CHAPTER 13
FEDERAL HABEAS CORPUS PETITIONS*

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A. Introduction

This Chapter explains how people incarcerated in both state and federal prisons can get a federal court to review the legality of their criminal conviction (including their arrest and trial leading up to the conviction) or sentence.

The steps for doing this are different depending on whether you are a *state incarcerated person*, meaning you were convicted and sentenced by a state court, or whether you are a *federally incarcerated person*, meaning you were convicted and sentenced by a federal court. If you are a *tribally incarcerated person*, meaning you were convicted and sentenced by a tribal court, you can still challenge the legality of your conviction or sentence in federal court, but the rules for doing this are very different. Section B(1) briefly discusses these different rules, but, at this time, this Chapter does not go into detail on federal habeas corpus for tribally incarcerated people because of the very different nature of these claims.

State incarcerated people have the right to file a "petition for a writ of habeas corpus"[1] ("habeas petition" for short), which asks a federal court to review whether their conviction or sentence violated a federal law, treaty, or the U.S. Constitution. Because there are not very many federal treaties or laws that govern state criminal procedures, state incarcerated people almost always have to show a violation of the U.S. Constitution for their federal habeas petition to succeed.

Federally incarcerated people can also ask a federal court to review whether their conviction or sentence violates a federal law, treaty, or the U.S. Constitution. However, federally incarcerated people must instead use a different procedure than state incarcerated people. Instead of filing a habeas petition, federally incarcerated people file a "Section 2255 motion."

Whether you are a state incarcerated person filing a federal habeas petition or a federally incarcerated person filing a Section 2255 motion, you are asking a federal court to determine whether your conviction or sentence is illegal. If the court accepts your argument, it can order your immediate release, order a new trial, or order a new sentencing hearing. This Chapter tells you more about federal habeas corpus review (for state incarcerated people) and Section 2255 review (for federally incarcerated people).

Because most incarcerated people in the U.S. are state incarcerated people, this Chapter usually talks about federal habeas corpus petitions. Often, the rules and procedures that control federal habeas corpus petitions for state incarcerated people are the same as (or similar to) the rules and procedures that control Section 2255 motions for federally incarcerated people. When the rules and procedures are different for federally incarcerated people making Section 2255 motions, this Chapter will tell you about the differences. Otherwise, what the Chapter says about state incarcerated peoples' federal habeas petitions is also likely to apply to federally incarcerated peoples' Section 2255 motions.

Habeas corpus law is very complicated. Different federal courts follow different rules. You will need to research cases that apply in your federal district court to understand how that court will potentially apply the law to your case. For that reason, you should use this Chapter only as a general guide to help you research the cases that apply to your district court. Because habeas corpus petitions are very difficult to file and argue successfully without a lawyer, you should also consider asking the court to appoint a lawyer to represent you.[2] Part C discusses the right to counsel in federal habeas

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[1] "Habeas corpus" is often shortened to "habeas." "Petition for a writ of habeas corpus" is sometimes shortened to "petition for habeas corpus," or "habeas petition."

[2] In noncapital cases, requests for financial assistance should be made under the Criminal Justice Act and show three things: (1) that investigative services are necessary; (2) that you are financially unable to engage in necessary investigations; and (3) that "the interests of justice so require." *See* 18 U.S.C. § 3006A(a), (e); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 12.1—12.5 (2022). If you are financially unable to pay for your own lawyer, a court, under limited circumstances, may be willing to appoint you a lawyer for your habeas proceeding. *See* 18 U.S.C. § 3006A. Part C of this Chapter ("Obtaining Counsel") gives more information on how to get a lawyer for your habeas petition. If you did not receive a death sentence, you are not entitled to a lawyer. That said, you still may be able to convince the court to appoint you a

proceedings. If you cannot get a lawyer, you should read this Chapter very carefully to understand how habeas corpus works. You probably will need to read parts of this Chapter more than once to be sure you understand them.

1. What is Habeas Corpus?

You can file a habeas corpus petition in federal court to argue that your imprisonment violates federal law.[3] The term "federal law" includes only federal statutes (law passed by Congress), treaties, and the U.S. Constitution. If you believe that your incarceration violates a federal statute, treaty, or the U.S. Constitution, you can use the habeas corpus process to challenge almost any aspect of your arrest, trial, or sentence. However, as you will learn in this Chapter, filing and getting a court to rule on your habeas corpus petition—and getting a court to rule that your conviction or sentence is illegal—requires you to take *many* different steps. These steps occur both in federal court *after* you file your habeas corpus petition and in state court *before* you file your habeas petition in federal court. If you miss a step, federal courts may not let you even file your habeas corpus petition or may rule against you even if your conviction or sentence was illegal. So, it is very important that you take **all** of the steps described in this Chapter.

