismiss the petitions without prejudice and return to state court to exhaust all of his claims.[211]

If the time limit to raise the unexhausted claim in state court has run out, look for an exception to the exhaustion requirement.[212] Because such exceptions are rarely successful, you should use this argument only as a last resort. If the time limit has not run out even after the federal court has dismissed your petition without prejudice for lack of exhaustion, file as quickly as possible in state court. This way, tolling will apply.[213] Once you re-file in state court and satisfy the exhaustion requirement, you can still re-file a federal habeas petition in federal court if the limitations have not run out. (Requesting a stay and abeyance order beforehand will ensure that your time has not run in federal court.) This petition—which follows your earlier petition that was dismissed by the district court without prejudice—will not count as a successive habeas petition and will not be subject to dismissal for that reason.[214]

The strict timelines that AEDPA imposes on habeas petitions make it very difficult for your habeas petition to succeed if you failed to exhaust state remedies within the one-year time limit. Therefore, it is important to make sure you understand this, and that you have complied with the two requirements of exhaustion: (1) you have given the highest state court an opportunity to hear your claim, and (2) you have fairly presented each claim by identifying the facts and the federal law supporting it to the highest state court.

3. Procedural Default

If you are a person incarcerated in state custody and you present a habeas claim to the federal court that has not been presented to the state court, your claim may be in "procedural default,"[215] and the federal court will be barred from hearing your claim.[216] If you are a person incarcerated in federal custody and include a claim in your habeas petition that was not a part of your direct appeal to a federal court of appeals, your claim may be in procedural default. As a person incarcerated in federal custody, you can avoid procedural default by raising every habeas claim in your direct appeal. In some circumstances, you may be required to have raised the claims at your trial (for example, by making

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dismissed, resolved in state court, and then re-added to the pending federal court claims that were already exhausted).

210. Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (directing that federal courts should issue a stay and abeyance for a mixed petition if petitioner had "good cause" for failing to exhaust the unexhausted claims, the unexhausted claims are "potentially meritorious," and there is no indication that the petitioner has engaged in tactics with the purpose of delaying the proceedings); *see*, *e.g.*, Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir. 2000) (agreeing to consider petitioner's proper federal habeas claim as if it had been filed on the date that he originally filed an improper claim because the district court had incorrectly dismissed the original claim for having both unexhausted and exhausted claims, instead of allowing petitioner to resubmit his claim with only the exhausted claims, as was customary in that circuit).

211. Pliler v. Ford, 542 U.S. 225, 231, 124 S. Ct. 2441, 2446, 159 L. Ed. 2d 338, 348 (2004).

212. See Part D(2)(c) ("Exceptions to Exhaustion") of this Chapter.

213. Tolling is discussed in Part D(3)(b)(iii) ("Time Limit") of this Chapter.

214. *See* Slack v. McDaniel, 529 U.S. 473, 478, 120 S. Ct. 1595, 1601, 146 L. Ed. 2d 542, 551 (2000). This issue is further discussed in Part D(4) ("Successive Petitions") of this Chapter.

215. "Procedural default" is a concept that requires a person incarcerated in state custody to present his habeas corpus claim to a state court in compliance with state procedural rules. If he does not, he will be barred from presenting his claim to federal court on appeal. 28 U.S.C. § 2254 (b)(1),(c).

216. *See* United States *ex rel.* Redding v. Godinez, 900 F. Supp. 945, 948–950 (N.D. Ill. 1995) (finding procedural default where petitioner did not raise claims during direct appeal, during state petition for post-conviction relief, or during state petition to appeal from denial of post-conviction relief); *see also* House v. Bell, 547 U.S. 518, 522, 126 S. Ct. 2064, 2068, 165 L. Ed. 2d 1, 12 (2006) ("Out of respect for the finality of state-court judgments federal habeas courts, as a general rule, are closed to claims that state courts would consider defaulted.").

appropriate objections) to be able to raise the claims in your direct appeal.[217] People incarcerated in state custody can avoid procedural default by raising every claim in state court. In many cases, people incarcerated in state custody will be required to have raised claims at trial, through motions or objections, in order to raise the claims on direct review.[218] People incarcerated in state custody must be certain to raise all claims in all state collateral proceedings, too.[219]

(a) State Procedural Rules and Procedural Default

If you are incarcerated in state custody, your claim can also be in procedural default if you raised your claim to a state court that refused to review the merits of the claim due to a state procedural rule. This often occurs when incarcerated persons fail to pursue their claim in a timely manner.[220] People incarcerated in state custody are not allowed to bring habeas claims in federal court if those claims were not reviewed on the merits in state court because the petitioner did not follow a state procedural rule.[221] But if a state procedural rule prevents you from bringing a claim in state court, and the state court ignores the rule and reviews the merits of your claim anyway, a federal court cannot later refuse to review your claim based on the state procedural rule.[222]

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217. Some kinds of claims do not have to be raised at trial to be validly raised on direct appeal. For example, you may bring an ineffective assistance of counsel claim in a § 2255 motion even if you did not raise the issue on direct appeal. *See* Massaro v. United States, 538 U.S. 500, 504, 123 S. Ct. 1690, 1694, 155 L. Ed. 2d 714, 720 (2003) (holding that "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal."); *see also* 28 U.S.C. § 2255.

218. Before your trial ends, you must object to any errors that occurred at trial in order to preserve these issues for review on appeal. *See* Wainwright v. Sykes, 433 U.S. 72, 90–91, 97 S. Ct. 2497, 2508, 53 L. Ed. 2d 594, 610 (1977) (describing how the "contemporaneous-objection rule" encourages the proceedings to be "as free of error as possible," so criminal defendants should make their objections known if they think the trial court has deprived them of any federal constitutional rights). Otherwise, states like New York will consider only those appellate issues involving a violation of fundamental principles of law. For example, if the prosecutor at your trial in New York made inflammatory closing remarks that prejudiced the jury, but your lawyer did not object to this error at trial, you cannot raise this error on direct appeal. New York courts probably will not see prejudicial remarks by a prosecutor as a violation of fundamental principles of law. Thus, if you did not object to the prosecutor's comments during trial, you probably cannot raise this issue on direct appeal or through an Article 440 motion (New York law gives courts discretion in refusing to accept 440 motions). *See* N.Y. CRIM. PROC. LAW § 440.10(3)(a)–(c) (McKinney 2009). See Chapter 20 of the *JLM* for more information about Article 440. Therefore, you will also be unable to raise the issue in your federal habeas petition. However, always remember that if your attorney was responsible for failing to object, you may have an ineffective assistance of counsel claim. See *JLM* Chapter 9 and Chapter 12 for more information on ineffective assistance of counsel claims.

219. In New York, you cannot raise claims in a post-conviction proceeding that you neglected to raise on direct appeal. *See* N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 2009). *See also* Anderson v. Harless, 459 U.S. 4, 7–8, 103 S. Ct. 276, 278, 74 L. Ed. 2d 3, 7–9 (1982) (rejecting habeas relief because the incarcerated person's constitutional argument had never been presented to, or considered by, the state court); Smith v. Duncan, 411 F.3d 340, 350 (2d Cir. 2005) (finding that the habeas claim was procedurally defaulted because the claim had not been fairly presented to the state court). If your lawyer failed to object to a prosecutor's prejudicial remarks, and you were therefore barred from raising this issue on appeal, you are also barred from raising the issue in a habeas corpus petition. Remember, though, that ineffective assistance of counsel claims can be raised for the first time in a post-conviction proceeding, and your lawyer's failure to raise objections in court may be grounds for an ineffective assistance of counsel claim. See *JLM*, Chapters 9 and 12, for more information on ineffective assistance of counsel claims.

220. *See* O'Sullivan v. Boerckle, 526 U.S. 838, 848 119 S. Ct. 1728, 1734 144 L. Ed.2d 1, 11 (1999) (concluding that petitioner who had failed to file an appeal with state supreme court in a timely fashion barred federal habeas review); Coleman v. Thompson, 501 U.S. 722, 749, 111 S. Ct. 2546, 2564, 115 L. Ed. 2d 640, 669 (1991) (holding that petitioner's failure to file a timely notice of appeal under state law barred further federal habeas review).

221. *See* Harris v. Reed, 489 U.S. 255, 260, 109 S. Ct. 1038, 1042, 103 L. Ed. 2d 308, 315 (1989) (reaffirming that the federal court will not review a federal issue if the state court's judgment is based on an independent and adequate state law ground).

222. *See*, *e.g.*, Freeman v. Attorney General, 536 F.3d 1225, 1231 (11th Cir. 2008) (discussing how, as an exception to the general rule of procedural default, when a state ignores the procedural bar, a federal court cannot

4. New Laws: The *Teague* Rule[223]

You also cannot raise a federal habeas claim based on new law.[224] This means that if the Supreme Court decides a rule, test, or standard in a case that is decided *after* your direct review was complete, you generally may not rely on this new law as a basis for habeas relief. This rule comes from the case *Teague v. Lane* [225] and is therefore called the *Teague* Rule. The *Teague* Rule applies to people incarcerated in federal and state institutions. However, people incarcerated in state custody have an additional requirement that they must meet. People incarcerated by the state are subject to AEDPA, which says that state decisions can only be reversed if they were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[226] This section discusses the requirement for people incarcerated in state custody that the law be "clearly established,"[227] in addition to the requirement from *Teague* that habeas petitioners cannot rely on new law.[228] If you are a person incarcerated in federal custody petitioning for habeas corpus, the AEDPA requirement that a law be "clearly established" does not apply to you, but the *Teague* Rule does.

These two standards (that the law is clearly established and that the law may not be new) mean almost the same thing. One important difference is that people incarcerated in federal custody can use cases from the federal district in which they were convicted to show that the law they are relying on is "not new" (even if the Supreme Court has not dealt with the law), while people incarcerated in state custody can only uses cases from the U.S. Supreme Court since they need to show that the law is "not new" by showing that it is "clearly established" by the Supreme Court.[229] This Section will address both standards at the same time. It is helpful to keep in mind that you only need to defend your petition as not based on new law if the government argues that it is.

(a) Difference between the *Teague* Rule and the AEDPA "Clearly Established" Rule

The fact that there are different rules for deciding what is new law for people incarcerated in federal custody and for people incarcerated in state custody can be confusing. It may be helpful for you to understand the different rules in the following way. Both people incarcerated in federal custody and people incarcerated in state custody cannot base their habeas petitions on new law. However, the definition of a new law is different for people incarcerated in federal custody and for people incarcerated in state custody. For people incarcerated in federal custody, only the *Teague* Rule defines what is a new law. For people incarcerated in state custody, AEDPA defines a new law as a law that

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apply the bar on the state's behalf and the federal court must then hear the claim (citing Peoples v. Campbell, 377 F.3d 1208, 1235 (11th Cir. 2004) and Davis v. Singletary, 119 F.3d 1471, 1479 (11th Cir.1997))).

223. Teague v. Lane, 489 U.S. 288, 308–310, 109 S. Ct. 1060, 1074–1075, 103 L. Ed. 2d 334, 354–356; 28 U.S.C. § 2254(d)(1).

224. Although a federal habeas petitioner cannot use a new rule as grounds for his petition, the courts can use a new rule to deny a habeas petition. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180, 191 (1993) (holding that the retroactivity rule in *Teague* does not apply to federal habeas petitioners).

225. Teague v. Lane, 489 U.S. 288, 308–310, 109 S. Ct. 1060, 1074–1075, 103 L. Ed. 2d 334, 354–356 (1989).

226. 28 U.S.C. § 2254(d)(1).

227. For more information on the "contrary to or involving an unreasonable application" requirement of 28 U.S.C. § 2254(d)(1), see Part B(4)(a) of this Chapter.

228. Teague v. Lane, 489 U.S. 288, 308–310, 109 S. Ct. 1060, 1074–1075, 103 L. Ed. 2d 334, 354–256 (1989).

229. *See* Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389, 430 (2000) ("With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law. . . '"). The one "caveat," or exception, is 28 U.S.C. § 2254(d)(1), which restricts the source of clearly established law to the Supreme Court's jurisprudence. You may be able to use non-Supreme Court federal court precedent to support your claim that the Supreme Court law was clearly established when your case was tried or to show whether the state court applied the law reasonably. *See* Dulhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

has not been "clearly established" by Supreme Court case law. The differences between these two definitions of new law are discussed below.

Under *Teague*, new law is a rule of law that was not in force at the time of your trial and direct appeals.[230] Under AEDPA, new law is law that is not "clearly established."[231] Only people incarcerated in state custody are subject to the requirement that any law used in a habeas petition must be "clearly established" by the Supreme Court. This requirement was established by AEDPA and changed the way that federal habeas law is applied to people incarcerated by the state.

The final date for when a law begins to be considered "new law" differs depending on whether you are using the *Teague* Rule or the "clearly established" requirement of AEDPA. For the *Teague* Rule, the law you rely on must have been established by the time your conviction becomes final. The date your conviction becomes final is usually when the Supreme Court refuses to hear your appeal (the date the Supreme Court denies your writ of certiorari).[232]

As mentioned above, people incarcerated in state custody must show that a law is not new by proving that it is "clearly established" by Supreme Court case law. In contrast, people incarcerated in federal custody may use cases from the federal district in which they were convicted or the application federal circuit court of appeals to show that a law is not new.

(b) What Is New Law

There is no specific formula that the courts use to determine what is "new law" under the *Teague* Rule. Instead, the courts look at many factors. Because the courts use similar factors to determine whether law is clearly established, this section will not distinguish between the *Teague* Rule and the "clearly established" rule. However, you should keep in mind the differences between the two rules explained in the previous section. If the law you are relying on had not been clearly stated in another court case when your conviction became final, the courts may still find that the law was clearly established if it was *dictated* by previously decided cases, known as "precedent." That means if a previously decided case requires a certain outcome in your case, even if a case exactly like yours has not yet been decided, the courts will consider the rule you are relying on to be established. For a rule of law to be dictated by precedent, and therefore not new law, the precedent does not have to *explicitly* state the rule of law. If precedent *implies* the rule of law, and a case that was decided after your conviction became final simply articulates the previously implied rule, that rule is already clearly established.[233] Although dictum (the part of a judge's opinion that does not count as a decision about the particular case that the judge is deciding) is not considered law, it may be used as support that an implied rule of law had been clearly established before it was actually stated.[234]

For example, in *Teague*, the prosecutor used "peremptory challenges" to keep all Black potential jurors off the jury (peremptory challenges are used by lawyers to disqualify potential jurors without giving any reason). The all-white jury then convicted the Black defendant of murder. Two and a half years after the defendant's conviction, the Supreme Court ruled in a different case that a defendant

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230. *See* Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070, 103 L. Ed. 2d 334, 354–356 (1989).

231. *See* 28 U.S.C. § 2254(d)(1).

232. *See* Stringer v. Black, 503 U.S. 222, 227, 112 S. Ct. 1130, 1135, 117 L. Ed. 2d 367, 376–377 (1992) ("Subject to two exceptions, a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal habeas corpus relief unless the decision was dictated by precedent existing when the judgment in question became final."). If you do not file for *certiorari* from the Supreme Court, your conviction becomes final when your time for filing a petition for *certiorari* has elapsed. *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S.Ct. 948, 953 127 L. Ed. 2d 236, 246 (1994).

233. *See* Roe v. Flores-Ortega, 528 U.S. 470, 484–485, 120 S. Ct. 1029, 1038–1039 145 L. Ed. 2d 985, 999–1001 (2000) (finding that a newly articulated rule "breaks no new ground" because the court's earlier decisions implicitly established the rule); Ryan v. Miller, 303 F.3d 231, 248 (2d Cir. 2002) (explaining that for a right to be clearly established, the Supreme Court must have acknowledged it, but "it need not have considered the exact incarnation of that right or approved the specific theory").

234. *See* Gibbs v. Frank, 387 F.3d 268, 277 n.6 (3d Cir. 2004) (noting that because Supreme Court dictum "offers guidance about how the Supreme Court reasonably interprets its previous decision," it is "relevant to determining whether a state court decision reasonably applies Supreme Court precedent").

can prove a *prima facie* case of racial discrimination by showing that he is a member of a racial group and that the prosecutor used peremptory challenges to remove jury members of that racial group at the trial.[235] The *Teague* defendant asked the habeas court to apply the second case to his trial. The Supreme Court ruled that the petitioner could not apply the second case because it was a "new rule of law." [236] That is, the second decision was not required by any prior cases.

A rule of law is considered "new" even if it is based *in part* on earlier cases. The Supreme Court has found that a law is "new" if lower courts disagree significantly about the question before the Supreme Court ruling.[237] Unfortunately if you are in this situation, the law will usually be called "new." [238] If "debate among reasonable minds"[239] is possible as to whether the law is clearly established, it is considered new law.

Consider the following four examples of the Supreme Court rejecting habeas relief because the petitioner's habeas claim was based on new law:

(1) In *Saffle v. Parks*,[240] the petitioner sought habeas relief because, at his trial, the judge had instructed the jury to "avoid any influence of sympathy."[241] The petitioner argued that this instruction was unconstitutional because it made the jury ignore evidence that mitigated the petitioner's guilt (to mitigate means to make the petitioner less responsible for his actions or less guilty). The Supreme Court decided that even though the instruction was based on earlier cases, the earlier cases did not say *how* the court should ask the jury to listen to mitigating evidence. So the instruction violated a new rule, not a previously established one. Thus, the Court denied habeas relief.

(2) In *Butler v. McKellar*,[242] petitioner sued four years after his murder conviction was finalized. Relying on another case *Arizona v. Roberson*, he said the police had violated his Constitutional rights by interrogating him about a murder after he had requested a lawyer on a separate charge.[243] The Supreme Court rejected his petition because the *Roberson* case announced a "new" rule of law a couple of years after his conviction. His lawyer argued that the *Roberson* rule was not a new rule because it was decided based on an earlier case, *Edwards v. Arizona*,[244] which was decided before his conviction became final. The Supreme Court did not agree that *Roberson* was determined by *Edwards* because the *Edwards* rule covered interrogations on the *same* charge while the *Roberson* rule covered interrogations on *separate* charges. The Court concluded no one could have predicted the *Edwards* rule would extend to the situation in *Roberson*. Thus, *Roberson* announced a new rule of law that the petitioner could not rely on.

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235. Batson v. Kentucky, 476 U.S. 79, 91–92, 106 S. Ct. 1712, 1720–1721, 90 L. Ed. 2d 69 (1986).

236. Teague v. Lane, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075, 103 L. Ed. 2d 334, 356 (1989).

237. *See* Butler v. McKellar, 494 U.S. 407, 415, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347, 356 (1990) (explaining that a rule is new if there is a "significant difference of opinion on the part of several lower courts that had considered the question previously").

238. Marc M. Arkin, *The Prisoner's Dilemma: Life In The Lower Federal Courts After Teague V. Lane,* 69 N.C. L. REV. 371, 401 (1991) (noting *Butler* broadened the definition of novelty so that "virtually every rule becomes 'new'").

239. Butler v. McKellar, 494 U.S. 407, 415, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347, 356 (1990).

240. Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

241. Saffle v. Parks, 494 U.S. 484, 486, 110 S. Ct. 1257, 1259, 108 L. Ed. 2d 415, 422 (1990).

242. Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990).

243. Butler v. McKellar, 494 U.S. 407, 415, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347, 356 (1990) (citing Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988)) (stating that a suspect who has requested counsel is not subject to further interrogation until counsel has been made available to him and that this request extends to police-initiated interrogation in a later investigation).

244. Edwards v. Arizona, 451 U.S. 477, 484–485, 101 S. Ct. 1880, 1884–1885, 68 L. Ed. 2d 378, 386 (1981) (holding that a defendant who had requested counsel during an interrogation but confessed the next day during another interrogation for the same offence had not waived his right to counsel).

(3) In *Sawyer v. Smith*, the petitioner had been convicted of murder and sentenced to death. At his trial, the prosecutor had told the jury that if they sentenced him to death "you yourself will not be sentencing [the petitioner] to the electric chair."[245] A year after the petitioner's conviction was final, the Supreme Court ruled in *Caldwell v. Mississippi*[246] that a prosecutor can't make remarks like that which reduce the jury's sense of responsibility for the capital sentencing decision. The *Sawyer* petitioner asked the court to apply the *Caldwell* rule to his conviction. He argued that the *Caldwell* case did not create a "new rule" of law because earlier cases made the rule predictable. The Supreme Court disagreed and ruled that the *Caldwell* rule was a "new rule of law" because it was not foreseeable based on earlier cases.[247]

(4) In *Caspari v. Bohlen*,[248] the Supreme Court explained the three steps the habeas court must take to see if the *Teague* rule applies. First, the court must find out the date on which the petitioner's conviction and sentence became final. Second, it must decide whether the trial court would have discovered the rule from earlier cases. Third, if the rule is "new," meaning the trial court would not have taken it from earlier cases, then the habeas court must decide if the petitioner falls into one of the exceptions to the *Teague* rule. (For a discussion of those exceptions, see Part C(3) ("Exceptions to the New Law Rules") below).

To summarize, the law you use cannot be new law, but it can be applied in a new way. Some rules will apply to many different fact situations. It is not necessary for the court to look at your exact fact situation and apply a rule of law to it. It is only necessary that the general legal principle which deals with your fact situation has been established.[249] Although you should show the court that the law you are relying on is not new law, you should not actually mention the *Teague* standard in your habeas petition, even if you are making a claim based on an exception to the *Teague* standard. You do not need to argue that your habeas petition is not based on new law unless the government brings it up. Since the government is very likely to raise the *Teague* rule, you should be well prepared to show the court the rule of law in question was not new law at the time your conviction became final.

If you are in procedural default, you can try to use the "independent and adequate state grounds" doctrine to avoid procedural default.[250] You can get out of procedural default if the procedural rule the state court used to deny you a hearing on the merits was (1) not "independent" of federal law, or (2)

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245. Sawyer v. Smith, 497 U.S. 227, 230, 110 S. Ct. 2822, 2825, 111 L. Ed. 2d 193, 203 (1990) (holding that the Caldwell rule that prosecutors may not make remarks that diminish the jury's sense of responsibility in capital cases was a new rule and did not apply retroactively).

246. Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S. Ct. 2633, 2639, 86 L. Ed. 2d 231, 239 (1985) (finding that where, in a capital case, a prosecutor makes statements to the sentencing jury that diminish the jury's sense of responsibility, the heightened requirements of the 8th Amendment are not met and the sentence of death cannot stand).

247. Sawyer v. Smith, 497 U.S. 227, 237, 110 S. Ct. 2822, 2829 111 L. Ed. 2d 193, 208 (1990).

248. Caspari v. Bohlen, 510 U.S. 383, 390, 114 S. Ct. 948, 953, 127 L. Ed. 2d 236, 246 (1994) (holding that, at the time of petitioner's conviction, a rule barring evidence of prior convictions for sentencing purposes did not yet exist).

249. *See* Hart v. Attorney Gen., 323 F.3d 884, 892 n.16 (11th Cir. 2003) (holding that, when confronting issues such as the voluntariness of a confession, where the rule of law will have to be applied on a case-by-case approach, it is "acceptable to derive clearly established federal law from . . . general principles").