A first question is timing: when in your criminal case can you file a federal habeas petition? Usually, the criminal process works in the following way. First there is a trial or a guilty plea that leads to a conviction and sentence. After that, you can file a "*direct* appeal" challenging your conviction or sentence. If you were tried in a state court, your direct appeal will be to a state "appellate court" (a court that handles appeals of lower court decisions). If you were tried in a federal court, your direct appeal will be to a federal court of appeals. A direct appeal asks the state or federal appellate court to review anything that happened in court during your trial or at the time of your guilty plea that may have been improper. This could be the case if the trial judge allowed the state to present evidence or testimony that it should not have allowed, or of if the trial judge prevented your lawyer from presenting evidence that should have been allowed, or if the trial judge gave an incorrect instruction to the jury. To learn more about direct appeals, read *JLM*, Chapter 9, "Appealing Your Conviction or Sentence."

If you are a federally incarcerated person whose direct appeal was denied, you may start the habeas process by filing a Section 2255 motion in the federal court where you were convicted. Most of the time, federally incarcerated people use a Section 2255 motion to challenge actions that occurred before their trial or actions that happened when a trial judge was not present/watching. For example, you can file a 2255 motion claiming that police obtained a confession from you by force (if that issue was not brought up during your trial), that your court-appointed attorney did not properly prepare to represent you, or that the police or prosecutor knew of evidence that supported your case but failed to provide that evidence to you or your attorney before trial, at trial, or before you pled guilty.

Things are different if you are a state incarcerated person. If you are a state incarcerated person, even after your direct appeal, if you have claims challenging the legality under federal law of actions that occurred before your trial or that happened when a trial judge was not present/watching, you may *not yet* file a habeas petition in federal court. Instead, you must first file what is called a "*state post-conviction petition*." (In some states, this procedure is called a "state habeas corpus petition" or some

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lawyer. If the court denies your request, you can write your own habeas petition and ask for a lawyer again after you file your petition with the court.

If you received a death sentence, you are entitled to a lawyer. *See* 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. *See* 18 U.S.C. § 3599(b); McFarland v. Scott, 512 U.S. 849, 859, 114 S. Ct. 2568, 2574, 129 L. Ed. 2d 666, 676 (1994) (holding that incarcerated people on death row can request counsel before filing a habeas petition and that the court should appoint such counsel). The court can stay a death sentence for a state incarcerated person for up to 90 days after a lawyer is appointed or the application for a lawyer is withdrawn or denied. 28 U.S.C. § 2251(a)(3). But after a stay is granted, any State court proceeding is void. 28 U.S.C. § 2251(b).

[3] A habeas challenge is a *civil*, not *criminal*, action. It is an action that you bring against the government. Therefore, in habeas petitions, you are usually referred to as the "petitioner," though you may be referred to as the "movant" if you are challenging a federal conviction. For consistency, this Chapter refers to the incarcerated person bringing the habeas petition as the "petitioner."

other name, but we will refer to it here as a "state post-conviction petition.") In your state post-conviction petition, you may raise claims showing that your conviction or sentence is illegal under either *state* or *federal* law. The procedures for filing a state post-conviction petition are described in the statutes of the state where your trial occurred.[4]

There are four important things that state incarcerated people should know about state post-conviction petitions:

(1) State post-conviction petitions are different from federal habeas corpus petitions.
(2) State post-conviction petitions must be filed *before* you file a federal habeas corpus petition.
(3) State post-conviction petitions usually are used to challenge the legality under state or federal law of actions that happened *before* your trial or when your trial judge or the judge who took your guilty plea was not present/watching.
(4) The only time you can skip a state post-conviction petition and go straight from your state direct appeal to a federal habeas corpus petition is if: (1) you included *all* of your legal reasons for challenging your conviction and sentence under federal law in your direct appeal, and (2) the court on direct appeal ruled against you on all those claims. If, however, you have a claim based on federal law that you did not raise or was not decided on direct appeal, then you must first file a state post-conviction petition raising that claim.