250. *See* Dretke v. Haley, 541 U.S. 386, 392, 124 S. Ct. 1847, 1851–1852, 158 L. Ed. 2d 659, 668 (2004) (discussing the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds); Coleman v. Thompson, 501 U.S. 722, 729–730, 111 S. Ct. 2546, 2553–2554, 115 L. Ed. 2d 640, 655–656 (1991) (stating that the Supreme Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment); Hoffman v. Arave, 236 F.3d 523, 530 (9th Cir. 2001) (stating that "so long as the dismissal relies on a state law ground that is independent of the federal question and adequate to support the judgment, it will be insulated from federal review."). *See*, *e.g.*, Fox Film Corp. v. Muller, 296 U.S. 207, 210, 56 S. Ct. 183, 184, 80 L. Ed. 158, 159 (1935) (affirming the non-reviewability of the state law decision in a breach of contract action for leasing motion-picture films).

not "adequate" (in other words, good enough) to bar federal review of the claim. These are hard standards to meet but the terms are further described below.

(i) Showing the State Procedural Rule Is Not "Independent" of Federal Law

To show that the procedural rule the state court used was not independent of federal law, you must show that the state law is connected with federal law and not entirely separate from federal law.[251] State law is connected with federal law if judges must answer questions about federal law in order to decide the question of state law.[252] For example, if a state procedural rule says that when fundamental or constitutional errors of federal law are made, the claim is not considered untimely and can be reviewed, then the state court judges have to decide questions of federal law—the constitutional issue—before deciding if the state procedural rule applied to your case.[253] If the procedural rule the state court used to deny your claim was not entirely separate from federal law, you can try to argue that the procedural rule is not "independent" of federal law and it should not stop the habeas court from reviewing your claim.

(ii) Showing the State Procedural Rule Was Not "Adequate" to Bar Federal Review

When you argue that your default of a state procedural rule is not an adequate (good enough) reason to deny review of your federal habeas petition, you are arguing that the state rule is unfair, interferes with enforcement of your federal rights, or is not applied consistently. Therefore, the state rule is not an adequate reason to bar review of your claim.[254] Some common ways to argue that a state procedural rule is not adequate to bar review of your federal claims are:

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251. *See* Ake v. Oklahoma, 470 U.S. 68, 74–75, 105 S. Ct. 1087, 1092, 84 L. Ed. 2d 53, 60–61 (1985); *see also* Boyd v. Scott, 45 F.3d 876, 880 (5th Cir. 1994) (finding that state court decision was "interwoven with federal law, and did not express clearly that its decision was based on state procedural grounds").

252. *See* Stewart v. Smith, 536 U.S. 856, 860, 122 S.Ct. 2578, 2581, 153 L.Ed.2d 762, 767 (2002) (stating that when resolving a matter of state procedural rules depends on a federal constitutional ruling, the state law ruling is not independent of the federal ruling).

253. *See* Cooper v. Neven, 641 F.3d 322, 327 (9th Cir. 2011) (stating that state procedural rules must be both independent and adequate in order to bar federal habeas review); La Crosse v. Kernan, 244 F.3d 702, 706–707 (9th Cir. 2001) (holding that the state's "untimeliness" rule did not constitute "independent" state grounds because at the time the petitioner defaulted his claim, the rule had a "fundamental constitutional error exception" that involved a ruling on federal law); Johnson v. Gibson, 169 F.3d 1239, 1249 (10th Cir. 1999) (holding that petitioner's claim was not procedurally defaulted because "Oklahoma courts do review such claims for fundamental error—a review that necessarily includes review for federal constitutional error," so procedural bar was not independent of federal law); Jones v. Jerrison, 20 F.3d 849, 854 (8th Cir. 1994) (holding that although petitioner failed to bring an objection at trial, the state courts may review for plain error); Bradley v. Meachum, 918 F.2d 338, 343 (2d Cir. 1990) (holding that a state waiver rule that resulted in procedural default of petitioner's claim is not "independent of federal law" because, under Connecticut law, "procedural waiver cannot bar a defendant's challenge 'involv[ing] his constitutional right to a fair trial,'" and the state court had to first decide whether the petitioner received the constitutionally-required fair trial).

254. For a Supreme Court case that held that the state's procedural rule was not adequate to bar federal habeas review, see *Lee v. Kemna*, 534 U.S. 362, 366, 122 S. Ct. 877, 880, 151 L. Ed. 2d 820, 830 (2002). *See also* Monroe v. Kuhlman, 433 F.3d 236, 245 (2d Cir. 2006) (finding state court's application of the contemporaneous objection rule to a situation where jurors viewed evidence during the trial without the judge present inadequate to bar federal review of the claim); Cotto v. Herbert, 331 F.3d 217, 247 (2d Cir. 2003) (finding New York Court of Appeals' application of the contemporaneous objection rule to a situation where there was no cross-examination of a witness who testified at petitioner's trial, and whose out-of-court identification of petitioner was admitted at trial through testimony of police officers, was inadequate to bar federal habeas review of this claim).

(1) The state's rule is not "firmly established," "consistently applied," or "strictly or regularly followed;"[255]
(2) The state procedural rule did not provide you with a reasonable opportunity to have your federal claim heard in state court because the rule frustrates (interferes with) the enforcement of federal rights or is unreasonably hard to meet and has the effect of frustrating federal rights;[256]

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255. *See* Smith v. Texas, 550 U.S. 297, 313, 127 S. Ct. 1686, 1697, 167 L. Ed.2d 632, 644 (2007) ("As a general matter, and absent some important exceptions, when a state court denies relief because a party failed to comply with a regularly applied and well-established state procedural rule, a federal court will not consider that issue."); Ford v. Georgia, 498 U.S. 411, 424, 111 S. Ct. 850, 857, 112 L. Ed. 2d 935, 949 (1991) (holding that state procedural rules "not strictly or regularly followed" may not bar federal review); *see also* Johnson v. Mississippi, 486 U.S. 578, 587, 108 S. Ct. 1981, 1987, 100 L. Ed. 2d 575, 585 (1988) ; James v. Kentucky, 466 U.S. 341, 348–349, 104 S. Ct. 1830, 1835, 80 L. Ed. 2d 346, 353 (1984) (holding that only state procedures that are "firmly established and regularly followed … can prevent implementation of federal constitutional rights."); Barr v. City of Columbia, 378 U.S. 146, 149, 84 S. Ct. 1734, 1736, 12 L. Ed. 2d 766, 769 (1964) ("[S]tate procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."); Sayre v. Anderson, 238 F.3d 631, 634 (5th Cir. 2001) (asserting that a state ruling that petitioner had procedurally defaulted claims would not bar federal review when the rule was not usually applied to defendants in petitioner's position); Romano v. Gibson, 239 F.3d 1156, 1170 (10th Cir. 2001) (asserting that state procedural rule was not adequate because state court applied the rule inconsistently in the cases of two co-defendants charged and tried together); Moore v. Ponte, 186 F.3d 26, 32–33 (1st Cir. 1999) (stating that procedural default resulting from defendant's violation of the contemporaneous objection rule does not bar federal review because state courts have overlooked the requirement in cases like petitioner's); Gosier v. Welborn, 175 F.3d 504, 507 (7th Cir. 1999) (asserting that state procedural rule was an inadequate bar to federal habeas corpus review because state courts applied the rule inconsistently and incompatibly); Clayton v. Gibson, 199 F.3d 1162, 1171 (10th Cir. 1999) (stating that default did not bar federal review because the state procedural rule was adopted after the default supposedly occurred and could not have been firmly established); Forgy v. Norris, 64 F.3d 399, 402 (8th Cir. 1995) (pointing out a previous holding that "unexpectable state procedural bars are not adequate to foreclose federal review of constitutional claims."); Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir. 1996) (stating that California's state habeas time limits were not an adequate and independent state grounds to support procedural default where the time limits were not clear, well-established, and consistently applied prior to petitioner's filing of his first state habeas petition); Cochran v. Herring, 43 F.3d 1404, 1409 (11th Cir. 1995) (finding no bar to federal habeas review even though petitioner did not raise *Batson* claim on direct appeal because Alabama courts have not consistently applied a procedural bar to these types of cases), *modified*, 61 F.3d 20 (11th Cir. 1995); Grubbs v. Delo, 948 F.2d 1459, 1463 (8th Cir. 1991) ("If a state applies its rule inconsistently, we are not barred from reaching the federal law claim.").

256. *See* Sivak v. Hardison, 658 F.3d 898, 906 (9th Cir. 2011) (finding that state's filing deadline was "uniquely harsh" and therefore, inadequate to prevent federal review); Hoffman v. Arave, 236 F.3d 523, 531 (9th Cir. 2001) ("[I]f a state procedural rule frustrates the exercise of a federal right, that rule is 'inadequate' to preclude federal courts from reviewing the merits of the federal claim."); Mapes v. Coyle, 171 F.3d 408, 429 (6th Cir. 1999) (asserting that state procedural ground for denial of petition was not "adequate" because rulings resulted in "erroneous … refus[al] to consider" petitioner's ineffective assistance of appellate counsel claims); Jackson v. Shanks, 143 F.3d 1313, 1318–1319 (10th Cir. 1998) (determining that state procedural rule procedurally barring claims not raised on direct appeal cannot be applied to ineffective assistance of counsel claims because doing so would "deprive [petitioner] of any meaningful review of his ineffective assistance of counsel claim"); Morales v. Calderon, 85 F.3d 1387, 1390 (9th Cir. 1996) (determining that federal habeas review was not barred due to procedural default because California timeliness rule was so unclear that it did "not 'provide … the habeas petitioner with a fair opportunity to seek relief in state court'" (quoting Harmon v. Ryan, 959 F.2d 1457, 1462 (9th Cir. 1992))); Wheat v. Thigpen, 793 F.2d 621, 624–625 (5th Cir. 1986) (stating that state rules not regularly followed prevented the "implementation of federal constitutional rights."); Williams v. Lockhart, 873 F.2d 1129, 1131–1132 (8th Cir. 1989) (stating that violation of a "new [state] rule designed to thwart assertion of federal rights" is not an adequate bar to federal habeas review); Walker v. Engle, 703 F.2d 959, 967 (6th Cir. 1983) (holding that notions of comity do not require deference to state court decisions where procedural bars that had no foundation in state law were applied) (abrogated on other grounds).

(3) The procedural rule required you to object to the error before you could realize that the error occurred, or that the rule was applied in your case in a way that you could not have anticipated;[257] or
(4) You tried to raise a claim, and even though you did not follow the rule exactly, the way you tried to bring up the claim served the same purpose as the state rule.[258]

If you have procedurally defaulted a claim, you can try to use the "independent or adequate state grounds" body of law to get around the procedural default. Remember, you have to show either that the state procedural rule is not independent of federal law or that the rule is not adequate to bar federal review.

(c) Exceptions to Procedural Default

If your claim is in procedural default, there are limited circumstances in which the federal court may still review your claim. These circumstances apply to people in both state and federal prisons. The court will review your claim if you satisfy either the (1) "cause and prejudice" test or the (2) "fundamental miscarriage of justice" test.[259] The courts rarely find either of these, so *you should not depend on either of these exceptions to the procedural default rule.*[260] You should work hard to avoid procedural default by first raising all of your claims in state court if you are incarcerated in state custody or on direct federal appeal if you are incarcerated in federal custody.

(i) Cause and Prejudice Test

The "cause and prejudice" test is a defense to procedurally defaulted claims. That means that if your claim is procedurally defaulted, the federal habeas court may still review your claim if you can prove that you had "cause" for not following the procedure and experienced "prejudice." To pass this test you must: (1) show cause (in other words, give a good reason for why you failed to follow the state procedural rule, or failed to present the claim in your direct appeal if you are in a federal prison); and

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257. *See* Beuk v. Houk, 537 F.3d. 618, 634 (6th Cir. 2008) ("A habeas petitioner can show cause where he failed to raise a constitutional issue because it was 'reasonably unknown to him' at the time"); Gonzales v. Elo, 233 F.3d 348, 353–354 (6th Cir. 2000) (determining that the state rule that barred post-conviction review of claims not raised on direct appeal was inadequate to bar federal review of the claim because the rule was adopted after the petitioner's direct appeal was complete); Barnett v. Hargett, 174 F.3d 1128, 1135 (10th Cir. 1999) (determining that state procedural rules deeming claims raised under Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996) as barred if not raised on direct appeal cannot be applied to cases in which the direct appeal occurred before the *Cooper* decision); United States *ex rel.* Duncan v. O'Leary, 806 F.2d 1307, 1314 (7th Cir. 1986) (determining that petitioner did not default by not raising his ineffective assistance of counsel claim under state law because disagreement between the federal and state courts over the proper standard was such that petitioner could not have known about the claim and could not have been said to waive it); *but see* Perri v. Director Dept. of Corrections, State of Ill., cv, 451 (7th Cir. 1987) (finding that a state court's determination of whether or not an incarcerated person had waived a constitutional right was a question of fact entitled to a presumption of correctness).

258. *See* Albuquerque v. Bara, 628 F.2d 767, 772–773 (2d Cir. 1980) (holding that "substantial compliance" with the state procedural rule is enough to overcome procedural default).

259. Two of the main cases on this issue are Wainwright v. Sykes, 433 U.S. 72, 84–85, 90–91, 97 S. Ct. 2497, 2505, 2508, 53 L. Ed. 2d 594, 606–607, 610 (1977) and Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640, 669 (1991). These exceptions were reaffirmed after the passage of AEDPA in Edwards v. Carpenter, 529 U.S. 446, 451, 120 S. Ct. 1587, 1591, 146 L. Ed. 2d 518, 524 (2000) ("We … require a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim … The one exception to that rule … is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice.").

260. *See*, *e.g.*, United States v. Mabry, 536 F.3d 231, 243 (3d Cir. 2008) (holding there was no miscarriage of justice from petitioner's claim that he did not fully understand what the phrase "miscarriage of justice" meant in his waiver of collateral and direct appeals in his guilty plea, because he had not satisfactorily identified any non-frivolous ground, had not produced any substantial appealable issues, and had failed to allege appealable issues that fell outside the terms of his waiver).

(2) show prejudice (that your case would have come out differently if you had been able to present your claim of constitutional violation).[261]

The cause and prejudice standard can be the greatest obstacle you must overcome to obtain federal habeas review. Since the Supreme Court announced the standard in 1977,[262] federal courts have thrown out thousands of habeas petitions for failing to meet the standard. Therefore, you must think carefully and creatively about how to satisfy or get around the "cause and prejudice" standard.

a. Showing Cause

Showing "cause" for not following procedure is not easy. Generally, cause must be based on an outside factor that prevented you from avoiding a procedural mistake.[263] Situations that courts consider "cause" include:

(1) State officials prevented you from following the state procedural rule.[264] For example, at your trial, a state officer led you to believe that a constitutional violation had not occurred, when in fact it had. In this case, the officer's actions would be "cause" for why you did not object to the violation at trial. The court will allow you to argue this claim.[265]

(2) State officials purposely lied about material information.[266] For example, when a state tells you that all *Brady* material (exculpatory material) has been turned over to you, when in reality it has not been, you cannot be expected to be able to present this evidence—since you did not know about it.[267] The fact that the state lied to you establishes a cause for failure to investigate that the court may consider.

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261. *See* Coleman v. Thompson, 501 U.S. 722, 755, 111 S. Ct. 2546, 2567, 115 L. Ed. 2d 640, 672 (1991) (holding that where petitioner had no independent constitutional right to counsel on appeal in state proceedings, his claim of ineffective counsel in state habeas petition did not constitute "cause" under the "cause and prejudice" standard); Engle v. Isaac, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572–1573, 71 L. Ed. 2d 783, 801 (1982) (reaffirming that any incarcerated person bringing a constitutional claim to the federal court after a state procedural default must demonstrate cause and actual prejudice) (abrogated on other grounds). *See also* Reed v. Ross, 468 U.S. 1, 11–13, 104 S. Ct. 2901, 2908–2909, 82 L. Ed. 2d 1, 11–13 (1984) (affirming habeas relief, because state law did not allow for constitutional review of the jury's instructions on burden of proof at the time of trial, and the incarcerated person was prejudiced, because he may not have been convicted had the jury been instructed correctly); *but see* Prihoda v. McCaughtry, 910 F.2d 1379, 1386 (7th Cir 1990) (stating that a change in law cannot be "cause" under the *Teague* Rule). It is important to note that the new laws issues discussed in Part C(2), "New Laws: The *Teague* Rule," would still apply and may bar relief, even if procedural default were overcome in this situation.

262. Wainwright v. Sykes, 433 U.S. 72, 84–85, 90–91, 97 S. Ct. 2497, 2505, 2508, 53 L. Ed. 2d 594, 606–607, 610 (1977).

263. *See* Banks v. Dretke, 540 U.S. 668, 696, *124 S. Ct. 1256,* 1275, *157 L. Ed. 2d 1166*, 1192–1193 (2004) ("The 'cause' inquiry, we have also observed, turns on events or circumstances 'external to the defense.'" (citing Amadeo v. Zant, 486 U.S. 214, 222, 108 S. Ct. 1771, 1776, 100 L. Ed. 2d 249, 260 (1988))).

264. Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397, 408 (1986) (determining that "some interference by officials" would constitute "cause" (citing Brown v. Allen, 344 U.S. 443, 486, 73 S. Ct. 397, 422, 97 L. Ed. 469, 504 (1953))).

265. *See* Strickler v. Greene, 527 U.S. 263, 283, 119 S. Ct. 1936, 1949, 144 L. Ed. 2d 286, 303 (1999) (holding that petitioner had shown cause for not raising a *Brady* claim in state court since the prosecutor had withheld evidence and the petitioner had relied on the prosecution's open file policy as fulfilling the prosecutor's duty to disclose, but also finding that petitioner did not show prejudice); *see also* Forman v. Smith, 633 F.2d 634, 641 (2d Cir. 1980) (reversing grant of habeas petition, but affirming the principle that, if a police officer made a misleading statement that obscures an opportunity to develop a federal constitutional violation claim, such statement would be "cause" for not raising the claim on direct appeal).

266. Banks v. Dretke, 540 U.S. 668, 695–696, 124 S. Ct. 1256, 1274–1275, 157 L. Ed. 2d 1166, 1192–1193 (2004) (holding that, where prosecutors had lied and concealed information regarding a paid informant, the petitioner had made a showing of cause for not raising a *Brady* claim in prior proceedings).

267. *See*, *e.g.*, Banks v. Dretke, 540 U.S. 668, 693, 124 S. Ct. 1256, 1273, 157 L. Ed. 2d 1166, 1191 (2004) (determining that because the prosecution persisted in hiding evidence and falsely representing that it had complied fully with its *Brady* disclosure obligations, the petitioner "had cause for failing to investigate, in state post-conviction proceedings").

(3) The legal basis of your constitutional claim was not reasonably available to you (or to your lawyer) at the time of your trial.[268] In other words, a federal court will excuse your failure to object to an incident that occurred at your trial, if you can show that you could not have known from the case law existing at the time of your trial that the incident was a constitutional violation. Unfortunately, most attempts to show cause in this way are unsuccessful.[269] You will not show "cause" by just claiming any of the following things: that your attorney was unaware of the claim; [270] that your attorney believed it would be useless to raise the claim because the state court had rejected the claim before; [271] or that your attorney overlooked the claim.[272]

(4) By failing to follow the state procedural rule (for example, failing to object at trial, failing to bring an appeal in time, etc.), your attorney provided you with "[i]neffective assistance of counsel."[273] Remember that you must exhaust your claim of ineffective assistance of counsel in the state courts before presenting the claim to the federal court as cause for why you failed to follow a state procedural requirement.[274]

It is important to understand that the reasons listed above are not the only possible ones: there may be other reasons in your specific case that would persuade a court to find that you have "cause." By "Shepardizing" both *Wainwright*[275] and *Coleman*[276] and researching this issue, you will discover other reasons that courts have found "cause."[277]

You should also be aware of various claims that the courts have determined *do not* constitute "cause." The following list includes only a few possibilities:

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268. *See* Reed v. Ross, 468 U.S. 1, 16, 104 S. Ct. 2901, 2910, 82 L. Ed. 2d 1, 15 (1984) (holding that, where well-settled law in the state placing the burden of proof on the defendant for self-defense and lack of malice could be challenged as unconstitutional under a new Supreme Court decision, the "novelty" of such a claim was proper cause for failing to raise the claim on direct appeal).

269. *See*, *e.g.*, Fernandez v. Leonardo, 931 F.2d 214, 216–217 (2d Cir. 1991) (finding no cause where the law was unsettled on the claim raised in the habeas petition but where the defense should have known to raise the objection nonetheless). In addition, even if you succeed in arguing that you had "cause" for not raising the constitutional error in your appeal, because you could not have known at the time of your trial that a constitutional error had occurred, the court could decide that this error still cannot be considered because of the *Teague* case, which says you cannot make an argument that raises a "new" rule of law. *See* Part C(2), "New Laws: The *Teague* Rule," of this Chapter for more information.

270. *See* Engle v. Isaac, 456 U.S. 107, 134, 102 S. Ct. 1558, 1575, 71 L. Ed. 2d 783, 804 (1982) ("Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.").

271. *See* Engle v. Isaac, 456 U.S. 107, 130, 102 S. Ct. 1558, 1573, 71 L. Ed. 2d 783, 802 (1982) ("If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim.").

272. *See* Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397, 408 (1986) ("We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made.").

273. Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397, 408–409 (1986). *But see* Tsirizotakis v. Le Fevre, 736 F.2d 57, 62–63 (2d Cir. 1984) (rejecting defendant's attempt to show cause by alleging ineffective assistance of counsel).

274. *See* Murray v. Carrier, 477 U.S. 478, 488–489, 106 S. Ct. 2639, 2645–2646, 91 L. Ed. 2d 397, 409 (1986) (expressing that the exhaustion doctrine "generally requires" the claim for ineffective assistance of counsel to be presented independently in state court). In New York, exhaustion of the ineffective assistance of counsel claim is done through an Article 440 motion (for more information on Article 440 motions, see Chapter 20 of the *JLM*).

275. Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

276. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

277. By *Shepardizing*, you can also make sure that the law has not changed. *See* Chapter 2 of the *JLM* for an explanation of how to Shepardize a case.

(1) Claims of ineffective assistance of counsel, if you did not have a constitutional right to counsel at that proceeding.[278]

(2) Claims that there are important facts that were not fully developed in the trial court, if you failed to develop the facts due to your own or your attorney's neglect.[279]

(3) Claims that rely on evidence that could have been reasonably available to you at the trial or on direct appeal.[280] It is not enough to argue that you failed to make the claim earlier because you had not yet discovered the evidence. You have to show that you *could not* have discovered the evidence, even if you had tried. For example, if the prosecutor purposely withheld evidence from the defense counsel at trial, that might show cause.[281]

b. Showing Prejudice

The Supreme Court has not explained the meaning of "prejudice" as thoroughly as "cause." In *United States v. Frady*, the Court explained the meaning of "prejudice" by stating that "prejudice" requires that you show errors at your trial "worked to [your] actual and substantial disadvantage, infecting [your] entire trial with error of constitutional dimensions."[282] Prejudice is a high standard for you to meet because the federal court will measure the effect of any violation you raise in the context of your whole trial.[283] You should Shepardize the *Frady* case to see if courts in your jurisdiction have explained what types of errors show prejudice. For example, the Second Circuit has stated in *dicta*[284] that it would find prejudice if a New York trial court accepted a defendant's guilty plea without holding a hearing on the defendant's competency when required to do so by state law. Such an error, the Second Circuit stated, would "infec[t]" the conviction and violate due process.[285]

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278. *See* Coleman v. Thompson, 501 U.S. 722, 754, 111 S. Ct. 2546, 2567, 115 L. Ed. 2d 640, 672 (1991) ("[I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel."). But see Martinez v. Ryan, 566 U.S. 1, 9, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272, 282 (2012) ("This opinion qualifies Coleman by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.").