To say the same thing another way, if you are a state incarcerated person, you may file a federal habeas corpus petition (1) only after your state direct appeal was finally decided against you by all available state appellate courts,[5] and (2) only after your state post-conviction petition raising any remaining claims based on federal law that were not raised on direct appeal has also been finally decided against you by all available state courts. The rule that you generally cannot file a federal habeas petition unless you first included all of the claims in the petition either in a state direct appeal or in a state post-conviction petition is referred to as the "exhaustion of remedies" requirement. To learn more about the exhaustion of remedies requirement, see Section D(6) of this Chapter ("Exhaustion of State Remedies by Persons Incarcerated for State Convictions").

2. What Will You Learn in This Chapter?

This Chapter is divided into ten parts. **Part B** says more about the laws governing habeas corpus review for state incarcerated people and describes when a state incarcerated person *may* or *must* file a federal habeas petition. It also explains how strong a legal claim must be for federal courts to grant relief (called the "standard of review") to state incarcerated people. The standard of review makes it difficult for state incarcerated people to get a federal court to rule in their favor.

Part C discusses how you might be able to get a lawyer to help you file your habeas petition or argue it in court. At your trial and during your direct appeal, the trial court must appoint a lawyer for you if you cannot afford to hire one yourself. In federal habeas corpus proceedings, however, the court is not required to appoint a lawyer to represent you unless you were sentenced to death. Still, federal habeas corpus courts have the power to appoint lawyers to represent state incarcerated people who are not sentenced to death, so it may be worth asking the court to appoint a lawyer to represent you.

Part D explains the most important requirements for filing and getting a court to grant you relief (give you what you asked for in your petition) on your federal habeas corpus petition. To file a habeas

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[4] For more information about state post-conviction proceedings, *see 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 Michigan are described in *JLM*, Chapter 21, "State Habeas Corpus: Florida, New York, and Michigan." 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.

[5] Sometimes, there are more than one level of appellate review available in the state courts. To meet the exhaustion requirement, you must go through *all* those levels of appeal. Petitioning the highest court in the state for review of your claims will meet the exhaustion requirement, even if that court denies review. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 513, 102 S. Ct. 1198, 1200, 71 L. Ed. 2d 379 (1982) (noting that claims for which the Tennessee Supreme Court denied review were fully exhausted).

petition, you must (1) show that you are "in custody," (2) identify a federal constitutional violation that occurred, (3) provide specific facts supporting your claim, (4) exhaust your state remedies, (5) file within the proper time limit, and (6) prove that the state courts' decisions were "contrary to" or an "unreasonable application" of Supreme Court law that was clearly established at the time of your direct appeal. In addition to the procedural requirements, Part D also explains other procedures you may want to use, such as how to correctly name the party you are filing the petition against and how to amend your petition.

Part E discusses the various procedures you can use to discover facts and present evidence to support your habeas corpus claims, such as discovery, expanding the state record, and an evidentiary hearing.

Part F discusses the "procedural default rule," which prevents state incarcerated people from bringing habeas claims in federal court if they previously failed to raise those claims in state court and if they no longer have an opportunity to raise the claims in state court. Part F explains what the state needs to prove that your claim was procedurally defaulted in state court, as well as arguments you can make in response.

Part G discusses the "harmless error defense," which the state will almost always raise in response to your habeas petition. If the state successfully argues that the violation you are claiming was actually harmless, then the court will deny you relief. Part G explains this rule in detail, discussing the various factors a judge may consider when deciding whether something was a harmless error and kinds of errors that courts generally find *not* to be harmless.

Part H discusses the strict rules that generally prevent you from filing a second or additional federal habeas corpus petition(s) (called "successive petitions") if you previously filed a habeas petition that the federal court decided against you. It also describes the rare situations in which you are permitted to file a second habeas corpus petition and the procedures you need to follow.

Part I outlines various motions you can file if the federal habeas court rules against some or all of the claims in your petition. Part I then describes how you can appeal the denial of your petition to a federal court of appeals. This part also explains how to expand the record that the court of appeals will use to review your appeal. After explaining how the court will review your appeal (the "standard of review" on appeal), Part I describes some special restrictions and procedures that apply to appeals in capital cases (cases where the sentence may be the death penalty).

Part J explains how to seek review (called *certiorari*) from the Supreme Court of the United States if the court of appeals denies your appeal. It also briefly discusses how to file for *in forma pauperis* status to avoid having to pay filing fees at this stage and how to obtain counsel if you do not have a court-appointed attorney.

Part K provides a brief explanation of petitions that are filed in the Supreme Court without first being filed in the federal district court or court of appeals (called "original" habeas corpus petitions). Original petitions are only rarely filed and are usually unsuccessful, so you should not depend on this method of obtaining habeas corpus relief.