279. *See* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 n.2, 112 S. Ct. 1715, 1717 n.2, 118 L. Ed. 2d 318, 326 n.2 (1992) (rejecting a rule that would require an evidentiary hearing for habeas corpus cases where the state court hearing did not adequately develop the material facts "due to petitioner's own neglect").

280. McCleskey v. Zant, 499 U.S. 467, 498, 111 S. Ct. 1454, 1472, 113 L. Ed. 2d 517, 547 (1991).

281. Fairchild v. Lockhart, 979 F.2d 636, 640 (8th Cir. 1992).

282. United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982) (emphasis omitted); *see* McCoy v. Newsome, 953 F.2d 1252, 1261–1262 (11th Cir. 1992) (applying the *Wainwright* standard, the court determined that the errors at trial did not actually and substantially disadvantage the defense, so the defendant was not denied fundamental fairness).

283. U.S. v. Kleinbart, 27 F.3d 586, 591 (D.C. Cir. 1994) (holding that the incarcerated person failed to show prejudice even though the judge did not properly instruct the jury regarding an element of the crime because the jury was otherwise informed of the element).

284. For a definition of *dictum* (the singular form of *dicta*), see Appendix V of the *JLM*, "Definitions of Words Used in the *JLM*."

285. *See* Silverstein v. Henderson, 706 F.2d 361, 368 n.13 (2d Cir. 1983). In *Silverstein*, the petitioner sought habeas relief from a sentence for armed burglary on the grounds that he was mentally retarded and had not understood his guilty plea. The Second Circuit granted habeas relief despite the fact that the petitioner had not raised this claim on direct appeal. The court found that applying the procedural default rule to an incompetent defendant was unconstitutional, and, therefore, it was unnecessary to apply the "cause and prejudice" test. In a footnote, the court remarked that even if procedural default applied, the defendant would be entitled to a hearing concerning the cause for his failure to raise the issue of competence on direct appeal. *See also* Pearson v. Secretary, 273 Fed. Appx. 847, 850, (11th Cir. 2008) (holding that an incarcerated person raising a claim of cause and prejudice or miscarriage of justice based on the fact that he was proceeding *pro se* does not establish either of the exceptions to the procedural bar).

The "cause and prejudice" test is very difficult to meet.[286] Do not rely on this excuse if another one is available to you.

(i) Fundamental Miscarriage of Justice

Another exception to procedural default is the "miscarriage of justice" exception. This exception is also difficult to meet, and you should not rely on this exception to get out of procedurally defaulted claims if you have another exception available to you. This exception usually works only if you can show that "failure to consider the claims [that are procedurally defaulted] will result in a fundamental miscarriage of justice."[287] Although the Supreme Court has not clearly said what a fundamental miscarriage of justice is, the Court in *Schlup v. Delo*, suggested that this exception requires a defendant to persuade the court of his "actual innocence."[288] If you use this exception, you are claiming that you are innocent and that your innocence is the reason that the court should consider your constitutional claim, even if it is in procedural default.[289]

To meet the requirements for the fundamental miscarriage of justice exception, you must present new evidence showing that you are innocent. This evidence must not have been presented at trial.[290] You must show that with this new evidence, it is more likely than not that no reasonable juror would have convicted you.[291] This new evidence also must not be barred by the Federal Rules of Evidence. However, persuasive evidence of actual innocence that may not have been admissible in trial *can* be

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286. Some incarcerated people have tried to avoid the "cause and prejudice" standard by arguing that the standard should not apply in death penalty cases. *See, e.g.*, Smith v. Murray, 477 U.S. 527, 538–539, 106 S. Ct. 2661, 2668, 91 L. Ed. 2d 434, 447 (1986). Some incarcerated people have argued that the standard should not apply to constitutional errors, such as faulty jury instructions, which directly affect a jury's finding of guilt at trial. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572–1573, 71 L. Ed. 2d 783, 801 (1982). Other incarcerated people have argued that the standard should not apply to procedural defaults that occurred on appeal (such as failure to raise a particular claim on appeal), and not at trial. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 491–492, 106 S. Ct. 2639, 2647, 91 L. Ed. 2d 397, 410–411 (1986). The Supreme Court, however, has rejected all of these arguments. In addition, the Court has ruled that the "cause and prejudice" standard applies even in cases where you have defaulted on not only one but all of your federal constitutional claims, since you failed to file a notice of appeal within the required time. Coleman v. Thompson, 501 U.S. 722, 749–751, 111 S. Ct. 2546, 2564–2565, 115 L. Ed. 2d 640, 668–670 (1991).

287. Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640, 669 (1991) (reaffirming that the "fundamental miscarriage of justice" exception applies to procedurally defaulted claims). *See also* Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397, 413 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."); Engle v. Isaac, 456 U.S. 107, 135, 102 S. Ct. 1558, 1575–1576, 71 L. Ed. 2d 783, 805 (1982) (stating that in some cases "cause" and "prejudice" will include the correction of a fundamentally unfair incarceration).

288. Schlup v. Delo, 513 U.S. 298, 321–322, 115 S. Ct. 851, 864, 130 L. Ed. 2d 808, 832–833 (1995).

289. If you are claiming that you are innocent and should be set free, meaning there was not enough evidence to convict you, the standard is much higher, and you should refer to Jackson v. Virginia, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791–2792, 61 L. Ed. 2d 560, 576–577 (1979) (holding that an incarcerated person can show that there was insufficient evidence to convict him "if it is found that upon the record evidence [produced] at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt") (abrogated on other grounds). Remember that AEDPA created a stricter standard of review, so the *Jackson* standard will likely be applied in an even stricter fashion than described in the Court's decision.

290. *See* Schlup v. Delo, 513 U.S. 298, 324, 327–328, 115 S. Ct. 851, 865, 867, 130 L. Ed. 2d 808, 834, 836–837 (1995) (stating that the new evidence does not have to be evidence that would be admissible at trial).

291. In Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397, 413 (1986), the Court first stated the standard for a fundamental miscarriage of justice and said an incarcerated person must show "a constitutional violation has probably resulted in the conviction of one who is actually innocent" in order to meet the fundamental miscarriage of justice exception. In *Schlup*, the Court explained that this standard requires the defendant to "show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" if the constitutional error had not occurred. Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836 (1995). In House v. Bell, 547 U.S. 518, 539, 126 S. Ct. 2064, 2078, 165 L. Ed. 2d 1, 22–23 (2006), the Supreme Court determined that AEDPA's higher standard of review does *not* apply in cases where there is a claim of actual innocence.

considered by the court in considering this claim.[292] If you can meet these standards, the court will consider your barred claims. The idea is that if you can convince the court that you are innocent, it will then look at the errors in your trial, even though it is normally barred from doing so, in order to make sure that a fundamental miscarriage of justice did not occur.

Finally, the fundamental miscarriage of justice exception can be used to challenge a procedurally defaulted claim if a constitutional violation has probably resulted in the conviction of someone who is "actually innocent" of a death sentence.[293] To be "actually innocent" of the death penalty means that you are innocent of the elements of the crime that pushed your sentence from a murder sentence to a *capital* murder sentence. To prove this claim, you must show by clear and convincing evidence that, if the constitutional violation had not occurred, no reasonable juror would have found that you were eligible for the death penalty.[294] This standard is difficult to meet, and you should not rely on it to get around a procedurally defaulted claim. Remember that this standard does not apply if you are claiming that you are "actually innocent" of the murder for which you were convicted and sentenced to the death penalty. Instead, in that instance the same standard applies as when you are attempting to show your "actual innocence" of any other crime under the fundamental miscarriage of justice exception.[295]

(ii) Time Limit

Time is an issue that may complicate the preparation of your habeas petition. People in both state and federal prisons have a one-year time limit for filing federal habeas petitions.[296] This time limit applies even if the state's post-conviction timeline is more than a year. Therefore, you must file both your state post-conviction petition and your federal habeas petition (if you are unsuccessful in your state petition) within the one-year time limit. Otherwise, the time runs out on your federal habeas petition, and you will be barred from seeking federal habeas review. Once you file the state post-conviction motion, however, your timeline for filing the federal habeas petition will be "tolled," which means that your time limit for filing the federal habeas petition will be extended for as long as the time it takes for the state to consider your motion.[297]

Generally, the one-year timeline will start on the day your case becomes "final"[298] following direct review.[299] Remember, the end of your direct review (not the end of your post-conviction appeals or any other proceeding) triggers the date when your case becomes final. Your case will generally become

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292. Schlup v. Delo, 513 U.S. 298, 327–328, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836–837 (1995).

293. *See, e.g.*, Dugger v. Adams, 489 U.S. 401, 410 n.6, 109 S. Ct. 1211, 1217 n.6, 103 L. Ed. 2d 435, 445 n.6 (1989) (stating that a court may grant a writ even in the absence of a showing of cause for procedural default, but only in an "extraordinary" case).

294. Sawyer v. Whitley, 505 U.S. 333, 347–350, 112 S. Ct. 2514, 2523–2525, 120 L. Ed. 2d 269, 284–287 (1992) (holding that the court must find that but for the alleged constitutional error, the sentencing body could not have found any aggravating factors, and thus the petitioner was ineligible for the death penalty). *But see* Busby v. Davis, 892 F.3d 735, 755 (5th Cir. 2018) (citing McQuiggin v. Perkins, 569 U.S. 383, 359-396, 133 S. Ct. 1924, 185 L.Ed.2d. 1019 (2013) (holding that *Sawyer* was decided before the passage of the federal AEDPA statute, limiting the application of the actual innocence test to "a first petition for federal habeas relief" and barring its application in second or successive habeas petitions, as in *Sawyer*).

295. Schlup v. Delo, 513 U.S. 298, 326–327, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836 (1995).

296. *See* 28 U.S.C. § 2244(d)(1) (people in state prisons); 28 U.S.C. § 2255(f)(1) (people in federal prisons). However, if you are in state prison convicted of the death penalty and your state qualifies as an opt-in state (meaning that, in exchange for providing competent counsel, the state can take advantage of faster resolution of federal habeas claims), your time limit is *much* shorter than one year.

297. *See* 28 U.S.C. § 2244(d)(2) (people in state prisons).

298. *See* 28 U.S.C. § 2244(d)(1)(A) (people in state prisons); 28 U.S.C. § 2255(f)(1) (people in federal prisons).

299. *See* 28 U.S.C. § 2244(d)(1)(A) (people in state prisons); 28 U.S.C. § 2255(f)(1) (people in federal prisons).

final when United States Supreme Court proceedings on direct review are completed,[300] or, if you do not file for certiorari,[301] on the date when time expires for filing a petition for certiorari.[302]

However, there are three special circumstances that can extend the time you have to file your federal habeas petition:

(1) If the state or federal government creates an impediment (obstruction or blockage) in violation of the Constitution or laws of the United States that prevents you from filing the application or motion, you have one year after the unconstitutional or illegal impediment is removed to file your federal habeas petition;[303]

(2) If the Supreme Court announces a new retroactive legal right on which your habeas petition can be based, the petition is due one year from the announcement;[304] or

(3) If new facts become discoverable that were not discoverable before the one-year time limit, even with due diligence, your habeas petition is due one year from when the facts became discoverable through due diligence.[305]

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300. *See* 28 U.S.C. § 2244(d)(1)(A) (people in state prisons); 28 U.S.C. § 2255(f)(1) (people in federal prisons).

301. "*Certiorari*," or a "writ of *certiorari*," is an appeal to the United States Supreme Court.

302. *See* 28 U.S.C. § 2244(d)(1)(A) (people in state prisons); Clay v. United States, 537 U.S. 522, 532, 123 S. Ct. 1072, 1079, 155 L. Ed 2d 88, 97 (2003) ("[F]or federal criminal defendants who do not file a petition for certiorari with [the Supreme Court] on direct review, § 2255's one-year limitation period starts to run when the time for seeking such review expires.").

303. *See* 28 U.S.C. § 2244(d)(1)(B) (people in state prisons); 28 U.S.C. § 2255(f)(2) (people in federal prisons). The unconstitutional or illegal impediment must be created by the state. An example of an unconstitutional impediment is the withholding of exculpatory evidence (evidence favorable to the defendant) in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963). *See, e.g.*, Edmond v. U.S. Attorney, 959 F. Supp. 1, 4 (D.D.C. 1997) (determining that, for petitioner claiming that the government is holding exculpatory evidence, the one-year limitation does not begin until the receipt of the evidence). Another example of a state-created impediment is inadequate prison libraries. *See, e.g.*, Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000) (remanding case for evidentiary hearing on whether petitioner's claim that an unconstitutional impediment existed because of lack of information in the prison law library may be upheld). The State can also create an impediment by interfering with your filing, for example, if prison officials place you in segregation and take away your legal materials. *See* United States v. Gabaldon, 522 F.3d 1121, 1126 (10th Cir. 2008) (finding *pro se* habeas petition from person in federal prison should not have been dismissed by district court because state interfered with his filing by placing him in segregation and confiscating his legal materials). *But see* Monroe v. Beard, 536 F.3d 198, 210 (3d Cir. 2008) (finding confiscation of incarcerated person's legal materials by prison officials did not violate constitutional rights because the incarcerated person did not allege actual injury nor did he provide evidence that confiscation was constitutionally unreasonable where there was a legitimate interest in stopping him from filing fraudulent claims and the decision to confiscate materials was rationally related to this interest; and also noting due process only requires post-deprivation process for return of confiscated materials).

304. *See* 28 U.S.C. § 2244(d)(1)(C) (people in state prisons); 28 U.S.C. § 2255(f)(3) (people in federal prisons). *See, e.g.*, United States v. Adams, No. 90–00431–08, 1996 U.S. Dist. Lexis 8875, at *5 n.2 (E.D. Pa. June 24, 1996) (*unpublished*) (noting that petitioner has one year from the date the right was initially recognized by the Supreme Court). Exactly when the one year ends depends on the circuit in which you are filing. *See* Haugh v. Booker, 210 F.3d 1147, 1150 (10th Cir. 2000) (noting that the circuits disagree as to whether the one-year period starts when the new right is announced, or when the court holds it to be retroactive on collateral claims). However, note that the Supreme Court understood AEDPA to mean that the one year runs from the date a new right was recognized, not the date the right was made retroactive. *See* Dodd v. United States, 545 U.S. 353, 357, 125 S. Ct. 2478, 2482, 162 L. Ed. 2d 343, 349–350 (2005).

305. *See* 28 U.S.C. § 2244(d)(1)(D) (people in state prisons); 28 U.S.C. § 2255(f)(4) (people in federal prisons). *See, e.g.*, Dobbs v. Zant, 506 U.S. 357, 358–359, 113 S. Ct. 835, 836, 122 L. Ed. 2d 103, 107 (1993) (holding that when petitioner's habeas claim, which had been rejected by lower courts, was being reviewed by the federal circuit court, petitioner was allowed to supplement his record with a trial transcript because the delay in locating the transcript had been substantially caused by the state's mistake). For a more recent case discussing the concept of "due diligence" in prison settings, see Wims v. United States, 225 F.3d 186, 190–191 (2d Cir. 2000) (finding that the district court erred in dismissing habeas petition filed 17 months after conviction became final because the time delay was reasonable).

The date on which your one-year timeline starts is called the "triggering date." If more than one triggering date affects your case, you will have to apply within one year of the latest date of the above three options.[306] But you should try to file within a year of the earliest triggering date, because it will often be difficult to show that a later triggering date applies to your case.

If you have multiple claims in your petition and the claims do not all have the same triggering date, you should try to file within one year of the earliest triggering date. If the time limit runs out on one of your claims, the court will probably not hear the claim even if your habeas petition also includes other claims with later triggering dates.[307] For example, imagine that your conviction became final on January 1, and then on March 1 the Supreme Court announced a new retroactive legal right (a right that, when announced, applies to past cases as well as future ones) that applies to you. The triggering date for any claims that you have that are related to your trial is January 1, and the triggering date for the claim that you have that is based on the new Supreme Court case is March 1. You should file a habeas petition that contains *all* of your claims by January 1 of the following year. If you file in February, the court will hear your claim based on the new Supreme Court case, but will probably not hear any of the claims related to your trial.

The time limit for habeas petitions is *very strict*, but most federal courts have allowed the statute of limitations to be "tolled" (meaning that the time limit is put on hold) under certain circumstances. Tolling occurs while your state post-conviction appeal is pending, as long as you filed the petition correctly.[308] This means that if you have filed the state post-conviction petition in the proper court, with all the paperwork submitted properly, and within the time allowed by state law,[309] then the time that the state court spends considering your petition will not count against your one-year time limit. However, your time *does not* toll while a *federal* court is considering your petition.[310] As discussed above, because your time does not toll while a federal court reviews your petition, if the federal court

306. *See* 28 U.S.C. § 2244(d)(1) (people in state prisons); 28 U.S.C. § 2255(f) (people in federal prisons).

307. The Third and Sixth Circuits have held that each claim in a habeas petition must satisfy the one-year time limit, and claims not satisfying that time limit will be dismissed. Bachman v. Bagley, 487 F.3d 979, 984 (6th Cir. 2007); Fielder v. Varner, 379 F.3d 113, 118–120 (3d Cir. 2004). The Eleventh Circuit has held that, as long as at least one claim in a habeas petition satisfies the one-year time limit, the court can hear *all* claims in the petition, even if some of those claims would otherwise be untimely. Walker v. Crosby, 341 F.3d 1240, 1245 (11th Cir. 2003). The majority of district courts confronting the issue have rejected *Walker* and concluded that any individual claim in a habeas petition should be dismissed if it does not satisfy the time limit. *See* Khan v. United States, 414 F. Supp. 2d 210, 216 (E.D.N.Y. 2006) (declining to address the untimely claims in a habeas petition that also contained a timely claim based on a newly recognized right); Murphy v. Espinoza, 401 F. Supp. 2d 1048, 1052 (C.D. Cal. 2005) (stating that "this Court must assess the timeliness of an inmate's [habeas] claims on a claim-by-claim basis"). *But see* Ferreira v. Dept. of Corr., 494 F.3d 1286, 1289 (11th Cir. 2007) (discussing and upholding *Walker* as valid precedent); Shuckra v. Armstrong, 2003 U.S. Dist. LEXIS 4408, at *12–13 (D. Conn. March 21, 2003) (*unpublished*) (holding that where a habeas petition contains at least one timely claim, other claims cannot be dismissed for untimeliness).

308. *See* 28 U.S.C. § 2244(d)(2) (explaining that the limitations period is tolled during "the time . . . which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending"); Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361, 364–65, 148 L. Ed. 2d 213, 218 (2000) (holding that a state post-conviction motion is "properly filed" even if the motion is procedurally barred, as long as the "delivery and acceptance [of the papers] are in compliance with the applicable laws and rules governing filings"). The *Artuz* Court also noted that these rules usually include the form of the document, the time limits on its delivery, the place it must be filed, and the filing fee.

309. *See* Allen v. Siebert, 552 U.S. 3, 7, 128 S. Ct. 2, 4, 169 L. Ed. 2d 329, 334 (2007) (holding that a petition for post-conviction relief rejected by the court as untimely is not "properly filed" under 28 U.S.C. § 2244(d)(2) and thus does not toll the one-year limitation, even though an affirmative defense of the state's statute of limitations may still be available).

310. *See* Duncan v. Walker, 533 U.S. 167, 172, 121 S. Ct. 2120, 2124, 150 L. Ed. 2d 251, 258 (2001) (holding that properly filed federal habeas petitions do not toll the one-year deadline). In this case, Walker's state conviction became final in April 1996, and he filed a habeas petition that was dismissed in July 1996. In May 1997 he tried to file another federal habeas petition, and the Court held that this petition was time-barred because the time he was waiting for the decision on his first federal habeas petition did not stop the clock on the one-year timeline.

dismisses your petition without prejudice, you may not be able to re-submit your habeas petition to the federal court before the one-year deadline. In some extreme situations, you may qualify for "equitable tolling" (a situation where the time is not counted against you). Time that is "equitably tolled" does not count against your one-year time limit. However, equitable tolling is only available when "'extraordinary circumstances' beyond the petitioner's control make it impossible to file a petition on time."[311]

Think of the time limit as a stopwatch with one year on its face. Once the direct review of your case becomes final, the clock starts ticking. If you are incarcerated in a state prison, when an Article 440 motion or state post-conviction petition is filed in state court, the clock is stopped. Once the state court decides the case and all other appeals are completed,[312] the clock starts ticking again, and a habeas petition must be filed in federal court before the one year is up. Note that the clock does not reset to one year. Rather, the only time remaining is what was left when the Article 440 motion or state habeas petition was filed in state court.

5. Successive Petitions[313]

It is difficult to file more than one federal habeas corpus petition. It is important to file your habeas petition properly and completely the first time. You may not raise a habeas claim a second time after it has been adjudicated (decided by a judge) on the merits.[314] There are a few instances when you may bring new claims in a second habeas petition, but these instances are very limited. It is difficult to show the court that your claim falls into one of the exceptions where petitioners are allowed to file a second petition.

If your first petition was insufficient for one of a few reasons, the courts will allow you to file a new petition without considering the new petition successive. The following are the situations for which the courts will not consider your second petition successive:

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311. *See* Rhines v. Weber, 544 U.S. 269, 277–278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (noting that in extraordinary circumstances the court may issue a stay so that the petitioner may have the opportunity to present his claim without the time limit running out). *See also* Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669, 679 (2005) (holding that habeas petitioner has the burden of establishing that he pursued his rights diligently and that some extraordinary circumstance stood in his way of filing within the time limit for equitable tolling to be proper). This is often a very high burden. For example, in the Third Circuit, the court rejected an equitable tolling argument when the petitioner was never informed that the state supreme court had denied his petition, even though his lawyer had been informed, since the lawyer never informed the petitioner. The court held attorney error was not sufficient to establish an extraordinary circumstance. LaCava v. Kyler, 398 F.3d 271, 275–276 (3d Cir. 2005). Courts also may allow equitable tolling of the statute of limitations to allow you to file a state exhaustion petition and an amended federal post-exhaustion petition.

312. Most courts have held that any time used to file a petition for *certiorari* to the Supreme Court after state post-conviction proceedings does not continue to toll the clock. *See* Stokes v. Dist. Attorney, 247 F.3d 539, 542 (3d Cir. 2001) (holding that the 90-day period during which a *certiorari* petition may be filed does not toll the statute of limitations); Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir. 2001) (affirming that the limitations period is not tolled for those 90 days); Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 2001) (finding that the limitations period for filing a habeas petition was not tolled while defendant was seeking an appeal to the Supreme Court).

313. "Successive" means the one after. In other words, any petitions you file after your first one are considered "successive."

314. 28 U.S.C. § 2244(b)(1). Section 2244 applies to all petitioners filing under §§ 2241, 2254, and 2255, which includes all state and federal habeas petitioners. You may consider reading the text of 28 U.S.C. § 2244 in full to better understand the restrictions on successive petitions. *See* Burton v. Stewart, 549 U.S. 147, 153–154, 127 S. Ct. 793, 796–797, 166 L. Ed. 2d 628, 633–635 (2007) (instructing the district court to dismiss incarcerated person's petition and finding that since the person had not made a motion in the court of appeals for an order authorizing the district court to consider the application, the application was thus a "second or successive" habeas application that he did not have authorization to file).

(1) If you failed to exhaust your state remedies, and your first petition is dismissed to allow you to exhaust your state remedies, your second petition, once all the claims are exhausted, is not considered successive.[315]
(2) If your first petition is rejected for failure to pay the filing fee or for mistakes in form, the second, corrected petition is not considered successive.[316]
(3) If the first petition you filed was mislabeled as a Section 2255 petition, but actually was a Section 2241 petition that challenged the execution instead of the validity of the sentence, the court will not bar (dismiss) your second petition for being successive.[317]
(4) If your second petition challenges parts of the judgment that came about as the result of an earlier, successful petition, the court will not bar that second petition.[318] In this case, you must obtain authorization to file a second petition.[319]

In some cases, even if the court deems a second petition to be successive, it may still allow you to proceed with your submission. However, exceptions to the general prohibition on successive petitions are rare and difficult to meet. The court will only consider a successive petition in extraordinary situations where you are raising a "new" claim in a second petition for federal habeas relief. The exceptions for "new" claims are different for people in state and federal prisons.

If you are incarcerated in a *state prison*, these are the exceptions to the general prohibition on successive petitions:

(1) Your new claim rests on a "new" and previously unavailable rule of constitutional law that the Supreme Court has deemed is applicable retroactively "to cases on collateral appeal."[320] This means, the Supreme Court has recently clarified or made a rule of constitutional law and noted that it applies, even to cases that were decided before they made the rule. See Part C(2) of this Chapter, "New Laws: The *Teague* Rules."

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315. *See* Slack v. McDaniel, 529 U.S. 473, 478, 120 S. Ct. 1595, 1601, 146 L. Ed. 2d 542, 551 (2000) (deciding that "a habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a 'second or successive' petition as that term is understood in the habeas context"); Carlson v. Pitcher, 137 F.3d 416, 420 (6th Cir. 1998) (affirming that "a habeas petition filed after a previous petition has been dismissed on exhaustion grounds is not a 'second or successive petition'"); Camarano v. Irvin, 98 F.3d 44, 46 (2d Cir. 1996) (*per curiam*) ("Application of the gatekeeping provisions to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review and thus, would conflict with the doctrine of writ abuse, as understood both before and after *Felker*. . . . To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether."). See Part D(2), "Exhaustion of State Remedies and Direct Appeal," of this Chapter for more information on exhaustion.

316. *See* O'Connor v. United States, 133 F.3d 548, 550 (7th Cir. 1998) (asserting that a petitioner's "returned" petition will not be considered an "initial petition"); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996) (finding that petitioner's failure to pay a filing fee is not to be considered an "unsuccessful petition" and therefore the subsequent petition is not considered "successive").

317. *See* Chambers v. United States, 106 F.3d 472, 474–475 (2d Cir. 1997). See Part A(4) of this Chapter, "Which Laws Apply to Federal Habeas Corpus," for more information on when people in federal prison would use § 2241 instead of § 2255.

318. *See, e.g.*, *In re* Taylor, 171 F.3d 185, 187–188 (4th Cir. 1999) (holding that petitioner's motion is not "second or successive" where petitioner seeks to raise only those issues that originated at the time of re-sentencing, after his first petition had been granted).

319. Burton v. Stewart, 549 U.S. 147, 157 127 S. Ct. 793, 799, 166 L. Ed. 2d 628, 637 (2007) (holding that where petitioner did not obtain authorization to file a second petition challenging the same judgment, the court lacked jurisdiction to hear it).

320. 28 U.S.C. § 2244(b)(2)(A). This provision only applies to you if the Supreme Court has announced a new right since your case was decided and has explicitly said that this new right would apply to cases that have already been decided. Tyler v. Cain, 533 U.S. 656, 662, 121 S. Ct. 2478, 2482, 150 L. Ed. 2d 632, 642 (2001) (allowing successive habeas petition if the claim relies "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable").

(2) Your new claim relies on facts that you could not have discovered earlier, even with "due diligence."[321] Additionally, these facts combined with the other facts already on the record establish by "clear and convincing"[322] evidence that "but for"[323] the constitutional error that you are challenging, no reasonable juror would have found you guilty of the offense with which you were charged.[324] See Part D(3)(B)(ii) of this Chapter, "Fundamental Miscarriage of Justice."

If you are incarcerated in a *federal prison*, these are the exceptions to the general prohibition:

(1) A recent Supreme Court decision announces a retroactive legal right (a right that, when announced, applies to past cases as well as future ones) that was not available when you filed your first petition.[325] In these cases, you do not need to show "the likelihood of innocence." If, after the rejection of your first petition, the Supreme Court announces that a particular new law will be applied to all future and prior cases, you can submit a second petition on the same claims. In these cases, you do not need to show that ignoring the new law will harm you in some way.[326]

(2) The combination of the "newly discovered evidence" with other facts on the record will provide "clear and convincing" evidence that, in the absence of a trial court's error, the jury would have found you not guilty.[327] In these cases, you need to show that the error caused by the court's violation of the Constitution, federal laws, or treaties is not simply "harmless."

Note that even if you can prove any of the above exceptions, other procedural difficulties could still keep you from filing a second request for habeas relief. In order to file a second petition in federal district court, you need to get permission from a panel of three federal circuit court judges. Upon your request, the panel of three judges will review your papers and make a decision within thirty days about whether or not they will allow your special second petition.[328] If the court decides not to review your papers, then you cannot appeal their decision and, thus, you cannot file a second petition.

Because the rules are so strict, you should be careful when you are filing your petition for the first time. Be sure you include all the facts and do not assume that you will have a second chance if you get something wrong or if you do not follow a procedural rule correctly. The new law in AEDPA was meant to be harsh, and it is.[329]

E. The Mechanics of Petitioning for Federal Habeas Corpus

This Section explains the basic process surrounding habeas law: (1) when to file, (2) where to file, (3) whom to file against, (4) how to file, (5) what to expect after you file, and (6) how to appeal.

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321. 28 U.S.C. § 2254(e)(2)(A)(ii). "Due diligence" means "good effort."

322. "Clear and convincing evidence" is a standard between "preponderance of evidence" and "beyond a reasonable doubt." According to the "clear and convincing evidence" standard, you must show that it is *highly likely* that the new facts would have changed the outcome of your trial. However, you do not have to show that the new facts *definitely* would have changed the outcome of your trial.

323. "But for," in this context, means "without."

324. 28 U.S.C. § 2254(e)(2)(B).

325. 28 U.S.C. § 2255(h)(2).

326. People in federal prison may be able to bring habeas claims by filing a § 2241 habeas motion even when the new law is not constitutional. To do this, the new law must meet a few conditions: (1) the new law must be substantive, and it must now deem the "criminal" conduct for which the petitioner was convicted no longer "criminal"; and (2) the new law must have been passed after the petitioner's direct appeal, and before the first habeas motion. *See* In re Jones, 226 F.3d 328, 333–334 (4th Cir. 2000). See also Part A(4), "Which Laws Apply to Federal Habeas Corpus," of this Chapter for more information on when people in federal prison should bring § 2241 petitions.

327. 28 U.S.C. § 2255(h)(1).

328. 28 U.S.C. § 2244(b)(3)(D).

329. *See* Felker v. Turpin, 518 U.S. 651, 654, 116 S. Ct. 2333, 2335, 135 L. Ed. 2d 827, 834 (1996) (finding AEDPA's new restrictions on successive habeas corpus petitions constitutional).

1. When to File

You must file your writ for habeas corpus in federal district court within one year after your case becomes "final."[330] This is *very* important; if you miss this time limit, you will probably not be allowed to bring a federal habeas claim. The time limit is discussed in detail in Part D(3) of this Chapter, "Time Limit."

If you are filing *pro se*,[331] you should file the following three documents within the one-year time limit: (1) a habeas petition,[332] (2) an application for appointment of counsel, and (3) an application for a stay (in death penalty cases only).[333]

2. Where to File

If you are incarcerated in a *state prison*, you may have a choice of federal courts in which to file your petition. You may file your petition in either the district court of the district where you are imprisoned, or in the district court of the district in which you were convicted.[334] For some people, this may be the same district. For others, these may be two different districts.

There are several advantages to filing in the district court where you were convicted. First, the records of your trial and sentencing are located there. Second, it is likely that additional evidence or witnesses that you may wish to produce for the court can be found there. Third, if you were convicted in a city and are now imprisoned in a small town or rural area, more qualified attorneys may be available to you in the district where you were convicted. On the other hand, if you already have an attorney, it may be easier for a local attorney to travel to your prison to discuss the case with you. In that case, you may choose to file in the district court of the place where you are now imprisoned. In any case, regardless of where you file, the court in which you file will likely transfer your case to the district where you were convicted if the court decides that a transfer is proper.[335]

If you are incarcerated in a *federal prison*, you do not have a choice of where to file your habeas petition. You must file your petition in the district in which you were convicted and sentenced.

3. Whom to File Against

If you are a person incarcerated in state custody filing a Section 2254 petition, or a person incarcerated in federal custody filing under Section 2241,[336] you need to name a respondent on your petition. If you are a person incarcerated in federal custody filing under Section 2255, you do not need to name a respondent on your petition.[337]

As a person incarcerated in state custody, your habeas petition is a civil, not a criminal, action. You can think of a habeas petition as a lawsuit—but instead of suing for money or damages, you are suing for a new trial, or for your release from imprisonment. Therefore, you cannot file a petition to the court; you must file a petition *against* the person currently responsible for detaining you. The person you file the petition against is called the "respondent." The respondent will be the person who

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330. *See* 28 U.S.C. § 2244(d)(1) (people in state prison); 28 U.S.C. § 2255(f) (people in federal prison).

331. "*Pro se*" means that you are appearing in court by yourself and are not represented by a lawyer.

332. Remember to raise all possible claims, as long as you can support them with factual details and explanations about how the violation of your rights harmed you by affecting the outcome of your trial.

333. A "stay" means a temporary court-ordered stop of the judicial proceeding.

334. 28 U.S.C. § 2241(d).

335. 28 U.S.C. § 2241(d).

336. If you are filing under 28 U.S.C. § 2241, the guidelines for your respondent will be similar to those for people in state prison filing under § 2254. See Part A(4), "Which Laws Apply to Federal Habeas Corpus," of this Chapter for information on when people in federal prison should use § 2241.

337. This is because a § 2255 motion, unlike a § 2241 or § 2254 petition, is technically a criminal procedural motion. So, the respondent remains the party that prosecuted you—the United States.

has control over your custody.[338] So, the person you name as the respondent will depend on the type of custody you are under.[339]

Generally, the person who has control over your custody and whom you should name as the respondent is the warden of your prison or the chief officer in charge of state penal institutions.[340] However, there are a few situations where you should name a different party as respondent. If you are not currently in custody, but are challenging a future custodial sentence, you should name the attorney general of the state that will have custody over you.[341] If you are not under physical custody of the state,[342] you should name as respondent the person who has legal control over your custody.[343] For example, if you are on parole, you should name the parole officer and the supervising agency, such as the parole board, as the respondents.[344]

4. How to File

To begin a habeas proceeding, you need to obtain a petition form for a writ of habeas corpus. You should write to the clerk of the federal district court in which you plan to file and request this form.[345] If you are incarcerated in a state prison, you should request the standard form for a petition under 28 U.S.C. § 2254 for a writ of habeas corpus.[346] If you incarcerated in a federal prison, request a standard form for a 28 U.S.C. § 2255 motion.[347] The clerk should send the form to you free of charge.[348] Sample blank forms for 28 U.S.C. § 2254 petitions and 28 U.S.C. § 2255 motions are in the United States Code ("U.S.C.") following each statute's rules.[349]

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338. This is called the "immediate custodian rule." Rumsfeld v. Padilla, 542 U.S. 426, 435, 124 S. Ct. 2711, 2717, 159 L. Ed. 2d 513, 527 (2004).

339. See Part D(1), "In Custody," of this Chapter for more information on custody.

340. "[T]he state officer having custody of the applicant [shall] be named as respondent." Rules Governing § 2254 Cases, Rule 2(a), 28 U.S.C. § 2254 advisory committee's note to 2004 amendment. You should name either the warden or officer based on who has "custody" over you. If you are unsure, you should name both the warden and the officer as respondents.

341. Rules Governing § 2254 Cases, Rule 2(a), 28 U.S.C. § 2254 advisory committee's note to 2004 amendment.

342. See Part D(1), "In Custody," of this Chapter for more information on custody.

343. *See* Rumsfeld v. Padilla, 542 U.S. 426, 439, 124 S. Ct. 2711, 2720, 159 L. Ed. 2d 513, 530 (2004) ("[I]dentification of the party exercising legal control only comes into play when there is no immediate physical custodian with respect to the challenged 'custody.'").

344. *See* Hogan v. Hanks, 97 F.3d 189, 190 (7th Cir. 1996) ("If the petitioner is on parole, the parole board or equivalent should be named [as respondent].").

345. For a list of federal district court addresses, see Appendix I at the end of the *JLM*.

346. Rules Governing § 2254 Cases 2(d) (requiring federal district courts to supply incarcerated people with forms for habeas corpus petitions). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Mar. 2, 2019).

347. Rules Governing § 2255 Proc., 2(c). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Mar. 2, 2019).

348. Rules Governing § 2255 Cases, 2(c). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Mar. 2, 2019).

349. Petition for Relief From a Conviction or Sentence By a Person in State Custody, available at https://www.ca4.uscourts.gov/docs/pdfs/ao241.pdf?sfvrsn=10 (last visited Mar. 2, 2019); Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody, available at https://www.ca4.uscourts.gov/docs/pdfs/ao243.pdf?sfvrsn=8) (last visited Mar. 2, 2019). Note that these are citations to blank sample forms, and should be attached to the rules governing these statutes. If you have trouble locating these in your library, check with the federal district court clerk. Note that the Rules Governing § 2254 Cases, 2(d) and the Rules Governing § 2255 Proc., 2(c), state that individual districts may alter the exact format

The form will ask for a lot of information. The information requested includes the facts on which you base your claims, your custody status, the state court proceedings in which you exhausted your claims, the citations and results of any other federal habeas petitions, and the relief you seek.[350] The petition or motion must also include all the grounds of relief available to you, the facts supporting each of your claims, and the relief you are requesting.[351] In providing this information, keep the following nine steps in mind.

(d) Write Plainly

Do not worry about using legal terminology with which you are uncomfortable. The court will not penalize you for not using formal legal terms. And, if you misuse legal phrases, you may confuse the court and prevent the judge from understanding your claim. Be sure to write as clearly as possible and to check your reasoning, grammar, and spelling.

(e) Tell the Facts

The most important thing you can do in your petition is to tell the court the relevant facts. Judges usually know the law but rarely know the facts of your case. If you have facts that relate to your legal claims—for example, that the government withheld a ballistics report from your trial lawyer—you should tell the court. Factual details you think are unimportant may be important to the court.

(f) Proofread

Ask someone you trust to read over your papers. Sometimes it is difficult to evaluate your own arguments. A fresh set of eyes can catch gaps in your reasoning or grammatical mistakes you might have missed.

(g) Argue Truthfully and Rely on the Law

Remember your audience. You are writing to a federal judge and his legal assistants. Federal judges and their assistants often have a great deal of experience handling habeas petitions, so you should not try to trick them or lie to them. Also, do not make a plea for mercy. Instead, you should appeal to a judge's sense of fairness by making an argument that the government has convicted or sentenced you unfairly. To do this, you should use the legal standards and information provided earlier in this Chapter and found through your own research.

(h) Provide Copies of Parts of the Record

Throughout the criminal justice process, you have probably received many papers like subpoenas, briefs, judgments, and transcripts. These papers make up the record of your case and are often helpful to a court reviewing your claim. Include copies of as much of the record as you can and point out the relevant parts of the record in your legal argument. If you are missing some of the record or do not have access to a copy machine, ask the court to get the relevant parts of the record from the trial court or the prosecution. If possible, identify the important parts of the record as specifically as you can. For example, do not simply say that the judge asked impermissible questions at your trial; instead, state (if possible) what those questions were and the transcript page numbers where the questions appear.

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of the form, but both the forms the court uses and the sample forms should have the same substance. Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Mar. 2, 2019).

350. ADMIN OFFICE OF THE U.S. COURTS, FORM AO 241, PETITION FOR RELIEF FROM A CONVICTION OR SENTENCE BY A PERSON IN STATE CUSTODY (2017), *available at* https://www.uscourts.gov/sites/default/files/AO_241_0.pdf (last visited Mar. 1, 2019); ADMIN OFFICE OF THE U.S. COURTS, FORM AO 243, MOTION TO VACATE, SET ASIDE, OR CORRECT A SENTENCE BY A PERSON IN FEDERAL CUSTODY (2017), *available at* https://www.uscourts.gov/sites/default/files/AO_243_0.pdf (last visited Mar. 1, 2019).

351. 28 U.S.C. § 2254 note (R. GOVERNING § 2254 CASES IN THE U.S. DIST. CTS. 2(c)(1)-(3)); 28 U.S.C. § 2255 note (R. GOVERNING § 2255 CASES IN THE U.S. DIST. CTS. 2(b)(1)-(3)).

(i) Provide Citations

Statutes, administrative rules, and judicial opinions often have citations explaining where they can be found. Whenever possible, give citations to the laws and cases that apply to your factual situation. See Chapter 2 of the *JLM*, "Introduction to Legal Research," to learn how to find these laws and cases and how to give citations. You do not have to give citations,[352] but they may help the judge make his or her decision efficiently. If you know only a part of the citation, like the name of a case, you should include that part. If you do not know the citation, do not include it and do not worry about it. Try not to include long lists of cases in your petition ("string cites"). Instead, use the best ones for your case. If a lot of cases say the same thing, pick the most recent decision from the highest court and cite it.

(j) Present All Possible Claims

As discussed in Part D(5) ("Successive Petitions") of this Chapter, you probably have only one chance to submit a federal habeas petition. Thus, in your habeas petition, you should include any and all the claims that are supported by the facts of your case and by the law.

(k) Sign, Date, and Copy

After you complete the form, you must sign it.[353] In addition, date the petition and/or swear to the date that it was given to a prison official to be mailed.[354] Then, make three copies of the completed petition so that you have four in total. You must send the original and two copies to the clerk of the court.[355] Keep the remaining copy for your own records.

(l) Pay Your Filing Fee

For people incarcerated in state custody and people incarcerated in federal custody filing 28 U.S.C. § 2241 petitions, the filing fee for a habeas petition is five dollars.[356] If you cannot afford the fee, you should ask the clerk of the court for an "*in forma pauperis*" application.[357] This application seeks the court's permission to proceed in the manner of a poor person by not paying court fees and costs.[358] In addition to completing the *in forma pauperis* form, you must write and sign an application of

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352. *See* Jones v. Jerrison, 20 F.3d 849, 853 (8th Cir. 1994) ("No statute or rule requires that a petition identify a legal theory or include citations to legal authority.").

353. *See* 28 U.S.C. § 2254 note (R. GOVERNING § 2254 CASES IN THE U.S. DIST. CTS. 2(c)(5)); 28 U.S.C. § 2255 note (R. GOVERNING § 2255 CASES IN THE U.S. DIST. CTS. 2(b)(5)).

354. Petition for Relief From a Conviction or Sentence By a Person in State Custody, p.16, 28 U.S.C. fol. § 2254 Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody, p.13, 28 U.S.C. fol. § 2255. It is important to note the date because the petition may not arrive at the court until a long time after you have given it to prison officials to be mailed. 28 U.S.C. §2254 r. 3(d); 28 U.S.C. § 2255 r. 3(d)(stating that a petition is considered on time as long as it enters the prison internal mailing system on or before the last day of filing). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

355. 28 U.S.C. § 2254 r. 3(a); 28 U.S.C. § 2255 r. 3(a). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

356. 28 U.S.C. § 1914(a).

357. 28 U.S.C. § 2254 r. 3(a)(2). Note that this is a citation to the Rules Governing § 2254 Cases in the United States District Courts, available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

358. ADMIN OFFICE OF THE U.S. COURTS, FORM AO 240, APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS (SHORT FORM) (2010), *available at* https://www.uscourts.gov/sites/default/files/ao240_0.pdf (last visited Mar. 1, 2019).

indigence.[359] You must also provide a certificate from your prison warden stating how much money is in your prison account.[360] When you have prepared the *in forma pauperis* form, the application of indigence, and the prison account certificate, you should make copies of them for your own records and send the originals to the clerk of the court. If the clerk accepts your application, you will not have to pay the filing fee or any other costs arising in your habeas proceeding.

People incarcerated in federal custody filing a motion under 28 U.S.C. § 2255 do not have to pay a filing fee.[361] However, all people incarcerated in federal custody should still complete the *in forma pauperis* form, discussed above, because it will be helpful to have the form on file in case the judge chooses to appoint you counsel.[362] Additionally, if you are a person incarcerated in federal custody filing 28 U.S.C. § 2241 petitions[363] or a person incarcerated in state custody filing 28 U.S.C. § 2254[364] petitions and you do not file the *in forma pauperis* application discussed above, you will have to pay the filing fee.

The Prison Litigation Reform Act ("PLRA") requires incarcerated persons to make full or partial payment of the application fee for civil suits. When the PLRA was first passed, it raised a question about whether habeas petitioners would be required to pay filing fees regardless of their *in forma pauperis* status.[365] However, federal courts of appeal have held that the requirements set out in the PLRA do not apply to incarcerated persons filing habeas corpus petitions.[366]

5. What to Expect After Filing

After you have filed your petition, you can expect the court to issue one or more of the following: (a) a dismissal, (b) an order to show cause, and/or (c) an evidentiary hearing. Generally, the court must conduct an evidentiary hearing if you "alleged facts, which, if found to be true, would have entitled

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359. 28 U.S.C. § 2254 r. 3(a)(2)(requiring an affidavit that the incarcerated person is unable to pay the filing fee in accordance with 28 U.S.C. § 1915). *See also* 28 U.S.C. § 1915 (stating general requirements for proceedings *in forma pauperis*). Note that this is a citation to the Rules Governing § 2254 Cases in the United States District Courts, available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

360. 28 U.S.C. § 2254 r. 3(a)(2). Note that this is a citation to the Rules Governing § 2254 Cases in the United States District Courts, available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

361. *See* 28 U.S.C. § 2255 r. 3 advisory committee's note ("There is no filing fee required of a movant under these rules."). Note that this is a citation to an Advisory Committee Note to the Rules Governing Section 2255 Proceedings for the United States District Courts, available at http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2255&num=0&edition=prelim (last visited Feb. 10, 2019).

362. *See* 28 U.S.C. § 2255 r. 3 advisory committee's note (stating that affidavit for an in forma pauperis form will still be attached to the form provided for a § 2255 motion in case the movant will need the form at a later stage). Note that this is a citation to an Advisory Committee Note to the Rules Governing Section 2255 Proceedings for the United States District Courts, available at http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2255&num=0&edition=prelim (last visited Feb. 10, 2019).