The Appendices at the end of this Chapter provide other helpful information for you. **Appendix A** is a flow chart that outlines the process of reviewing convictions and sentences in state and federal courts. **Appendix B** is a checklist of steps you need to take to be sure you have exhausted your state remedies before filing your first habeas corpus petition. **Appendix C** lists examples of violations of the U.S. Constitution that can be a basis for federal habeas corpus relief if they occurred in your case.

3. When Should You File a Federal Habeas Petition?

State incarcerated people should file their federal habeas petitions only after finishing their direct appeal and soon after finishing their state post-conviction proceedings:

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

To file a federal habeas petition, you must have already raised all of your federal claims in at least one full set of state court proceedings. This is called the "exhaustion of state remedies" rule. This rule exists because federal courts want the state courts to do most of the work of correcting illegal convictions and sentences, so they require you to raise your claims in state court first. You are only allowed to bring claims in federal court if the state courts have reviewed and rejected *all* of your claims.

To satisfy the exhaustion of state remedies rule, you first must raise *all* of your federal claims in state court before you file you file a federal habeas petition (and you must include *all* of your federal claims in the first federal petition you file). "Exhaustion of state remedies" is an important requirement and is discussed in more detail in Section D(6) ("Exhaustion of State Remedies by Persons Incarcerated for State Convictions") below.

One way to "exhaust your state remedies" on a federal claim is to include that claim in your state direct appeal. Another way is to include the claim in a state post-conviction petition. Whether you raise the claim on state direct appeal or state post-conviction appeal, you must make sure that the claim is decided against you by *all* state courts that can do so, which in some states can be more than one court. For example, some states allow direct appeals to a court of appeals and to the state supreme court. And some states begin state post-conviction cases in a trial court, after which a state court of appeals and the state supreme court can review the decision of the trial court. The next paragraph discusses direct appeals. The paragraph after discusses state post-conviction.

In most cases, after you are convicted and sentenced in a trial court, your lawyer will file a direct appeal to the state appellate court. That direct appeal should include all federal claims that you know about or hope to include in a federal habeas corpus petition later on. For direct appeals, you have the right to a lawyer. This lawyer can be your trial lawyer, another lawyer appointed by the court, or a lawyer your hire for the appeal.

If you lose your direct appeal, you have to decide whether you need to file a state post-conviction petition before filing a federal habeas corpus petition. If you or your lawyer know some reason why your conviction or sentence is illegal that was not included in your direct appeal, you must include that claim in a state post-conviction petition before filing a federal habeas petition. Often, such claims are based on facts or evidence that were not part of your trial or were not known to your trial judge that you only discovered later. For example, you may have found out after your trial that your trial lawyer failed to prepare adequately for your trial or that the police or prosecutors failed to tell you or your lawyer about evidence that suggests you are not guilty of the crime for which you were convicted. It is almost always a good idea to file a state post-conviction petition, because doing so assures that you have satisfied the exhaustion requirement.[6] If you raised a claim on state direct appeal, you do not need to raise it again in a state post-conviction petition. Sometimes, you will learn of new facts that support a claim you *did* raise in your direct appeal, but you did not include those facts in the direct appeal for reasons that are not your fault. For example, the police may have hidden those facts from you before your direct appeal. If that happens, then you should raise that claim again in your state post-conviction petition, even though the claim was already raised on direct appeal.

You should file your federal habeas petition very soon after you finish your state direct appeal and post-conviction petition. (Remember that in some states, more than one court must decide your state post-conviction petition against you—first a trial court, then one or more appellate courts.) There are strict time limits that apply to filing a federal habeas petition after you finish your state direct appeal and state post-conviction process. You have only one year to file your federal habeas corpus petition after your state direct appeal has been completed. However, the time that the state courts take to finally decide any state post-conviction petition that you file does *not* count towards your one-year deadline. Any time, however, that passed after your direct appeal ended and before your state post-conviction was filed *does* count toward the one year. And any time that passes after your state post-conviction proceeding and before you file your federal habeas corpus petition also will count toward your one-year deadline. So, when the state courts finish deciding your state post-conviction petition, you almost always will have less than one year to file your federal habeas corpus petition. It is important, therefore, for you to move quickly to file a federal habeas petition after your state court remedies are exhausted. The time limits that apply and the rules about what does and does not count towards the one-year limit are discussed in Section B(2) ("Statute of Limitations"), Subsection D(5)(b) ("Tolling), and Subsection D(5)(c) ("Equitable Tolling").

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[6] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.1 (2022) ("The exacting exhaustion and procedural default doctrines that now prevail in the federal courts, . . . leave potential federal petitioners with no choice but to take literally the exhaustion of state remedies metaphor.").

4. Three Rules to Keep in Mind at All Times

This Section goes over three very important rules that you should be aware of before you read the rest of this Chapter:

(a) File Your Federal Habeas Corpus Petition Within One Year After the End of Your Direct Appeal.

Once your direct appeal is finished, you have only one year of what might loosely be called "free time" before you must file your federal habeas corpus petition. If you fail to file before one year of "free time" passes, the federal court will reject your petition. By "free time," we mean any time *other than* the time when your case is properly filed, argued in, and ruled on by one or more state post-conviction courts. If you file a state post-conviction petition, the days that pass while your case goes through the state post-conviction process do *not* count toward your one year. It is important for you to pay close attention to the one-year deadline and to remember that the time that passes after your direct appeal and before you file a state post-conviction petition counts toward the one-year limit. Keep in mind that the time that passes after your state post-conviction petition is decided and before you file your federal habeas corpus petition also counts against your one year. The one-year deadline and how to determine which days do and do not count against that one-year deadline are discussed at greater length in Section B(2) ("Statute of Limitations") of this Chapter.

(b) If You Are a State Incarcerated Person, You Must First Present Any and All Claims to the State Courts Before Including Them in a Federal Habeas Corpus Petition.

This requirement is called the "exhaustion of state remedies rule" or, for short, the "exhaustion rule" and is discussed more fully in Section D(6) ("Exhaustion of State Remedies by Persons Incarcerated for State Convictions") of this Chapter. The point of this requirement is to give state courts the first chance to correct any violations of federal law that you may later argue to a federal court in your habeas petition. If you do not seek a state direct appeal first, the federal court will not address your claims. For reasons stated in the next rule, it is also important to exhaust *all* of your claims in state court before bringing them to federal court. This is because (with only rare exceptions) you must include all of your federal claims in your *first* federal habeas corpus petition, and you must have "exhausted" state review of *all* the claims in that petition before you file that petition.

(c) Include All Your Claims in Your Federal Habeas Corpus Petition Because You May File Only One Petition Challenging Your Current Convictions and Sentence.

Courts are very strict about the rule that you have only one chance to challenge your current convictions and sentence in a federal habeas corpus petition. So, except in very limited cases, you only have one chance to get your habeas petition right. This means that you must (1) meet all the deadlines for that petition, (2) include all available federal legal claims and facts that support those claims in that petition, (3) exhaust all of your state remedies on those claims before filing that petition, and (4) follow all the rules and procedures when you file and make arguments in favor of your that petition. If you make a mistake or miss a deadline, it is very likely that you will not be able to ask for habeas relief again. For more information about this, see Part G ("Successive Petitions") of this Chapter.

B. Overview of the Federal Habeas Corpus Proceeding

This Part briefly introduces you to some of the most important rules and procedures that apply to federal habeas corpus petitions. Each brief introduction tells you where you can find a fuller discussion of that topic later in the Chapter.

1. Laws Governing Federal Habeas Petitions

You can find all of the laws covering federal habeas petitions for state incarcerated people and Section 2255 motions for federally incarcerated people in 28 U.S.C. §§ 2241–2266. Section 2241 gives federal courts the authority to release state and federally incarcerated people who are being held in violation of the Constitution. Sections 2242 and 2253 cover how incarcerated people may present evidence and appeal decisions of the federal district courts. Section 2244 includes important time limits on filing federal habeas corpus petitions and places very strict limits on when you can file a second or successive federal habeas corpus petition.

Most importantly, Section 2254 has a set of requirements and restrictions that apply only to people tried and convicted in state court. Among other things, these requirements and restrictions define the "exhaustion of remedies" rule, say how strong claims must be before a federal court may grant relief on them, and control whether you can present evidence in favor of your claims at a court hearing. This statute is so important to petitions by state incarcerated people that the courts often refer to such petitions as "section 2254 petitions."[7]

Section 2255 applies only to people convicted and sentenced by the federal government.[8] When federally incarcerated people challenge their convictions or sentences after they finish their direct appeals, they usually do so under 28 U.S.C. § 2255, and their challenge is called a "Section 2255 motion." In very rare circumstances, an incarcerated person may bring a habeas action directly under 28 U.S.C. § 2241, without using Section 2254 or 2255.[9]