363. 28 U.S.C. § 1915 (general guidelines on proceedings *in forma pauperis*). For more information on when people incarcerated in federal custody should use 28 U.S.C. § 2241 instead of § 2255, see Part A(4), "Which Laws Apply to Federal Habeas Corpus?," of this Chapter.

364. 28 U.S.C. § 2254 r. 3(a). Note that this is a citation to the Rules Governing § 2254 Cases in the United States District Courts, available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

365. Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e. Please see Chapter 14 of the *JLM* for a full discussion of the PLRA.

366. *See*, *e.g.*, United States v. Levi, 111 F.3d 955, 956, 324 U.S. App. D.C. 196, 197 (D.C. Cir. 1997) (per curiam) (holding that the PLRA filing fee provisions do not apply to habeas proceedings); Smith v. Angelone, 111 F.3d 1126, 1129–1131 (4th Cir. 1997) (holding that the PLRA filing fee provisions do not apply to habeas proceedings); Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996) (holding that the PLRA filing fee provisions do not apply to habeas proceedings).

[you] to habeas relief."[367] In other words, the court is supposed to give you the benefit of the doubt and assume the truth of your alleged facts when deciding whether to look at the evidence in an evidentiary hearing. However, the court may make its decision without you present.[368]

(a) Dismissal

After you file your habeas request, the judge may dismiss your entire petition. The judge will do so if it appears on the face of your petition that you are not entitled to relief—that is, even assuming your claims are true, habeas law does not give you any relief.[369] For instance, the court will dismiss your claim if, in your federal habeas petition, you complain about a harmless error. The court may also reject your claim if the facts of your case on the record are not fully developed (in other words, if you have not fully stated that you have a federal claim), or if it is clear that your petition was not filed within the one-year time limit.

(b) Order to Show Cause

If the judge decides that, assuming the truth of your claim, you may have a case, he or she will issue an "order to show cause" to the person who has you in custody.[370] If you are a person incarcerated in state custody, this person is probably the superintendent of your prison.[371] If you are a person incarcerated in federal custody, this person is the United States Attorney (the prosecutor) in charge of your case.[372] The "order to show cause" directs the warden or attorney to state why the judge should not issue a writ of habeas corpus.[373] The warden or attorney must then reply by filing an "answer"

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367. *See* Ciak v. United States, 59 F.3d 296, 307 (2d Cir. 1995) (requiring an evidentiary hearing where petitioner alleged trial counsel abandoned defense strategy because of conflict of interest); *see also* Shaw v. United States, 24 F.3d 1040, 1043 (8th Cir. 1994) (dismissing habeas petition in order to allow district court to complete discovery on whether trial counsel failed to use exceptions to rape shield law); United States v. Blaylock, 20 F.3d 1458, 1465–1469 (9th Cir. 1994) (requiring evidentiary hearing where defendant claimed counsel's failure to inform defendant of government's plea offer constituted ineffective counsel); Gov't of V.I. v. Weatherwax, 20 F.3d 572, 580, 29 V.I. 410, 424 (3d Cir. 1994) (requiring evidentiary hearing where defendant claimed counsel's failure to seek *voir dire* constituted ineffective counsel because, if true, claim would be grounds for habeas corpus relief); Frazer v. United States, 18 F.3d 778, 781, 784–785 (9th Cir. 1994) (entitling incarcerated persons to evidentiary hearing unless files and record of the case conclusively show that the incarcerated person is not entitled to relief).

368. *See* 28 U.S.C. § 2243 (people incarcerated in state custody do not have to be present when the court is only dealing with issues of law); 28 U.S.C. § 2255(c) (people incarcerated in federal custody do not have to be present at the hearing determining a § 2255 motion).

369. 28 U.S.C. § 2254 r. 4 ("If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition …."); 28 U.S.C. § 2255 r. 4(b). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

370. 28 U.S.C. § 2254 r. 4 ("If the petition is not dismissed, the judge must order the respondent to file an answer, motion or other response."); 28 U.S.C. §2255 r. 4(b). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

371. 28 U.S.C. § 2254 r. 2(a) ("If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody"). Note that this is a citation to the Rules Governing § 2254 Cases in the United States District Courts, available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

372. 28 U.S.C. § 2255 r. 4(b) ("If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response."). Note that this is a citation to the Rules Governing § 2255 Proceedings in the United States District Courts, available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

373. The state attorney or a district attorney will usually represent the warden. 28 U.S.C. § 2254 r. 4; 28 U.S.C. § 2255 r. 4(b). Note that these are citations to the Rules Governing § 2254 Cases in the United States

within a time limit fixed by the court,[374] and must supply you with a copy of his answer.[375] If you object to any statement of fact in the answer, you need to challenge the statements in a document known as a "traverse."[376]

(c) Evidentiary Hearing

For people incarcerated in state custody, under AEDPA, the court reviewing your habeas petition is required to assume the facts as found by the state court.[377] This means that the habeas court must make its judgment on your habeas petition based on the version of the facts that your trial court found to be true. However, after receiving the petition, answer, and traverse, the habeas court may choose to hold an evidentiary hearing on facts that were not fully developed in state trial court.[378] Facts that are not fully developed are those that are still in dispute. The habeas court's decision to hold a hearing may depend on why the facts were not developed in the trial court. Whether a hearing will be held may be affected by (1) whether some error for which you are responsible prevented the development of the facts, or (2) whether the state's error prevented the factual development.

6. Petitioner's Error

For people incarcerated in state custody, if you or your lawyer failed to fully develop the facts in state court, this is referred to as a "petitioner's error." AEDPA has severely limited the opportunities

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District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

374. 28 U.S.C. § 2254 r. 5(b); 28 U.S.C. § 2255 r. 5(b). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

375. 28 U.S.C. § 2254 r. 5 advisory committee's note ("Rule 5 does not indicate who the answer is to be served upon, but it necessarily implies that it will be mailed to the petitioner …."). Note that this is a citation to an Advisory Committee Note to the Rules Governing Section 2254 Cases in the United States District Courts, available at http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28 section2254&num=0&edition=prelim (last visited Feb. 10, 2019).

376. A "traverse" is your way of denying any important facts claimed by the warden. Under Rule 5 following § 2254 and § 2255, you may submit a "reply" in response to the other side's answer within a time fixed by the judge. 28 U.S.C. § 2254 r. 5(e); 28 U.S.C. § 2255 r. 5(d). Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

377. 28 U.S.C. § 2254(e)(1)("a determination of a factual issue made by a State court shall be presumed to be correct.").

378. *See* 28 U.S.C. § 2254 r. 8 advisory committee note (stating that the judge may hold an evidentiary hearing where the material facts of the case are in dispute (citing Townsend v. Sain, 372 U.S. 293, 319)); 28 U.S.C. § 2254(d) specifies the circumstances under which a hearing is mandatory. 28 U.S.C. § 2254 r. 8 advisory committee's note. Note that this is a citation to an Advisory Committee Note to the Rules Governing Section 2254 Cases in the United States District Courts, available at http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2254&num=0&edition=prelim (last visited Feb. 10, 2019).

Regardless of whether you are incarcerated in state or federal custody, the federal district court may designate a magistrate to conduct hearings on your petition. 28 U.S.C. § 2254 r. 8(b); 28 U.S.C. § 2255 r. 8(b). After the hearing, the magistrate judge must file their findings of facts and recommendations with the court, and then mail you a copy. 28 U.S.C. § 2254 r. 8(b); 28 U.S.C. § 2255 r. 8(b). You must serve and file written objections to the magistrate's findings and recommendations *within 14 days* of receiving the magistrate's proposals. 28 U.S.C. § 2254 r. 8(b); 28 U.S.C. § 2255 r. 8(b). While Rule 8(b) states only that you "may" file written objections, you should *always* file written objections if you disagree with any of the magistrate's findings or recommendations. Note that these are citations to the Rules Governing § 2254 Cases in the United States District Courts, and to the Rules Governing § 2255 Proceedings for the United States District Courts, both are available at https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 10, 2019).

for evidentiary hearings in this situation. The rule states that you must show two things in order to receive an evidentiary hearing: cause and innocence.[379]

You can show cause in one of two ways:

(1) By showing you are now relying on a retroactive right newly recognized by the Supreme Court,[380] or

(2) By showing you are now relying on newly discovered facts that could not be uncovered earlier during the state proceedings through "due diligence" (reasonable effort).[381]

In addition to showing cause, you must also show innocence. You can show innocence if the "facts underlying [your] claim would be [enough] to establish by clear and convincing evidence that but for the constitutional error, no reasonable fact-finder would have found [you] guilty of the underlying offense."[382] In other words, you must prove that, if the constitutional error you are alleging had never happened, a "reasonable" juror would have found you innocent of the crime of which you were convicted.

If you show both cause and innocence will you be granted an evidentiary hearing to further develop your facts. However, if you cannot show cause and innocence, the court will proceed with the facts as they appear in the state court record. Petitioner's error is difficult to show if you made a mistake presenting your case. If the lack of factual development was caused by your error, the court will probably not grant you an evidentiary hearing. The possibility of not getting an evidentiary hearing explains why it is so important for you to investigate and raise all the facts supporting all your constitutional claims in state court. It is also why you must ask the state court to appoint an investigator and all the experts you need to help you discover and identify facts supporting your constitutional claims. Be sure to also request discovery of documents, and always request an evidentiary hearing at which you can present your witnesses and evidence and can prove your claims. If you do not request discovery of documents in state court, the cause and innocence standard means that you may not be able to request discovery of documents in your habeas court. Because the cause and innocence standard also makes it unlikely that the habeas court will give you an evidentiary hearing, you should request an evidentiary hearing in state court so that you can develop all of the facts necessary for your habeas petition.

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379. The statute does not use the terms cause or innocence, but does require that you provide the court with a reason, based either on new law or facts, to hear your claim, as well as prove your likely innocence *See* 28 U.S.C. § 2254€(2); *see also* McQuiggin v. Perkins, 569 U.S. 383, 396, 133 S. Ct. 1924, 1934, 185 L. Ed. 2d 1019, 1033 (2013) ("Under AEDPA, a petitioner seeking an evidentiary hearing must show diligence and, in addition, establish her actual innocence by clear and convincing evidence.").

380. 28 U.S.C. § 2254(e)(2)(A)(i). This means that you are relying on a right that, even though it was recognized after your trial, can be applied to past situations like yours.

381. 28 U.S.C. § 2254(e)(2)(A)(ii). For a case providing an example of evidence not previously discoverable through "due diligence," *see* Williams v. Taylor, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). In that case, the Supreme Court held that, in order to obtain an evidentiary hearing in federal court, the petitioner had to show he exercised due diligence in trying to develop the facts in state court. If the petitioner could show he was "diligent in developing the record and presenting, if possible, all claims of constitutional error," but the facts remained inadequately developed regardless, the petitioner may be entitled to a federal evidentiary hearing. Williams v. Taylor, 529 U.S. 420, 437, 120 S. Ct. 1479, 1491, 146 L. Ed. 2d 435, 452 (2000). Additionally, the requirement of due diligence does not depend on whether the efforts were successful, but on whether "the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Williams v. Taylor, 529 U.S. 420, 435, 120 S. Ct. 1479, 1490, 146 L. Ed. 2d 435, 451 (2000). The Court also held that "in the usual case … the prisoner, [must] at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." Williams v. Taylor, 529 U.S. 420, 437, 120 S. Ct. 1479, 1490, 146 L. Ed. 2d 435, 452 (2000); *see also* Dobbs v. Zant, 506 U.S. 357, 359, 113 S. Ct. 835, 836, 122 L. Ed. 2d 103, 107 (1993) (finding that a trial transcript may not be excluded for delay in its being discovered where the delay mostly was a result of the state's error).

382. 28 U.S.C. § 2254(e)(2)(B); *see* Sawyer v. Whitley, 505 U.S. 333, 345, 112 S. Ct. 2514, 2522, 120 L. Ed. 2d 269, 283–284 (1992) (citing the "actual innocence" exception, but not allowing an exception based solely upon a showing of additional mitigating evidence that related only to the discretionary decision between the death penalty and life imprisonment).

7. State's Error

If the state or the state court prevented the development of facts in your case, you will receive a mandatory hearing. The Supreme Court has listed six situations in which state errors require the federal court to hold an evidentiary hearing:[383]

(1) The merits of the factual dispute were not resolved in the state hearing,
(2) The state's factual determination is not fairly supported by the record as a whole,
(3) The state court's fact-finding procedure did not adequately provide a full and fair hearing,
(4) There is a substantial allegation of newly discovered evidence,
(5) The material facts were not adequately developed at the state court hearing,[384] or
(6) The state judge did not afford the applicant a full and fair hearing for any reason.

Remember that these situations afford you a hearing only if the state or the court was at fault for not developing the facts during the state proceedings.

8. How to Appeal

If you filed a petition for habeas corpus in federal district court and your petition was denied, you may appeal to the appropriate United States Court of Appeals (also called the circuit court).[385] Because AEDPA has severely restricted the opportunity to file a second or successive petition for habeas relief, the opportunity to appeal your first petition is even more important. Be sure to follow the procedures correctly. You must file a notice of appeal in the district court within thirty days of the district court judgment.[386] You must be sure to file on time because it is unlikely the circuit court will grant an extension.[387]

An appeal is not mandatory, and you do not have an automatic right to appeal a denial of your habeas petition. In order to appeal you must get permission by obtaining a "certificate of appealability" from a federal district judge or circuit court judge.[388] You do this by filing an application for a certificate of appealability with your notice of appeal in district court.[389] If the district court denies your request for a certificate of appealability entirely, you may request one from the appeals court by filing an

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383. Townsend v. Sain, 372 U.S. 293, 313, 83 S. Ct. 745, 757, 9 L. Ed. 2d 770, 786 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5–6, 112 S. Ct. 1715, 1717–18, 118 L. Ed. 2d 318, 326–327 (1992).

384. Under *Keeney v. Tamayo-Reyes*, federal courts will not provide an evidentiary hearing to a habeas petitioner who had an adequate opportunity to develop the relevant facts in state court proceedings unless the petitioner can show (1) cause for failure to develop the facts and that that failure resulted in actual prejudice to petitioner; or (2) he can show that a fundamental miscarriage of justice would result from not having an evidentiary hearing. Keeney v. Tamayo-Reyes, 504 U.S. 1, 11–12, 112 S. Ct. 1715, 1721, 118 L. Ed. 2d 318, 330–331. *But see* Rhoden v. Rowland, 10 F.3d 1457, 1460 (9th Cir. 1993) (remanding for an evidentiary hearing because, unlike the petitioner in *Tamayo-Reyes*, petitioner here took all steps possible to develop a record of prejudice). Note that the standards of both *Townsend* and *Keeney* were superseded by the passage of the AEDPA in 1996.

385. 28 U.S.C. § 2253(a).

386. 28 U.S.C. § 2107(a).

387. Even though getting an extension is hard, Federal Rule of Appellate Procedure 4(a)(5)(A) allows federal courts to extend the time for filing if you can show excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(A)(ii). For example, in Mendez v. Knowles, 556 F.3d 757, 764–67 (9th Cir. 2009), the court granted an extension based on excusable neglect, when the defendant's mailed habeas petition arrived to the court a day late. The court believed it was permissible to grant an extension because it would not prejudice the other party, the defendant acted in good faith when he filed the petition for an extension, and the delay was only for one day and had no impact on the judicial proceedings. Note that these are still very narrow circumstances, and different courts may be more or less open to granting extensions.

388. 28 U.S.C. § 2253(c)(1); *see*, *e.g.*, Hogan v. Zavaras, 93 F.3d 711, 712 (10th Cir. 1996) (refusing to issue a certificate of appealability because the plaintiff failed to show a substantial denial of a constitutional right).

389. 28 U.S.C. § 2253.

application for a certificate of appealability with that court's clerk.[390] If the district court grants a certificate for only some of your claims, you may ask the court of appeals to include additional claims the district court did not specify.[391]

The circuit judge will permit an appeal only upon a "substantial showing of the denial of a constitutional right."[392] To satisfy this "substantial showing" standard, you must specify the issue(s) involved in the violation of your federal constitutional rights.[393] Be sure to ask for a certificate of appealability on every issue you want to appeal. Your appeal will be limited to those issues on which the certificate is granted.

Some of the "appealable issues" that have been accepted in the past are listed below:

(1) Even if the parties consent, does a magistrate judge have the authority under 28 U.S.C. § 636 and Article III of the Constitution to make a final judgment in a habeas corpus case?[394]
(2) Did the trial court deny you the right to confront witnesses?[395]
(3) Did the prosecutor commit a *Brady* violation concerning blood-testing evidence?[396]
(4) Did the prosecutor commit a *Brady* violation by withholding witness statements at trial that were favorable to your case?[397]
(5) Was your confession coerced by police beatings?[398]
(6) Was your trial counsel constitutionally ineffective?[399]

If your petition was dismissed for procedural reasons, like failure to exhaust state remedies,[400] a certificate of appealability will only be granted if reasonable jurors could debate whether (1) a constitutional violation occurred, and whether (2) the district court correctly dismissed your petition.[401] Issuing a certificate of appealability does not require showing that the appeal will succeed

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390. 28 U.S.C. § 2253. If the court of appeals denies your request for a certificate of appealability, you may try to appeal this denial to the Supreme Court. The Supreme Court has held that it has jurisdiction to hear such appeals. Hohn v. United States, 524 U.S. 236, 247, 118 S. Ct. 1969, 1975, 141 L. Ed. 2d 242, 256 (1998).

391. *See*, *e.g.*, Rule 22-1(e) of the Ninth Circuit Rules, which allows a defendant to present issues that did not appear in the application for the certificate of appealability and which submits this motion to expand the certificate of appealability to be decided by the merits panel as it sees appropriate. 9TH CIR. FED. R. APP. P. 22–1(e).

392. 28 U.S.C. § 2253(c)(2).

393. 28 U.S.C. § 2253(c)(3).

394. *See* Orsini v. Wallace, 913 F.2d 474, 476 (8th Cir. 1990) (finding that magistrate judges have authority to enter final judgment on a habeas petition where both parties consent because "Congress intended for magistrates to be authorized to conduct habeas proceedings within the limitations set forth in 28 U.S.C. § 636(c)(1).").

395. *See* Norris v. Schotten, 146 F.3d 314, 329–331 (6th Cir. 1998) (stating that an error in limiting cross-examination will yield a grant of habeas relief only when the error rises to the level of a "being a denial of fundamental fairness.").

396. Norris v. Schotten, 146 F.3d 314, 334 (6th Cir. 1998) (stating that *Brady* principles—which require prosecutors to disclose certain evidence favorable to the defendant—only apply when prosecutors either fail to disclose evidence, or when they disclose evidence so late that it prejudices the defendant).

397. Mahler v. Kaylo, 537 F.3d 494, 503–504 (5th Cir. 2008) (reversing district court's denial of defendant's petition for habeas relief by finding that the lower court's determination that the witness statements were not material was contrary to established federal law).

398. *See* Nelson v. Walker, 121 F.3d 828, 832 (2d Cir. 1997) (finding that the defendant satisfied the requirement of a "substantial showing of a denial of a constitutional right" because the record indicated it was "debatable among jurists of reason …" that his confession was coerced by beatings).

399. See Part B(2) ("Standards and Tests for Claims of Violations") of this Chapter for more information on ineffective assistance of counsel.

400. See Part B(5) ("Successive Petitions") of this Chapter for more information on failure to exhaust.

401. Slack v. McDaniel, 529 U.S. 473, 484, 489, 120 S. Ct. 1595, 1604, 1606–1067, 146 L. Ed. 2d 542, 555, 558 (2000) (reversing district court's denial of habeas petition because defendant had shown reasonable jurists could conclude that the district court's procedural rulings were wrong). The Second Circuit applied the same standard in Matias v. Artuz, 8 F. App'x. 9, 11–12 (2d Cir. 2001).

but that reasonable jurors could *debate* whether the petition should have been resolved differently.[402] The inquiry does not require full consideration of the factual or legal bases presented in support of the claim,[403] which makes getting a certificate of appealability a bit easier.

F. How to Get Help from a Lawyer

You do not have a constitutional right to a court-appointed lawyer in a federal habeas corpus proceeding. In non-capital cases, a court may provide you with a lawyer when the "interests of justice" require the court to do so.[404] If you are not appointed a lawyer, your right to access the courts includes at least some access to either a law library or "jailhouse" lawyers.[405] See *JLM*, Chapter 3, "Your Right to Learn the Law and Go to Court," for more information. It is important to note that even if you are appointed counsel for your habeas petition, you do not have a right to *effective* assistance of counsel.[406]

Generally, federal courts will appoint a lawyer to represent you if one of the following is true:

(1) Your case involves complex legal issues;[407]

(2) You are mentally or physically disabled;[408]

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402. Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034, 154 L. Ed. 2d 931, 944 (2003) ("A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues are adequate to deserve encouragement to proceed further.").

403. Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039, 154 L. Ed. 931, 950 (2003) ("This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.").

404. 18 U.S.C. § 3006A(a)(2)(B); 28 U.S.C. § 2255(g); R. Governing § 2255 Cases 6(a), 8(c), *available at* https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 9, 2019). For incarcerated persons in state custody, the court may appoint counsel for an applicant who is or becomes unable to afford counsel. Again, the decision is governed by the "interests of justice." 28 U.S.C. § 2254(h); R. Governing § 2255 Cases 6(a), 8(c), *available at* https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 9, 2019); *see also* Reese v. Fulcomer, 946 F.2d 247, 263–264 (3d Cir. 1991) (describing the factors the court should consider before appointing counsel to an indigent habeas petitioner as: (1) whether the habeas claim is frivolous; (2) whether appointment of counsel will benefit the petitioner and the court; (3) the complexity of the legal or factual issues in the case; and (4) the ability of the pro se petitioner to investigate facts and present claims).

405. *See* Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72, 83 (1977) (holding that the right of access to the courts "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing incarcerated persons with adequate law libraries or adequate assistance from persons trained in the law."). *See also* Lewis v. Casey, 518 U.S. 343, 351–353, 116 S. Ct. 2174, 2180–2181, 135 L. Ed. 2d 606, 617–619 (1996) (affirming the view from *Bounds* that incarcerated persons' rights includes access law libraries and librarian staff, but limiting the decision by holding that incarcerated persons need to show an actual injury suffered to prove a violation of the right to access to the courts).

406. 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

407. *See, e.g.*, Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990) (stating the district court was wrong for failing to appoint counsel because the factual and legal issues were sufficiently complex and numerous; also finding that petitioner's imprisonment significantly hurt his ability to investigate the issues); United States *ex rel.* Jones v. Franzen, 676 F.2d 261, 267 (7th Cir. 1982) (holding that counsel should be appointed for complex legal issues like allegations regarding withholding evidence, admission of co-defendant's statements, and improper jury sequestration). "Jury sequestration" is when the court orders that the jurors be isolated from the public and have limited access to outside influences, like television news or newspapers)). But you should know a court won't always appoint counsel. *See* Williams v. Groose, 979 F.2d 1335, 1337 (8th Cir. 1992) (refusing to appoint counsel when petitioner had assistance in his earlier judicial proceedings that raised substantially similar claims as his habeas claim).

408. *See* Hearn v. Dretke 376 F.3d 447, 455 (5th Cir. 2004) (holding that a incarcerated person's petition for appointment of counsel need rest only on a colorable claim of mental retardation); In re Hearn, 389 F.3d 122, 123 (5th Cir. 2004) (clarifying that even if counsel is appointed, this does not grant capital defendants a right to automatic stay of execution pending review); Merritt v. Faulkner, 697 F.2d 761, 764–766 (7th Cir. 1983) (appointing counsel to a recently blinded petitioner in a non-habeas petition that had the same requirements for

(3) You cannot investigate key facts, or the issues in your case require expert testimony to be resolved;[409]
(4) The court decides to hold a hearing to investigate the facts of your case;[410]
(5) The court allows you to conduct discovery;[411] or
(6) Your habeas petition is denied in district court but a certificate of appealability is granted in the court of appeals.[412]

The federal district judge usually has full discretion in determining whether you should get assigned a lawyer for one of these reasons. This means that the appellate court normally will not overturn the district judge's decision about the appointment of counsel. However, at least one jurisdiction has made a general rule that counsel should be appointed whenever an indigent incarcerated person has a strong legal claim in a habeas petition.[413]

To request a court-appointed lawyer, you must prepare a motion for appointment of counsel, a brief document stating the legal and factual reasons why the court should appoint a lawyer, and an *in forma pauperis* application[414], including the supporting documents discussed in Part E(4) of this Chapter.

You may file these papers at several different times during your habeas proceeding. For example, you may request a lawyer even before you file your petition, so that the lawyer can help you prepare the petition. Courts, however, are unlikely to appoint an attorney at this early stage because they do not know the nature or complexity of your claims. So, you may want to wait until you submit your petition or until a later stage in the proceeding, such as during discovery or a hearing, when the rules favor appointment of a lawyer because the issues become more complex.

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appointment of counsel as habeas petitions). *But see* Phelps v. United States, 15 F.3d 735, 738 (8th Cir. 1994) (refusing to appoint counsel to a petitioner committed to a mental health institution where the court found that he was "'fully capable of arguing the issues'" and there was "no inference that [petitioner] was unable to understand the legal proceedings in which he was participating.").

409. *See*, *e.g.*, Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990) (requiring because, among other things, petitioner's imprisonment significantly impaired his ability to investigate the issues); United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960) (ruling that when complex factual data must be developed and incarcerated person does not have sufficient ability or training to recognize, organize, or elicit testimony to develop such data, appointment of counsel may be necessary); Al Odah v. United States, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (determining that incarcerated person who did not have access to a law library, had an "obvious language barrier," and were "almost certainly lack[ing] a working knowledge of the American legal system" were entitled to appointed counsel because it was "impossible" for them to investigate their claim); Lemeshko v. Wrona, 325 F. Supp. 2d 778, 788 (E.D. Mich. 2004) (finding counsel should be appointed in a habeas action where incarcerated person "has made a colorable claim, but lacks the means to adequately investigate, prepare, or present the claim.").

410. Rule 8 (c) of the Rules Governing § 2254 Cases and of the Rules Governing § 2255 Cases require a court to appoint a lawyer if the court decides to hold a hearing to investigate the facts of your case and you are financially eligible under 18 U.S.C. § 3006A. These rules can be viewed at the follow location: https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (last visited Feb. 9, 2019). *See also* United States v. Duarte-Higareda, 68 F.3d 369, 370 (9th Cir. 1995) (finding court appointment of counsel mandatory for indigent applicants when evidentiary hearings are required for habeas petitions under 28 U.S.C. § 2255 or 28 U.S.C. § 2254).

411. Rule 6(a) of the Rules Governing § 2254 Cases, and of the Rules Governing § 2255 Cases suggest that a court should provide you with a lawyer if the court believes a lawyer is necessary for effective use of discovery proceedings, and you are financially eligible under 18 U.S.C. § 3006A. See Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery," for a discussion of discovery.

412. *See* 18 U.S.C. 3006A(a)(2)(B); ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY: DEFENDER SERVICES § 210.20.20 (2019), *available at* http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-210-representation-under-cja#a210_20 (last visited Mar. 2, 2019).

413. The court's rule extends to civil actions in general, not just habeas petitions. Hahn v. McLey, 737 F.2d 771, 774 (8th Cir. 1984) (holding that "when an indigent [person] presents a colorable civil claim to a court, the court, upon request, should order the appointment of counsel" if satisfied that the incarcerate person has made out a prima facie case).

414. An application submitted by someone who cannot afford a lawyer.

G. Conclusion

This Chapter explains the writ of habeas corpus and lays out the procedures you will need to follow to petition for the writ. Remember, your imprisonment is unlawful if your arrest, trial, or sentence violated a federal statute, treaty, or the U.S. Constitution. However, the process and standards for your habeas claim will differ depending on whether you are incarcerated in state or federal custody. If you are incarcerated in state custody, for your writ of habeas corpus to succeed, your imprisonment must violate the U.S. Constitution. In either case, a federal habeas petition claims that your imprisonment is illegal because your arrest, trial, or sentence violated federal law.

APPENDIX A:

THE NINE-STEP APPEALS PROCESS

This chart represents the steps you must take when appealing a decision as person incarcerated in state custody. The chart starts from the initial trial and goes all the way through to the habeas petition.

The first column, on the left, shows you how to make direct appeals. Box 1 is your initial trial. After this trial you make your direct appeals to the higher state courts, shown in box 2. After your direct appeals to the higher state courts, you appeal to the United States Supreme Court. This is the last step in your direct appeals process. This is shown in box 3.

The second column (the middle of the chart) represents your state post-conviction proceedings. You begin state post-conviction proceedings *after* your direct appeals are complete. You begin this process in the same court where your trial was. Box 4 shows the first step of a state post-conviction appeal. In box 5, you appeal to the higher state courts. Finally, in box 6, you appeal to the United States Supreme Court, the last step in your state post-conviction proceedings.

The final step is to begin your federal habeas corpus petition. You begin the federal habeas process after completing your direct appeals process, in the first column, and after you have completed your state post-conviction proceedings, in the second column. You start in the appropriate federal district court, shown in box 7. In box 8, you appeal to the appropriate circuit court. Finally, you appeal to the United States Supreme Court in box 9.

You can always ask the Supreme Court to hear your case, but it does not have to grant your request. If you do ask the Supreme Court to hear your case, it is called petitioning for a *writ of certiorari*. The Supreme Court will either grant your petition (hear your case) or deny your petition (refuse to hear your case). It is worth noting that the Supreme Court rarely grants these petitions. It is important to file, even if you think you might not be successful.

DIRECT APPEAL	STATE POST-CONVICTION	FEDERAL HABEAS
(1) Trial in the Court	(4) Post-Conviction in Court Where Convicted	(7) Federal District Court
↓	↓	↓
(2) Direct Appeal to State Intermediate Court and State Supreme Court	(5) Appeal to State Intermediate Court and State Supreme Court	(8) Court of Appeal (Circuit Court)
↓	↓	↓
(3) U.S. Supreme Court	(6) U.S. Supreme Court	(9) U.S. Supreme Court

APPENDIX B:

CHECKLIST FOR FIRST-TIME FEDERAL HABEAS CORPUS PETITIONERS

Before submitting your habeas petition, make sure that you can answer "yes" to each of the following questions:

For people incarcerated in state OR federal custody:

(1) Have you tried to get help from an attorney?
(2) Does your conviction or sentence violate the Constitution, federal law, or treaties?
(3) Have you described how your conviction or sentence violates the Constitution, federal law, or treaties?
(4) Have you discussed every possible violation and included a detailed explanation of the facts for each violation?
(5) If the violation concerns the illegal search and seizure clause of the Fourth Amendment, have you shown that you were denied the opportunity to discuss this claim in the trial or appeals process?
(6) If possible, does your petition avoid relying on "new" law ("new" laws are laws that passed after your trial; see Sections 2 and 3 of this Chapter)?
(7) Does the violation have a substantial effect on the verdict or sentence? Was the violation not "harmless?"
(8) Have you explained why the violation was not harmless?
(9) Can you file your habeas petition within one year from when your case became final?
(10) Have you written to the clerk to ask for a model form?
(11) Have you checked your petition to see if your arguments are logical and organized and have the correct spelling and grammar?
(12) If possible, have you asked someone to read and check your papers?
(13) Have you made four copies of the petition and kept one for yourself?

For people incarcerated in state custody:

(1) Are you in state custody?
(2) Have you followed state procedures in exhausting the state remedies or have you challenged your procedural default?
(3) Have you chosen where you will file your petition?

For people incarcerated in federal custody:

(1) Are you in federal custody?
(2) Have you finished your initial appeal motion to your sentencing court?

For people sentenced to the death penalty for a state criminal conviction:

(1) Have you sought the advice of an attorney?
(2) Have you applied for a stay of execution?
(3) If your state meets the guidelines in Section 2261 (if your state is an "opt-in" state), can you file your habeas petition within six months of the date your conviction becomes final?

APPENDIX C:

Examples of Habeas Claims Based on the Constitution

1) Investigation and Policing: A witness identified you through a police line-up or photograph in which the police were (impermissibly) suggestive,[415] violating your Fourteenth Amendment right to due process.
2) Your Confession: Your confession was obtained involuntarily in violation of your Fourteenth Amendment due process rights.[416] In order to prove that your confession was involuntary, you must prove that your will was overborne (overtaken).[417] Some facts that may support a claim that your will was overborne include threats of physical violence,[418] threats against loved ones,[419] repeated coercive questioning after you indicated that you wanted to stop answering questions,[420] fraudulent promises by police,[421] and other forms of ill treatment.[422]
3) Right to Counsel Violations: You were denied your Fifth and Sixth Amendment rights to counsel. You would claim this if (1) you were denied counsel that the State should have provided because you were indigent (poor); (2) you were denied the opportunity for new counsel when an irreconcilable difference arose between you and your appointed counsel;

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415. Suggestiveness is generally determined by five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977); *see also* Neil v. Biggers, 409 U.S. 188, 199–200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972) (discussing suggestiveness and the possible danger from police suggestiveness, but ultimately finding that the totality of circumstances showed that the suggestiveness was overcome in that case); Dickerson v. Fogg, 692 F.2d 238, 244–247 (2d Cir. 1982) (granting habeas relief because the identification was impermissibly suggestive based on the five-factor assessment). *Dickerson* involved both a pretrial and in-court identification. The court held that the suggestiveness of the pretrial identification must be weighed against the independent reliability of the in-court identification. Dickerson v. Fogg, 692 F.2d 238, 244 (2d Cir. 1982).

416. *See* Miller v. Fenton, 474 U.S. 104, 110–112, 106 S. Ct. 445, 449–451, 88 L. Ed. 2d 405, 411–412 (1985) (holding that the voluntariness of a confession is not a factual question but a legal question that requires independent consideration in a habeas proceeding, and that such a finding would therefore not be subject to the § 2254(d) presumption of correctness for state court findings of fact). In *Miller*, the police got a confession by questioning a suspect with a mental problem and telling him that, if he confessed, he would receive medical help instead of punishment. Miller v. Fenton, 474 U.S. 104, 106–107, 106 S. Ct. 445, 447–448, 88 L. Ed. 2d 405, 408–409 (1985).

417. *See* Dickerson v. United States, 530 U.S. 428, 434, 120 S. Ct. 2326, 2331, 147 L. Ed. 2d 405, 413 (2000) (affirming that when a defendant claims his confession was involuntary, the question is whether his will was overborne by the circumstances surrounding the giving of the confession).

418. *See* Brown v. Mississippi, 297 U.S. 278, 286, 56 S. Ct. 461, 465, 80 L. Ed. 682, 687 (1936) (stating that due process is violated when violence is used to coerce confession).

419. *See* Lynumn v. Illinois, 372 U.S. 528, 534, 83 S. Ct. 917, 920, 9 L. Ed. 2d 922, 926 (1963) (finding that defendant's confession was involuntary because her will was overborne when the police threatened to take her young children from her if she did not confess).

420. *See* Kordenbrock v. Scroggy, 919 F.2d 1091, 1100 (6th Cir. 1990) (holding that portions of the confession were invalid because they were obtained after the police ignored defendant's statements that he did not want to talk and they threatened to arrest his girlfriend).

421. *See* United States v. Rutledge, 900 F.2d 1127, 1129–1131 (7th Cir. 1990) (holding that police are allowed to pressure, cajole, conceal facts, actively mislead, and commit minor acts of fraud, but are not allowed to feed the defendant false promises in a manner that "seriously distorts his choice" to the point where a rational decision becomes impossible).

422. *See* Davis v. North Carolina, 384 U.S. 737, 752, 86 S. Ct. 1761, 1770, 16 L. Ed. 2d 895, 904 (1966) (finding that where police held an incarcerated person in a cell and questioned him off and on for sixteen days with a meager diet, the incarcerated person's confession was an involuntary end product of coercive influences and therefore constitutionally inadmissible).

(3) you were denied counsel at arraignment; (4) you did not voluntarily, knowingly, and intelligently waive your right to counsel during interrogation or discussions with police officers while in custody; 5) you were temporarily banned from consulting with your attorney.[423] 6) you were convicted based on information provided by an informant who was "bugged" or who reported jail cell conversations between you and him in violation of the Fifth or Sixth Amendments.[424]; or 7) your lawyer provided such poor representation as to amount to ineffective assistance of counsel.

4) Right to Self-Representation: The trial court unreasonably denied your request to proceed *pro se* (as your own attorney).[425]
5) Your Competency: You were denied your Fourteenth Amendment right to an examination to determine whether you were competent to stand trial, whether you were competent to waive counsel, or whether you were competent to plead guilty.[426]

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423. *See* Jones v. Vacco, 126 F.3d 408, 415–417 (2d Cir. 1997) (finding that an overnight ban on petitioner's consultation with his attorney, which was imposed when the trial judge declared an overnight recess during petitioner's cross-examination, violated petitioner's 6th Amendment right to counsel).

424. *See* Massiah v. United States, 377 U.S. 201, 206–207, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250–251 (1964) (finding that evidence from a conversation between defendant on bail and a co-defendant that was radio transmitted without defendant's knowledge violated his 6th Amendment right to assistance of counsel); *see also* Maine v. Moulton, 474 U.S. 159, 177, 106 S. Ct. 477, 488, 88 L. Ed. 2d 481, 497 (1985) (finding that the state violated the 6th Amendment right of the defendant when they recorded conversations between him and a co-defendant who was operating as an undercover agent for the state); United States v. Henry, 447 U.S. 264, 274, 100 S. Ct. 2183, 2189, 65 L. Ed. 2d 115, 125 (1980) (omitting from trial the defendant's incriminating statements made to a paid informant who was confined in the same cell block as defendant because the government was found to have violated the defendant's 6th Amendment right to counsel by intentionally creating a situation that was likely to induce the defendant to make incriminating statements). *But see* Kuhlmann v. Wilson, 477 U.S. 436, 459, 106 S. Ct. 2616, 2630, 91 L. Ed. 2d 364, 384–385 (1986) (holding that it is not a constitutional violation if the informant merely listens to the defendant without questioning or inciting him to speak); United States v. Rommy, 506 F.3d 108, 136 (2d Cir. 2007) (explaining that it could potentially not be a constitutional violation if the informant's questions to the defendant do not stimulate discussion, but only seek to clarify information already volunteered).

425. Faretta v. California, 422 U.S. 806, 818–819, 95 S. Ct. 2525, 2532–2533, 45 L. Ed. 2d 562, 572–573 (1975) (finding that the 6th and 14th Amendments provide the right to self-representation); United States v. Hernandez, 203 F.3d 614, 620–621 (9th Cir. 2000) (finding that a denial of a *pro se* request may be unconstitutional if the request was made before jury selection and if the request was not a delay tactic), *overruled on other grounds by* Indiana v. Edwards, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008); *see also* Moore v. Haviland, 531 F.3d 393, 403–404 (6th Cir. 2008) (holding that petitioner's habeas relief was warranted because he was denied the right to proceed *pro se* where petitioner had requested during trial to proceed *pro se* and did not waive this right merely by responding to questions posed by his attorney). *But see* Indiana v. Edwards, 554 U.S. 164, 174–178, 128 S. Ct. 2379, 2386–2388, 171 L. Ed. 2d 345, 355–357 (2008) (holding that defendant could be denied his right to self-representation if he is deemed not competent to defend himself at trial, even if he is competent enough to stand trial). Note that this does not mean that you have a constitutional right to *any* counsel. The court may reject your request to have a non-lawyer, other than yourself, represent you. United States v. Gigax, 605 F.2d 507, 517 n.1 (10th Cir. 1979) (finding that the 6th Amendment does not protect the right to be represented by a lay person).

426. The Supreme Court has held that the standard of competency is the same for these three matters. That is, if a defendant is found competent to stand trial, he is necessarily competent to waive counsel and to plead guilty. Godinez v. Moran, 509 U.S. 389, 391, 402, 113 S. Ct. 2680, 2682, 2688, 125 L. Ed. 2d 321, 327, 334 (1993). The court identified the test for legal competency as "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, 171–172, 183, 95 S. Ct. 896, 904, 909, 43 L. Ed. 2d 103, 113, 119 (1975) (finding that a psychiatric evaluation was also required when, among other indications, defendant had attempted suicide during trial); *see also* Cooper v. Oklahoma, 517 U.S. 348, 369, 116 S. Ct. 1373, 1384, 134 L. Ed. 2d 498, 515 (1996) (finding that a state law presuming defendant is competent unless he proves his incompetence by clear and convincing evidence violates due process); Pate v. Robinson, 383 U.S. 375, 385, 86 S. Ct. 836, 842, 15 L. Ed. 2d 815, 822 (1966) (holding that defendant is entitled to a competency hearing when there has been evidence presented in trial showing his insanity, since convicting an incompetent defendant violates the 14th Amendment); Johnson v. Norton, 249 F.3d 20, 22, 27–28 (1st Cir. 2001) (finding a violation of due process when the trial court did not hold a competency hearing when defendant

6) Your Guilty Plea: Your guilty plea was unconstitutional because you pleaded guilty involuntarily.[427]
   (a) You pleaded guilty as part of a plea bargain agreement that was broken.[428]
   (b) You pleaded guilty without understanding the charges against you,[429] or language difficulties prevented you from understanding the charges against you.[430]
   (c) You pleaded guilty without understanding the consequences of pleading guilty.[431]
7) Timing of Conviction and Trial:

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stated that he did not know "what's going on" because he had been hit on the head and lost consciousness just before the start of trial); Bouchillon v. Collins, 907 F.2d 589, 592–594 (5th Cir. 1990) (finding that there was sufficient evidence at trial to establish a reasonable probability that defendant was incompetent at the time of a guilty plea due to post-traumatic stress disorder).

427. *See* Fontaine v. United States, 411 U.S. 213, 213–215, 93 S. Ct. 1461, 1462–1463, 36 L. Ed. 2d 169, 171–172 (1973) (holding that a defendant is entitled to a hearing to determine whether or not his guilty plea was voluntary even though he had declared in open court that his plea was given voluntarily and knowingly); Machibroda v. United States, 368 U.S. 487, 493–494, 82 S. Ct. 510, 513, 7 L. Ed. 2d 473, 478 (1962) (holding that petitioner was entitled to a hearing on the issue of whether his guilty plea, which was based on the prosecutor's threats and unkept promises, was made involuntarily); Fair v. Zant, 715 F.2d 1519, 1520–1522 (11th Cir. 1983) (holding that defendant's guilty plea was not voluntary where trial judge told defendant he could plead guilty but later withdraw his plea if he did not want to accept the sentence, but then refused to allow withdrawal of plea after sentencing); United States *ex rel.* Hill v. Ternullo, 510 F.2d 844, 846–847 (2d Cir. 1975) (holding that defendant was entitled to a hearing to determine whether his guilty plea was voluntary when his guilty plea was made based on his attorney's assurances that he would receive a lesser sentence than what was allowed under state law).

428. *See* Santobello v. New York, 404 U.S. 257, 262–263, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971) (holding that when pleas rest on an implied promise or on an agreement by a prosecutor that he will make no sentencing recommendations, such promises and agreements must be fulfilled); Brown v. Poole, 337 F.3d 1155, 1160–1162 (9th Cir. 2003) (granting habeas relief and release of incarcerated person when state breached oral plea agreement that incarcerated person would only have to serve half of her 15-year sentence if she maintained a good prison record, even though prosecutor never had authority to make such a promise); Johnson v. Beto, 466 F.2d 478, 479–480 (5th Cir. 1972) (holding that if a prosecutor says he will make a sentencing recommendation in exchange for a guilty plea, but then actually recommends a harsher sentence in court, the plea bargain has been broken and defendant is entitled to resentencing or withdrawal of his guilty plea).

429. *See* Marshall v. Lonberger, 459 U.S. 422, 436, 103 S. Ct. 843, 852, 74 L. Ed. 2d 646, 660 (1983) (ruling that a guilty plea cannot be voluntary unless the accused has "received real notice of the true nature of the charge against him"); Henderson v. Morgan, 426 U.S. 637, 647, 96 S. Ct. 2253, 2258–2259, 49 L. Ed. 2d 108, 116 (1976) (ruling that where neither defense counsel nor the trial court had explained the elements of the offense of second degree murder to a defendant with an especially low mental capacity, the guilty plea was involuntary); United States v. Andrades, 169 F.3d 131, 134–136 (2d Cir. 1999) (holding that defendant's guilty plea was invalid because he did not understand the nature of the charges against him due to his poor education and drug addiction).

430. The Court Interpreters Act, 28 U.S.C. §§ 1827–1828, requires the court to supply you with an interpreter if you do not understand English. *See also* United States v. Mosquera, 816 F. Supp. 168, 177 (E.D.N.Y. 1993) (setting requirements for translation in cases where the defendant does not speak English), *aff'd* 48 F.3d 1214 (2d Cir. 1994).

431. *See* Marvel v. United States, 380 U.S. 262, 262, 85 S. Ct. 953, 953, 13 L. Ed. 2d 960, 960 (1965) (ordering a rehearing to determine whether the trial judge misled the defendant about maximum possible sentence); United States *ex rel.* Leeson v. Damon, 496 F.2d 718, 722 (2d Cir. 1974) (reversing a conviction because the appellant did not understand that his plea could result in confinement in a reformatory for five years rather than a shorter state prison term); Jones v. United States, 440 F.2d 466, 468 (2d Cir. 1971) (ruling a defendant was entitled to a hearing on whether he was aware of the maximum possible sentence at the time of his guilty plea and, if not, whether he would have pled guilty had he known).

(a) The statute of limitations had already run out when you were charged with the offense,[432] or you were charged with a federal, non-capital crime more than five years after the crime occurred.[433]

(b) You were denied your Sixth Amendment right to a speedy trial.[434]

8) Right to be Free from Self-Incrimination: You were made to testify before a grand jury in violation of your Fifth Amendment right against self-incrimination.[435]

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432. A statute of limitations is a period of years, set by state law, after which the government cannot prosecute a suspect. Statutes of limitations vary depending on the crime with which you are charged. The clock starts running on a statute of limitations once the *crime is committed*. The statute of limitations *cannot* be waived. This time limit is different than the 6th Amendment right to a speedy trial. The right to a speedy trial does not start running until *you are indicted*; you *can* waive the right to a speedy trial right, and the court balances this right against other considerations.

433. *See* 18 U.S.C. § 3282 (requiring the federal government to issue an indictment within five years of the commission of a non-capital offense). There is an important new exception to this rule for crimes of sexual abuse: the government can issue a "DNA profile indictment" that contains a set of DNA identification characteristics but not the identity of the accused. It must be issued within the five-year limit, but the indictment can be modified to include the defendant's name after the five-year limit has run. *See* 18 U.S.C. § 3282(b). There are many other federal laws that govern the procedure to be followed in federal criminal trials and sentencing.

434. Courts follow the guidelines set out in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972), to determine whether a defendant was denied his right to a speedy trial. Courts balance the conduct of the prosecution and defendant and look at these factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asked for a speedy trial; and (4) whether the delay prejudiced the defendant. Barker v. Wingo, 407 U.S. 514, 533–536, 92 S. Ct. 2182, 2193–2395, 33 L. Ed. 2d 101, 118–120 (1972) (ruling that, where defendant did not want a speedy trial and was not seriously prejudiced by the delay, a five-year delay between arrest and trial did not violate defendant's 6th Amendment rights); *see also* Klopfer v. North Carolina, 386 U.S. 213, 221–223, 87 S. Ct. 988, 992–993, 18 L. Ed. 2d 1, 7 (1967) (ruling that a state may not postpone prosecution for an unlimited period even when the accused remains free to go wherever he desires). *But see* Reed v. Farley, 512 U.S. 339, 349–352, 114 S. Ct. 2291, 2297–2299, 129 L. Ed. 2d 277, 288–290 (1994) (ruling that a violation of a federal statute that limits trial length is not necessarily a violation of the constitutional right to a speedy trial when defendant did not object to delay and showed no prejudice from the delay); United States v. Marion, 404 U.S. 307, 313, 92 S. Ct. 455, 459, 30 L. Ed. 2d 468, 474 (1971) (ruling that the right to a speedy trial guaranteed by the 6th Amendment does not apply until you have been accused of a crime, which may not occur until indictment).

435. *See* United States v. Mandujano, 425 U.S. 564, 574–575, 96 S. Ct. 1768, 1775–1776, 48 L. Ed. 2d 212, 221 (1976) (ruling that a witness cannot be compelled to answer questions that are self-incriminating, a determination that the judge may make if necessary). *But see* Kastigar v. United States, 406 U.S. 441, 462, 92 S. Ct. 1653, 1666, 32 L. Ed. 2d 212, 227 (1972) (finding that a defendant may be forced to testify over a claim of privilege from self-incrimination when defendant has been granted immunity from use of the compelled testimony, or evidence derived from the testimony, in future criminal proceedings).

1. After you were promised immunity in exchange for testimony before a grand jury, the grand jury used your testimony against you in violation of your Fifth Amendment right against self-incrimination.[436]

2. During trial, the prosecutor commented on your post-arrest silence in violation of your Fifth Amendment right against self-incrimination;[437] or the prosecutor made an improper summation.[438] (A summation, or closing argument, is the argument made to the jury at the end of a trial.)

3. Statements that you made at a court-ordered competency hearing before a state-appointed psychologist or psychiatrist were used against you in violation of your Fifth and Fourteenth Amendment rights against self-incrimination.[439]

9) Access-to-Evidence Violations:

4. The prosecution withheld requested[440] evidence that could have helped your case, in violation of the Fourteenth Amendment.[441]

5. The state failed to preserve important evidence in your investigation.[442]

6. You were denied needed expert assistance at trial in violation of the Fourteenth Amendment.[443]

7. The prosecution admitted hearsay, or out-of-court statements against you in violation of the Confrontation Clause of the Sixth Amendment,[444] and the admitted hearsay did not qualify as one of the many exceptions to the hearsay rule.[445]

10) Witness Violations:
(a) You were denied the right to cross-examine a witness who testified against you.[446]
(b) A witness lied on the stand about having been granted leniency from the police in exchange for testifying against you.[447]

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436. Two types of immunity may be granted to witnesses who testify before grand juries. "Transactional immunity" gives a potential defendant full immunity from prosecution for any offense related to the incident in question. "Use immunity," on the other hand, only guarantees that the government will not use any of the information revealed in your testimony in future proceedings against you. *See* Kastigar v. United States, 406 U.S. 441, 458, 92 S. Ct. 1653, 1664, 32 L. Ed. 2d 212, 225 (1972) (ruling that a court can compel witnesses to testify simply by giving them use immunity and that the court does not also need to give transactional immunity); *see also* United States *ex rel.* Gasparino v. Butler, 398 F. Supp. 127, 129–130 (S.D.N.Y. 1974) (ruling that, in New York, use immunity is the usual kind of immunity intended and that transactional immunity must be expressly authorized by a grand jury vote). Note, however, that habeas petitions are rarely granted on these grounds.

437. *See* Doyle v. Ohio, 426 U.S. 610, 617–619, 96 S. Ct. 2240, 2244–2245, 49 L. Ed. 2d 91, 97–98 (1976) (holding that due process rights are violated when the prosecutor questions defendant about why he didn't tell his story to police after *Miranda* warnings at time of his arrest); Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (ruling that a defendant's 5th Amendment rights were violated where judge instructed the jury that they may take into account the failure of defendant to testify about evidence to indicate the truthfulness of that evidence); Gravley v. Mills, 87 F.3d 779, 790 (6th Cir. 1996) (holding that a prosecutor violated due process by repeatedly making references to petitioner's post-arrest silence; also finding that defendant had ineffective assistance of counsel because counsel had not objected to prosecutor's comments at trial); Hill v. Turpin, 135 F.3d 1411, 1416 (11th Cir. 1998) (granting habeas corpus where prosecutor's references to petitioner's post-*Miranda* assertions of right to remain silent were "repeated and deliberate"). *But see* Fletcher v. Weir, 455 U.S. 603, 607, 102 S. Ct. 1309, 1312, 71 L. Ed. 2d 490, 494 (1982) (finding that it is not a constitutional violation for prosecutors to use post-arrest silence to impeach a defendant where the defendant had not been told that he had a right to remain silent); Roberts v. United States, 445 U.S. 552, 561, 100 S. Ct. 1358, 1364–1365, 63 L. Ed. 2d 622, 631 (1980) (refusing to consider petitioner's 5th Amendment claim when he was given a harsher sentence due to his refusal to answer questions about drug suppliers because his purpose in keeping silent was not to prevent self-incrimination); Jenkins v. Anderson, 447 U.S. 231, 240–241, 100 S. Ct. 2124, 2130, 65 L. Ed. 86, 96 (1980) (finding that it is not a constitutional violation for prosecutors to use a defendant's pre-arrest two-week

silence to impeach his testimony that he had acted in self-defense); Splunge v. Parke, 160 F.3d 369, 371–373 (7th Cir. 1998) (holding that prosecutor's comment on petitioner's post-arrest silence was not a 5th Amendment violation when not used for the purpose of impeaching petitioner at trial). Therefore, the mere fact that the prosecution or judge improperly commented on your silence will not necessarily afford you relief.

438. *See* Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144, 157 (1986) (announcing that, where prosecutor called defendant an animal and made offensive emotional remarks, the comments were improper but did not merit relief because the comments did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process"); United States v. Elias, 285 F.3d 183, 190, 192 (2d Cir. 2002) (noting that remarks of a prosecutor during summation do not amount to a due process violation unless they constitute egregious misconduct); Moore v. Morton, 255 F.3d 95, 100 n. 4, 119–120 (3d Cir. 2001) (ruling that habeas relief was appropriate when prosecutor made improper race-based comments and trial judge's curative instructions to the jury were not adequate to ensure a fair trial, and listing in footnotes 15 and 16 cases where habeas relief was granted or denied for improper racial comments).

439. *See* Satterwhite v. Texas, 486 U.S. 249, 260, 108 S. Ct. 1792, 1799, 100 L. Ed. 2d 284, 296 (1988) (ruling that where defendant was not afforded right to consult with counsel before submitting to psychiatric examination, admission of testimony based on examination was a constitutional violation and not harmless error); Estelle v. Smith, 451 U.S. 454, 467–469, 101 S. Ct. 1866, 1875–1876, 68 L. Ed. 2d 359, 372 (1981) (finding that defendant's statements in a court-ordered psychiatric examination could not be admitted at a capital trial when the defendant had not been warned of his 5th Amendment privilege against compelled self-incrimination); Buchanan v. Kentucky, 483 U.S. 402, 421–424, 107 S. Ct. 2906, 2916–2918, 97 L. Ed. 2d 336, 354–356 (1987) (ruling that the prosecution may use a psychologist's report solely to rebut petitioner's psychological evidence).

440. A defendant's failure to request evidence that could have helped his case does not leave the government free of all obligations. *See* United States v. Agurs, 427 U.S. 97, 103–108, 96 S. Ct. 2392, 2397–2399, 49 L. Ed. 2d 342, 349–352 (1976) (finding that there are three situations in which a *Brady* claim might arise: (1) where new evidence revealed that the prosecution introduced trial testimony that it knew or should have known was false; (2) where the prosecution failed to obey a defense request for specific exculpatory evidence (evidence that helps to prove defendant's innocence); and (3) where the prosecution failed to volunteer exculpatory evidence that was never requested, or requested only in a general way; and noting the existence of a duty on the part of the government in this last situation when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial"); *see also* United States v. Bagley, 473 U.S. 667, 678681–682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985) (finding that regardless of whether the request for the evidence was specific or general, favorable evidence is material, and the government violates the Constitution by suppressing such evidence "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"); Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490, 507 (1995) (finding that once a court applying *Bagley* has found constitutional error, there is no need for further harmless-error review).

441. *See* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963) (holding that the prosecution must turn over evidence to the defense if evidence is exculpatory, impeaching, or material). The *Brady* standard says that the prosecution must disclose evidence that is exculpatory (helps to prove the defendant's innocence) or impeaching (shows one of the prosecution's witnesses might not be believable). Exculpatory or impeaching evidence must also be material, which means that there must be a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985); *see also* Kyles v. Whitley, 514 U.S. 419, 421–422, 115 S. Ct. 1555, 1560, 131 L. Ed. 2d 490, 498 (1995) ("[B]ecause the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result, [defendant] is entitled to a new trial."); Pennsylvania v. Ritchie, 480 U.S. 39, 59–60, 107 S. Ct. 989, 1002–1003, 94 L. Ed. 2d 40, 58–59 (1987) (finding that a defendant has the right to ask the court to review confidential files to see if evidence is material, but the defendant does not have the right to examine the confidential files himself); United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985) (holding that evidence impeaching a witness' credibility falls within the *Brady* rule); United States v. Agurs, 427 U.S. 97, 112–114, 96 S. Ct. 2392, 2401–2402 49 L. Ed. 2d 342, 354–356 (1976) (holding that evidence of a murder victim's prior criminal record was not "material" and did not have to be turned over to the defense because it did not change the probability that the result of the trial would have been different); Boyette v. Lefevre, 246 F.3d 76, 93 (2d Cir. 2001) (holding that a state's non-disclosure of information relating to the witness' ability to identify the defendant was a *Brady* violation because the non-disclosure seriously undermined "confidence in the outcome of the trial"); Carriger v. Stewart, 132 F.3d 463, 478–479 (9th Cir. 1997) (*en banc*) (finding a violation of due process when the prosecutor failed to disclose that the man whom the defendant claimed had committed the murder and who was also the prosecutor's main witness had a long history of prior crimes, of lying to police, and of shifting blame to others, and there was evidence that he had boasted about committing the murder).

442. *See* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution"); Killian v. Poole, 282 F.3d 1204, 1209–1210 (9th Cir. 2002) (holding that the prosecution's failure to turn over letters in which the prosecution's witness admitted to perjury in order to gain sentencing concessions amounted to a constitutional violation and, with other violations at trial, amounted to reversible error). *But see* Arizona v. Youngblood, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988) (holding that to show a denial of due process, defendant must show that the prosecution acted in bad faith in failing to preserve evidence if the evidence is only *potentially* exculpatory); California v. Trombetta, 467 U.S. 479, 490–491, 104 S. Ct. 2528, 2534–2535, 81 L. Ed. 2d 413, 423 (1984) (finding that the state's failure to retain breath samples for defendants was not a violation of procedural due process when defendants had alternative means of demonstrating their innocence); United States v. Garza, 435 F.3d 73, 75–76 (1st Cir. 2006) (ruling that the destruction of evidence is a violation of due process if the exculpatory value of the evidence was apparent before its destruction and if the evidence is of such a nature that the defendant cannot obtain comparable evidence, but finding in this situation that the violation was harmless). The case law establishing that destruction of evidence can be a constitutional violation is based on the case law that withholding evidence is a constitutional violation.

443. *See* Ake v. Oklahoma, 470 U.S. 68, 82–83, 105 S. Ct. 1087, 1096, 84 L. Ed. 2d 53, 66 (1985) (noting that when an indigent defendant shows that his sanity will be a significant factor in his defense, due process entitles the defendant to the services of a court-appointed expert to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense"); Schultz v. Page, 313 F.3d 1010, 1017–1018 (7th Cir. 2002) (finding that the competency evaluation ordered by the court and conducted at the time of trial was insufficient to establish defendant's sanity at the time of the crime and that denial of defendant's request for an evaluation of his sanity at the time of the crime violated due process where defendant had shown sanity was a significant factor at trial); Starr v. Lockhart, 23 F.3d 1280, 1287 (8th Cir. 1994) (holding that the denial of petitioner's request for appointment of a mental health expert to develop evidence of diminished capacity and mitigating circumstances violated his due process rights) *abrogated on other grounds by* Baldwin v. Reese, 541 U.S. 27, 124 S.Ct. 1347, 158 L. Ed. 2d 64 (2004).

444. The "Confrontation Clause" of the 6th Amendment, which protects your right to confront witnesses who testify against you, generally prohibits the prosecution from using hearsay as evidence against you at trial. Hearsay is testimony, or comments, presented at trial by someone other than the person who originally spoke. The rules on hearsay are found in the Federal Rules of Evidence, at Fed. R. Evid. 801–807, in Title 28 of the United States Code. For more information on the hearsay rules and their exceptions, see an evidence textbook or evidence treatise. *See*, *e.g.*, Charles T. McCormick, McCormick on Evidence (John W. Strong et al. eds., 6th ed. 2006); Christopher B. Mueller & Laird C. Kirkpatrick, Evidence (3d ed. 2003). *See also* Murillo v. Frank, 402 F.3d 786, 791 (4th Cir. 2005) (admitting that hearsay statements made by another suspect during interrogation violated the 6th Amendment); Brown v. Keane, 355 F.3d 82, 87–88 (2d Cir. 2004) (finding that the admission of an anonymous 911 call was unconstitutional, despite prosecution's argument that the call fell within the "present sense impression" exception to the 6th Amendment's hearsay prohibition).

445. The Federal Rules of Evidence list exceptions to the hearsay rule. Fed. R. Evid. 803, 804, 807. When out-of-court statements fall within a category listed in the Federal Rules of Evidence, it is admissible as evidence despite the Confrontation Clause of the 6th Amendment. Some of the exceptions include "excited utterances" and statements for medical diagnosis. Fed. R. Evid. 803. Some out-of-court statements are *not* defined as hearsay and are not protected by the hearsay rule. For example, courts do not consider as hearsay any statements that are made by a co-conspirator in furtherance of a conspiracy; since such statements are not considered hearsay, they may generally be admitted as evidence. Fed. R. Evid. 801. The Supreme Court may make exceptions to the hearsay rule in addition to those listed in the Federal Rules. Fed. R. Evid. 802. *See also* United States v. Inadi, 475 U.S. 387, 399–400, 106 S. Ct. 1121, 1128–1129, 89 L. Ed. 2d 390, 401–402 (1986) (finding that the prosecution does not need to show that a person is unavailable to appear in court for his or her out-of-court statements to be used in a trial if the person was a co-conspirator).

446. *See* Crawford v. Washington, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1373, 158 L. Ed. 2d 177, 203 (2004) (ruling that a defendant must have the opportunity to confront a person giving testimonial evidence against the defendant either before or during trial, unless that person is unavailable; noting that the reliability of the person testifying is irrelevant); *see also* Giles v. California, 554 U.S. 353, 377, 128 S. Ct. 2678, 2693, 171 L. Ed. 2d 288 (2008) (holding that the unconfronted testimony of a murder victim cannot be admitted under a theory that defendant forfeited his 6th Amendment right to confront the victim/witness because he murdered her and thereby made her unavailable to testify); Lilly v. Virginia, 527 U.S. 116, 139, 119 S. Ct. 1887, 1901, 144 L. Ed. 2d 117, 136 (1999) (finding that a defendant has a 6th Amendment right to confront an accomplice whose confession is offered as evidence against that defendant); Davis v. Alaska, 415 U.S. 308, 320, 94 S. Ct. 1105, 1112, 39 L. Ed. 2d 347, 356 (1974) (ruling that a defendant was denied his 6th Amendment right to confront and to cross-examine a

11) The Jury:
   (a) You were denied your Sixth Amendment right to a trial by a fair and impartial jury because you were denied a trial by jury.[448]
   (b) You were tried by a jury of fewer than six members,[449] or you were convicted by a non-unanimous jury vote.[450]
   (c) The community where members of the jury work or live was exposed to inflammatory media accounts about your case.[451]

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witness when the state prevented the defendant from questioning a juvenile witness about the juvenile's probationary status); Howard v. Walker, 406 F.3d 114, 132–133 (2d Cir. 2005) (finding that limiting a defendant's cross-examination of the state's expert witness and impeding the defendant's presentation of a counter expert witness violated the Confrontation Clause); Hill v. Hofbauer, 337 F.3d 706, 717 (6th Cir. 2003) (ruling that it is a violation of the Confrontation Clause to admit a non-testifying co-defendant's confession that implicates the defendant); Lewis v. Wilkinson, 307 F.3d 413, 420–421 (6th Cir. 2002) (finding a violation of the Confrontation Clause in a rape case when defendant was barred from cross-examining complainant about diary passages that supported a consent defense); United States *ex rel.* Negron v. New York, 434 F.2d 386, 389–390 (2d Cir. 1970) (holding that an inadequate translation during trial violated non-English-speaking petitioner's right to confront witnesses). *But see* United States v. Hendricks, 395 F.3d 173, 179 (3d Cir. 2005) (finding that defendant does not always have the right to cross-examine hearsay evidence that is not "testimonial").

447. Giglio v. United States, 405 U.S. 150, 154–155, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972) (holding that the government has a due process duty to disclose impeachment evidence, including promises that the prosecution makes to key witnesses in exchange for their testimony); *see* Brown v. Wainwright, 785 F.2d 1457, 1464–1465 (11th Cir. 1986) (finding prosecutors had deliberately withheld fact that the main witness against defendant lied on the stand by saying he had not received leniency from prosecution in exchange for his testimony against defendant); *see also* DuBose v. Lefevre, 619 F.2d 973, 979 (2d Cir. 1980) (finding that the prosecution cannot make agreements in general terms to a witness and therefore escape the fact that it gave the witness reason to believe that his testimony would lead to favorable treatment by the State). *But see* Shabazz v. Artuz, 336 F.3d 154, 162–166 (2d Cir. 2003) (finding that evidence that prosecution witnesses ultimately received favorable sentencing treatment in their own cases did not alone show that prosecutor failed to disclose promises of leniency because there was no evidence that anything was promised before the witnesses' testimony).

448. U.S. CONST. amend. VI; Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491, 496 (U.S. 1968) (applying the sixth amendment right to a trial by jury to state criminal trials because ""trial by jury in criminal cases is fundamental to the American scheme of justice.") Note, however, that you may waive your right to trial by jury. There are various reasons why you may choose not to have a jury trial: you may wish to plead guilty, for instance, or you may think that the nature of your case is best decided by a judge, alone. If you waived this right, the fact that you were not tried by a jury will not be considered a violation of your Sixth Amendment rights.

449. Ballew v. Georgia, 435 U.S. 223, 228, 98 S. Ct. 1029, 1033, 55 L. Ed. 2d 234, 239 (1978) (holding that juries must consist of at least six people or else there is a 6th Amendment violation); *see* Williams v. Florida, 399 U.S. 78, 86, 90 S. Ct. 1893, 1898, 26 L. Ed. 2d 446, 452 (1970) (holding that refusal to impanel more than six members for the jury does not violate the defendant's 6th Amendment rights). *But see* People v. Dean, 80 A.D.2d 695, 696, 436 N.Y.S.2d 455, 456 (2d Dept. 1981) (granting that a defendant is denied due process of law when he is tried before a jury of six rather than 12 people if the state constitution says that "crimes prosecuted by indictment shall be tried by a jury composed of twelve persons").

450. *See* United States v. Gipson, 553 F.2d 453, 456 (5th Cir. 1977) (holding that a federal criminal defendant has a constitutional right to a unanimous jury verdict); *see also* Richardson v. United States, 526 U.S. 813, 815, 119 S. Ct. 1707, 1709, 143 L. Ed. 2d 985, 991 (1999) (finding that the jury in a federal criminal case cannot convict unless it unanimously finds that the government has proven each element of the crime). Fed. R. Crim. P. 31(a) requires a unanimous verdict in all federal jury cases. *But see* McKoy v. North Carolina, 494 U.S. 433, 449–450, 110 S. Ct. 1227, 1236–1237, 108 L. Ed. 2d 369, 385 (1990) (finding that the constitutional requirement for a unanimous verdict requires only a "substantial agreement as to the principal factual elements underlying a specified offense"). *See also* Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); Johnson v. Louisiana, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972). Note that both *Apodaca* and *Johnson*, which allow convictions in state court with jury majorities of 10–2 and 9–3 respectively, apply only to certain non-capital cases.

451. *See* Irvin v. Dowd, 366 U.S. 717, 724–725, 81 S. Ct. 1639, 1643–1644, 6 L. Ed. 2d 751, 757–758 (1961) (holding that failure to grant change of venue, despite build-up of prejudice and a jury that was not impartial, is unconstitutional);) *superseded on other grounds*; Woods v. Dugger, 923 F.2d 1454, 1460 (11th Cir. 1991) (finding

(d) Members of certain racial, religious, gender, or age-based (the elderly) groups were excluded from the jury pool,[452] or the prosecutor intentionally used his or her peremptory challenges (peremptory challenges are when the prosecutor or defendant eliminates potential jurors without a reason) to remove members of a particular racial group or gender from the jury.[453]

(e) Members of a distinct class or group, such as Black people or women, were systematically excluded from the grand jury in violation of the Fourteenth Amendment.[454]

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deprivation of a fair trial after extensive pretrial publicity and presence of uniformed prison guards in audience at trial when victim was a prison guard).

452. *See* Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 82–83 (1986) (holding that use of peremptory challenges to exclude African-Americans from a jury when the defendant was African-American violates the 14th Amendment's equal protection guarantee); Taylor v. Louisiana, 419 U.S. 522, 531, 95 S. Ct. 692, 698, 42 L. Ed. 2d 690, 698 (1975) (holding that sex discrimination in selection of jury violates the 6th Amendment); Smith v. Texas, 311 U.S. 128, 132, 61 S. Ct. 164, 166, 85 L. Ed. 84, 87 (1940) (holding that the 14th Amendment prohibits racial discrimination in selection of grand jury); *see also* Snyder v. Louisiana, 552 U.S. 472, 474, 128 S. Ct. 1203, 1206, 170 L. Ed. 2d 175, 179 (2008) (holding that the Supreme Court of Louisiana's rejection of a *Batson* claim was erroneous and that the prosecutor at trial improperly excluded blacks from a jury that convicted defendant of capital murder); United States v. Barnes, 520 F. Supp. 2d 510, 514 (2d Cir. 2007) (finding that in order to establish a prima facie case of a violation of the fair cross-section requirement of the 6th Amendment, a defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process); People v. Snow, 44 Cal.3d 216, 225–226 (Cal. 1987) (generally upholding principle against excluding members of a certain race from a jury); State v. Gilmore, 103 N.J. 508, 543 (N.J. 1986) (finding a violation where prosecutor excluded members of a cognizable group—in this case, black jurors—from a jury because of prosecutor's presumption that those jurors had a group bias). Although the Supreme Court has never expressly held that religious discrimination in jury selection is unconstitutional, many lower courts have. *See*, *e.g.*, United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (stating that *Batson* applies to religious discrimination and "only if the religion of the jurors is directly relevant to the crimes at issue" can the strike based on religion of a juror be proper); State v. Hodge, 248 Conn. 207, 240 (Conn. 1999) (stating peremptory challenges based on religious affiliation are unconstitutional).

453. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146, 114 S. Ct. 1419, 1430, 128 L. Ed. 2d 89, 107 (1994) (holding that the use of peremptory challenges to exclude members of a particular gender violates the Equal Protection Clause); Amadeo v. Zant, 486 U.S. 214, 228–229, 108 S. Ct. 1771, 1780, 100 L. Ed. 2d 249, 264 (1988) (finding prosecutor's jury selection scheme to limit number of African-Americans and women on the jury constituted serious error); Batson v. Kentucky, 476 U.S. 79, 84, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d 69, 79 (1986) (holding that the use of peremptory challenge to exclude members of a racial group violates the Equal Protection Clause); Galarza v. Keane, 252 F.3d 630, 640 (2d Cir. 2001) (vacating denial of habeas petition since the state trial court failed to resolve the factual issue of whether it credited the prosecution's race-neutral explanations for striking potential jurors); Jordan v. Lefevre, 206 F.3d 196, 202 (2d Cir. 2000) (reversing denial of habeas petition because of lack of meaningful inquiry into the question of discrimination); Turner v. Marshall, 121 F.3d 1248, 1250 (9th Cir. 1997) (holding prosecutor's use of peremptory challenges to strike African-Americans from jury venire not justified by stated reasons). *But see* Smulls v. Roper, 535 F.3d 853, 859 (8th Cir. 2008) (finding that since prosecution's reasons for the strike were "credible," which was the standard—as opposed to giving "persuasive" reasons or "plausible" reasons—he was not motivated by racial discrimination).

454. *See* Campbell v. Louisiana, 523 U.S. 392, 398, 118 S. Ct. 1419, 1423, 140 L. Ed. 2d 551, 559 (1998) (holding that a white defendant, convicted by an all-white jury and alleging discriminatory selection of jurors, has standing to challenge whether he was convicted by means that violate due process, even though the claim is based upon exclusion of blacks from the grand jury); Vasquez v. Hillery, 474 U.S. 254, 264, 106 S. Ct. 617, 624, 88 L. Ed. 2d 598, 609 (1986) (holding that habeas relief is appropriate where blacks were systemically excluded from the grand jury that indicted petitioner); Johnson v. Puckett, 929 F.2d 1067, 1068–1069 (5th Cir. 1991) (granting black incarcerated person's habeas corpus petition where his grand jury foreman was white because petitioner had shown a *prima facie* claim of racial discrimination by showing that for 20 years every grand jury foreman in the county had been white, despite a 43% black population in the county). *But see* Hobby v. United States, 468 U.S. 339, 345–346, 104 S. Ct. 3093, 3096–3097, 82 L. Ed. 2d 260, 266–267 (1984) (holding that discrimination in grand jury foreman selection, as distinguished from discrimination in the selection of the grand jury itself, does

(f) The jury instructions[455] were unconstitutional because they did not tell the jury the prosecution must prove all crucial elements of guilt beyond a reasonable doubt,[456] or the instructions did not tell the jury the prosecution must overcome a presumption of innocence to convict you.[457]

(g) Evidence was insufficient to sustain the jury's verdict of guilty beyond a reasonable doubt.[458]

12) The Judge: The judge was biased against you because he was corrupt and you did not bribe him.[459]

13) Your Lawyer:

(a) Your lawyer did not represent you effectively at trial.[460]

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not threaten defendant's due process rights); United States v. Taylor, 154 F.3d 675, 681 (7th Cir. 1988) (holding that *Vasquez* is a limited ruling).

455. Jury instructions are read by the judge to inform the jury of the elements of the crime and to explain the legal standards by which the jury must weigh the evidence against you. An example of a jury instruction is to find guilt "beyond a reasonable doubt."

456. *See* Sandstrom v. Montana, 442 U.S. 510, 524, 99 S. Ct. 2450, 2459, 61 L. Ed. 2d 39, 51 (1979) (holding that the prosecution must prove every element of a crime beyond a reasonable doubt; therefore, trial court may not shift the burden of proof to defendant by instructing jury to presume intent in jury instructions); Patterson v. New York, 432 U.S. 197, 215, 97 S. Ct. 2319, 2329, 53 L. Ed. 2d 281, 295 (1977) (holding that the state must prove every element of an offense beyond a reasonable doubt); *see also* Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316, 329 (1990) (holding that in an ambiguous case the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence"); Patterson v. Gomez, 223 F.3d 959, 961 (9th Cir. 2000) (holding that jury instructions that assumed the defendant was sane at the time of offense constituted an unconstitutional shifting of the prosecution's burden of proof).

457. *See* Kentucky v. Whorton, 441 U.S. 786, 789, 99 S. Ct. 2088, 2090, 60 L. Ed. 2d 640, 643 (1979) (holding that a judge's refusal to instruct the jury that a defendant is innocent until proven guilty may violate the Constitution if the "totality of the circumstances" indicates that the trial was constitutionally unfair); Taylor v. Kentucky, 436 U.S. 478, 490, 98 S. Ct. 1930, 1937, 56 L. Ed. 2d 468, 478 (1978) (finding that the judge's refusal to give jury instruction that defendant is presumed to be innocent was a violation of due process).

458. *See* Jackson v. Virginia, 443 U.S. 307, 318–319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979) (ruling that a reviewing court will determine whether any rational jury, viewing the evidence in the light most favorable to the prosecution, could have found the defendant guilty beyond a reasonable doubt). However, the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies a stronger standard to this determination, so a federal reviewing court must give strong deference to the state court's findings. 28 U.S.C. § 2254(d). See Part B(4) of this Chapter ("Standard for Getting Relief") for more information on how the AEDPA standard is applied. *See also* Juan H. v. Allen, 408 F.3d 1262, 1276 (9th Cir. 2005) (finding that evidence was insufficient to establish defendant's guilt beyond a reasonable doubt); United States v. Desena, 260 F.3d 150, 154–156 (2d Cir. 2001) (reversing a conviction where no evidence linked the defendant to the general conspiracy charge).

459. Usually, a judge's qualifications are not considered to be a constitutional issue. However, the Due Process Clause requires "a fair trial in a fair tribunal" before a judge with no actual bias against the defendant. *See* Bracy v. Gramley, 520 U.S. 899, 904–905, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97, 104 (1997) (finding a due process violation where the judge imposed excessively harsh treatment on petitioner in order to hide or to compensate for the fact that he was taking bribes and giving light sentences in other cases). Note that this is a serious charge. You must have proof that the judge was corrupt and that your sentence was unusually harsh. The Supreme Court has made it clear that there is a presumption of legitimacy to public officers' actions, and clear evidence to the contrary must be presented in order to contradict that presumption. *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174–175, 124 S. Ct. 1570, 1581–1582, 158 L. Ed. 3d 319, 336 (2004) (holding that a privacy interest against the government's release of public information—photographs—is only overcome by clear evidence showing that the government engaged in some wrongdoing).

460. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (confirming that the proper standard for judging attorney performance is "reasonably effective assistance," considering all circumstances). Ineffective assistance of counsel is among the most promising habeas claims. The standard for determination of ineffective assistance of counsel is discussed in Part B(2) of this Chapter ("Standards and Tests for Claims of Violations"). Your trial counsel may have been ineffective for any number of

(b) Your lawyer did not file an appeal although you would have wanted to file one.[461]
(c) Your lawyer did not represent you effectively in your direct appeal (also known as a "first appeal as of right").[462]

14) The Law and Statutes:
(a) You were convicted under a statute that is unconstitutional.[463]

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reasons. *See*, *e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (finding ineffective assistance of counsel where counsel conducted no pretrial discovery and failed to file a timely suppression motion against prosecution's evidence); Cossel v. Miller, 229 F.3d 649 (7th Cir. 2000) (holding that the victim's in-court identification of petitioner lacked sufficient independent reliability to be admissible, that petitioner's counsel was ineffective for failing to object to its admission, and that the state court's rejection of petitioner's ineffective assistance claim was an unreasonable application of clearly established federal law); Brown v. Myers, 137 F.3d 1154, 1156–1157 (9th Cir. 1998) (ruling counsel was ineffective in failing to investigate and present available testimony supporting petitioner's alibi); Alston v. Garrison, 720 F.2d 812, 815–816 (4th Cir. 1983) (holding defendant was denied effective assistance of counsel where counsel failed to object to evidence that defendant exercised right to remain silent); *but see* Wilson v. Vaughn, 533 F.3d 208 (3d Cir. 2008) (holding that defendant was not prejudiced by failure to object to evidence because the court concluded that such evidence would have been admitted even without the racketeering charge).

461. This claim is a subset of an ineffective assistance of counsel claim that was decided by the Supreme Court in Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). The Supreme Court held that there is a constitutionally imposed duty on an attorney to consult with a defendant about an appeal if there is reason to believe that a rational defendant would want an appeal or that the particular defendant has reasonably demonstrated that he was interested in appealing. Additionally, the defendant must show that had he been consulted about an appeal he would have made a timely appeal. *See* Nnebe v. United States, 534 F.3d 87, 91–92 (2d Cir. 2008) (finding a violation of the right to effective assistance of counsel where lawyer who is appointed under statute that requires pursuing appeals to the Supreme Court fails to file petition despite requests by defendant); Restrepo v. Kelly, 178 F.3d 634, 640–641 (2d Cir. 1999) (finding that failure of petitioner's counsel to file timely notice of appeal despite repeated requests by petitioner and reassurances by counsel constituted a denial of constitutional right to effective assistance); Alston v. Garrison, 720 F.2d 812, 816 (4th Cir. 1983) (holding that "the content of an appeal is heavily controlled by counsel, and where … the defendant's trial lawyer also prosecuted the appeal, it is obvious that ineffective assistance of counsel is not likely to be raised at trial or to appear among the assignments of constitutional error" on appeal).

462. *See* Cannon v. Berry, 727 F.2d 1020, 1022 (11th Cir. 1984) (affirming writ of habeas corpus where counsel failed to file a brief on direct appeal of defendant's murder conviction, which thus constituted ineffective assistance of counsel). Defective counsel is a ground for habeas relief only if counsel was constitutionally required. Therefore, the defective representation must have been at the trial or on direct appeal because there is no constitutional right to counsel in post-conviction proceedings. *See* Coleman v. Thompson, 501 U.S. 722, 755–757, 111 S. Ct. 2546, 2567–2568, 115 L. Ed. 2d 640, 672–674 (1991) (refusing to grant federal habeas relief for counsel errors in state habeas proceedings because there was no constitutional right to counsel). Still, an indigent criminal defendant is constitutionally entitled to an effective attorney in his "one and only appeal as of right," which usually occurs in a state court of appeals. Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985) ("[A] first appeal as of right therefore is not adjudicated in accord with due process of law if appellant does not have the effective assistance of an attorney."); Douglas v. California, 372 U.S. 353, 357–358, 83 S. Ct. 814, 816–817, 9 L. Ed. 2d 811, 814–815 (1963); Mason v.) (holding that "where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor"); Mason v. Hanks, 97 F.3d 887, 902 (7th Cir. 1996) ("[W]hen we are convinced that a petitioner might well have won his appeal on a significant and obvious question of state law that his counsel omitted to pursue, we are compelled to conclude . . . that the appeal was not fundamentally fair and that the resulting affirmation of his conviction is not reliable."). For more information on ineffective assistance of counsel claims, see *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel," and Part H in *JLM*, Chapter 9, "Appealing Your Conviction or Sentence."

463. Yick Wo v. Hopkins, 118 U.S. 356, 373–374, 6 S. Ct. 1064, 1073, 30 L. Ed. 220, 227–228 (1886) (finding imprisonment of the petitioners illegal because the ordinance upon which their conviction was based violated the equal protection clause of the 14th Amendment as applied); *Ex parte* Siebold, 100 U.S. 371, 376–377, 25 L. Ed. 717, 719 (1879) (finding that the question of the constitutionality of the laws involved was a proper ground for considering a writ of habeas corpus); Vuitch v. Hardy, 473 F.2d 1370, 1370 (4th Cir. 1973) (finding defendant doctor entitled to habeas corpus because the state abortion statute was unconstitutional).

(b) You received a certain type of punishment, and the law now forbids this type of punishment.[464]
(c) You were convicted for an act that is no longer a crime under the new law.[465]
(d) A state statute cancels your provisional early release credits after you have already earned them.[466]

15) Double Jeopardy:
(a) You were convicted for an act that is no longer a crime under the new law.[467]
(b) A state statute cancels your provisional early release credits after you have already earned them.[468]
(c) Your conviction violates your Fifth Amendment right against "double jeopardy" because you were convicted of a crime for which you had already been tried in the same state.[469]
(d) You were convicted in a second trial after your first trial was declared a mistrial in violation of the Fifth Amendment.[470]
(e) You were tried a second time for the same offense after a reviewing court had reversed your earlier conviction on the grounds that the evidence at your first trial was insufficient to support a conviction.[471]

16) Other Procedural Problems at Trial:

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464. See Part C(3)(a)(i) ("Prohibited Punishments") of this Chapter.

465. See Part C(3)(a)(ii) ("Decriminalized Behavior") of this Chapter for further explanation.

466. *See* Lynce v. Mathis, 519 U.S. 433, 447, 117 S. Ct. 891, 899, 137 L. Ed. 2d 63, 75–76 (1997) (holding retroactive cancellation, which actually increased the incarcerated person's punishment through re-arrest, violated the *Ex Post Facto* Clause).

467. See Part C(3)(a)(ii) ("Decriminalized Behavior") of this Chapter for further explanation.

468. *See* Lynce v. Mathis, 519 U.S. 433, 447, 117 S. Ct. 891, 899, 137 L. Ed. 2d 63, 75–76 (1997) (holding retroactive cancellation, which actually increased the incarcerated person's punishment through re-arrest, violated the *Ex Post Facto* Clause).

469. *See* Green v. United States, 355 U.S. 184, 190, 78 S. Ct. 221, 225, 2 L. Ed. 2d 199, 205 (1957) (determining that where jury had been instructed on first and second degree murder and convicted defendant of second degree murder with no comment on first degree charge, defendant may not be tried again for first degree murder); Dye v. Frank, 355 F.3d 1102, 1104 (7th Cir. 2004) (barring a criminal drug charge because defendant had previously been sanctioned under a state civil penalty "so punitive in purpose and effect that it constituted a criminal punishment"); Terry v. Potter, 111 F.3d 454, 459–460 (6th Cir. 1997) (holding that where petitioner's wanton murder conviction was reversed, and where the first jury was discharged without convicting him of intentional murder, petitioner could not be retried for intentional murder). Footnote 475 below describes when jeopardy attaches in a criminal trial.

470. Generally, once jeopardy "attaches" to a charge in a trial the state may not try you for that charge in another trial without violating the 5th Amendment. If there is a mistrial declared after jeopardy has attached, you may not be tried again for that charge unless you consented to the mistrial declaration or there was a "manifest necessity" for declaring the mistrial. Arizona v. Washington, 434 U.S. 497, 505, 98 S. Ct. 824, 830, 54 L. Ed. 2d 717, 728 (1978) (explaining that the prosecutor has the burden of showing this "manifest necessity"); *see also* United States v. Razmilovic, 507 F.3d 130, 141–142 (2d Cir. 2007) (finding that double jeopardy bars a second trial where defendant initially joined in a co-defendant's motion for mistrial but almost immediately changed his position after mistrial was to be finalized); Love v. Morton, 112 F.3d 131, 137 (3d Cir. 1997) (affirming grant of habeas relief from conviction on retrial after first trial court judge declared a mistrial soon after jury was sworn due to the judge's inability to complete the trial and without consent from counsel). Jeopardy "attaches" to your jury trial when the jury is sworn and empaneled. *See* Crist v. Bretz, 437 U.S. 28, 38, 98 S. Ct. 2156, 2162, 57 L. Ed. 2d 24, 33 (1978) (holding federal double jeopardy rule, which states that jeopardy attaches after jury is sworn and empaneled, overrides a Montana state rule that jeopardy attaches after the first witness is sworn).

471. *See* Burks v. United States, 437 U.S. 1, 18, 91 S. Ct. 2141, 2151, 57 L. Ed. 2d 1, 14 (1978) (holding that double jeopardy prohibits a second trial after a reviewing court has found the evidence legally insufficient to justify conviction); Hudson v. Louisiana, 450 U.S. 40, 44–45, 101 S. Ct. 970, 973, 67 L. Ed. 2d 30, 34–35 (1981) (holding double jeopardy protection was violated when petitioner was prosecuted after trial judge had already granted petitioner's motion for new trial based on insufficiency of evidence supporting guilty verdict).

(a) You were denied the right to be present at your trial.[472]
(b) You were prohibited from testifying on your own behalf.[473]
(c) The court in which you were convicted did not have the power to convict you because it did not have jurisdiction.[474]
(d) You were convicted without using a certain procedure that the law now says is necessary to ensure the fundamental fairness of a trial.[475]
(e) An error occurred during trial that made the trial fundamentally unfair in violation of the Fourteenth Amendment.[476]

Remember that the above list does not include every possible example. If you think you experienced a violation of your rights not listed above, try to identify what kind of right may have been violated. Look carefully through a criminal procedure handbook in your prison library. Read the amendments to the Constitution carefully. Read many cases, especially cases dealing with a situation like yours. For example, if you were convicted of drug trafficking, read other cases involving drug trafficking. Start by looking at Supreme Court cases because the Supreme Court is the strongest authority on Constitutional rights and how those rights should apply to actual cases. The Supreme Court's decisions are what all the other courts look to when they make their own decisions. If you find a case that deals with something similar to the situation you experienced, then read the cases the

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472. *See* McKaskle v. Wiggins, 465 U.S. 168, 178, 104 S. Ct. 944, 951, 79 L. Ed. 2d 122, 133 (1984) (stating that a defendant has a right to be present at all important stages of trial); Drope v. Missouri, 420 U.S. 162, 182–183, 95 S. Ct. 896, 909, 43 L. Ed. 2d 103, 119–120 (1975) (noting that the trial court failed to adequately determine whether the defendant waied his right to be present at trial); Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990) (holding that defendant's absence from the courtroom at critical junctures in his trial violated his due process rights because he was unable to provide assistance to his counsel or have a psychological impact on the jury). However, you will likely only be granted habeas relief for denial of this right if it resulted in "substantial and injurious effect." Rice v. Wood, 77 F.3d 1138, 1144 (9th Cir. 1996) (holding that a writ should not be granted for petitioner's absence during the jury's announcement of a death sentence if his absence did not have a "substantial and injurious effect" on him because his absence was not a structural error); *see also* Sturgis v. Goldsmith, 796 F.2d 1103, 1108–09 (9th Cir. 1986) (holding that petitioner's absence from his competency hearing warrants habeas relief if the absence was not harmless error).

473. *See* Rock v. Arkansas, 483 U.S. 44, 49, 107 S. Ct. 2704, 2708, 97 L. Ed. 2d 37, 44–45 (1987) (holding that defendants have a fundamental constitutional right to testify on their own behalf); People v. Allen, 187 P.3d 1018, 1030, 44 Cal. 4th 843, 860, 80 Cal. Rptr. 3d 183, 198 (Cal. 2008) (holding that a defendant who was found to be a sexually violent predator had a right to testify under the California and federal constitutions even though his lawyer told him not to testify). *But see* Taylor v. United States, 287 F.3d 658, 661–62 (7th Cir. 2002) (holding defense counsel does not have a duty to tell defendant about his constitutional right to testify).

474. *See* Sunal v. Large, 332 U.S. 174, 178–79, 67 S. Ct. 1588, 1591, 91 L. Ed. 1982, 1987 (1947) (finding habeas relief appropriate where (1) conviction was under a federal statute alleged to be unconstitutional, (2) federal court's jurisdiction was challenged, or (3) specific constitutional guarantees were violated); Butler v. King, 781 F.2d 486, 490 (5th Cir. 1986) (finding that defendant was entitled to federal writ of habeas corpus because state district court lacked jurisdiction over him at time of trial); Lowery v. Estelle, 696 F.2d 333, 336–38 (5th Cir. 1983). Having "jurisdiction" means that the court has the power to hear your case. If a court holds a trial without jurisdiction, it violates the Due Process Clause of the 5th or 14th Amendments. In *Lowery*, a Texas trial court dismissed an indictment for firearm use, and then convicted the defendant on other charges. The court violated a Texas state law that strips a court of jurisdiction over a case if it dismisses an indictment. The incarcerated person filed a habeas petition claiming that the trial court lacked jurisdiction to hold his trial. The federal court would not consider this claim for habeas corpus, however, because the petitioner had not exhausted state procedures, which means he had not raised the claim in the state courts before petitioning in federal court.

475. See Part C(3)(b) ("Exception: Fundamental Fairness at Trial") of this Chapter.

476. *See* Riggins v. Nevada, 504 U.S. 127, 137–138, 112 S. Ct. 1810, 1816–1817, 118 L. Ed. 2d 479, 490–91 (1992) (finding that the forced administration of an antipsychotic drug to defendant may have impermissibly violated his constitutional right to receive a fair trial by compromising the substance of his testimony, interaction with counsel, and comprehension); Young v. Callahan, 700 F.2d 32, 37 (1st Cir. 1983) (finding that a trial court committed a constitutional error by requiring petitioner to sit in prisoner's block rather than at counsel's table even though there was no finding that restraint was necessary and petitioner objected). *But see* Moore v. Ponte, 186 F.3d 26, 36 (1st Cir. 1999) (finding no constitutional error when it appeared the court had considered security concerns in deciding to make defendant sit in prisoner's block).

court relies on to determine whether something was a violation or not. Shepardize[477] the case to find lower court decisions in your district that may give you more information on how violations are interpreted in your district. You should look out for a rule or standard used to review your violation. Then, you will develop your case around how the standard or rule was violated in your arrest, trial, or sentence. (This process is explained further in Section 2 below.)

Another approach is to start by getting an idea of what a constitutional violation looks like, and then examining what happened at your arrest, trial, and sentence to determine if there was a similar error. If you can, look at a transcript of your trial and pay close attention to where your lawyer raised an objection. You should look at any records relating to your case, including pretrial proceedings. Also, speak to family members, your trial attorney, and investigators to help discover violations. If you are unable to identify a violation, federal habeas will not be able to help you.

And remember, if you can identify violations, you should list every possible violation and every instance of each violation.

477. By *Shepardizing*, you can make sure that the law has not changed over time. See Chapter 2 of the *JLM* for an explanation of how to *Shepardize* a case.