There are also special rules that incarcerated people must follow when filing and litigating habeas cases and that courts must follow in hearing those cases. If you are a state incarcerated person, the rules you should follow are called the "Rules Governing Section 2254 Cases in the United States District Courts."[10] If you are a federally incarcerated person, the rules you should follow are the "Rules Governing Section 2255 Proceedings in the United States District Courts."[11]

If you are a state incarcerated person sentenced to death, your habeas petition may be subject to special procedures that are described in 28 U.S.C. §§ 2261–2266. See Part C ("Obtaining Counsel") of this Chapter for more information relevant to state incarcerated people sentenced to death.

Finally, if you tribally incarcerated person (meaning you were convicted and sentenced by a tribal court), you cannot sue for a violation of the constitutional rights described in this Chapter. This is because the U.S. Constitution does not apply to tribal nations, and tribes are therefore not required to

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[7] You are a state incarcerated person if you are incarcerated for a state crime. You are a federally incarcerated person if you are incarcerated for a federal crime. Most people in the U.S. are incarcerated for state crimes. Still, there are many people incarcerated for federal crimes, which can include certain drug-related crimes, crimes committed on federal property, among others.

[8] This Chapter describes some important differences in the rules and procedures that are used in filing and resolving state incarcerated people's Section 2254 petitions and federally incarcerated people's Section 2255 petitions. Still, there are enough similarities that you often may use cases decided under either section. *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."); *see also* 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 [Antiterrorism and Effective Death Penalty Act of 1996] 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 courts."). In this Chapter, the procedural differences are discussed as they arise, and you should pay careful attention to them.

[9] The Supreme Court has said that restrictions in 28 U.S.C. § 2241(e) that forbid people detained by the federal government determined to be "enemy combatants" from filing a petition for relief under section 2241 are unconstitutional. This provides those people determined to be "enemy combatants" with access to federal courts by filing a "Section 2241 petition." *See* Boumediene v. Bush, 553 U.S. 723, 792, 128 S. Ct. 2229, 2274, 171 L. Ed. 2d 41, 93 (2008).

[10] You can find these rules in the United States Code ("U.S.C.") directly after 28 U.S.C. § 2254.

[11] You can find these rules in the United States Code ("U.S.C.") directly after 28 U.S.C. § 2255.

follow it when prosecuting people for crimes.[12] Instead, the Indian Civil Rights Act ("the ICRA") provides some, but not all, constitutional rights to tribal citizens to protect them during tribal criminal proceedings.[13] If you believe your tribal conviction or sentence violates the ICRA, you can file a habeas petition in federal court under Section 1303 of the ICRA.[14] When you do this, you will typically be required to meet the "exhaustion" requirement by first bringing your claim and pursuing all possible appeals in tribal court.[15] Because the steps a tribally incarcerated person must follow in their habeas proceedings are different than those for state and federally incarcerated people, this Chapter does not go into further detail on federal habeas corpus petitions under the ICRA.[16]

The habeas corpus statutes often change quite often. Sometimes, Congress makes dramatic changes to the habeas corpus statutes all at once, like what happened with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[17] Additionally, courts very often decide cases that change how the habeas corpus laws are applied by judges. So, you should *Shepardize* the cases included in this Chapter before relying on them to make sure that they are still the law that is being followed as of the date when your habeas corpus petition is being considered by the federal courts.[18]

2. Statute of Limitations in Federal Habeas Corpus

As explained above, you should only file a federal habeas petition: (1) after you finish your state direct appeal, and (2) after the state court or courts make a decision on your state post-conviction petition. Remember that if you are in a state that has multiple levels of courts who hear appeals, all of those courts must make a decision on your direct appeal or state post-conviction petition. But you cannot wait very long during the time between when your direct appeal finishes and when you file your state post-conviction petition. You also cannot wait very long during the time between when your state post-conviction petition finishes and when you file your federal habeas corpus petition.

Federal law imposes strict time limits on your ability to file a petition—you have *only one year* of what might be called "free time" to file your federal habeas petition after your state direct appeal has completed.[19] By "free time," we mean time after your direct appeal when your case is not "pending" in a state post-conviction proceeding. That time may occur (1) after your direct appeal and before you file a state post-conviction petition, or (2) after all levels of state post-conviction courts available to you have ruled against you and before you have filed your federal habeas corpus petition.

If there has been more than one year of this "free time" in your case between direct appeal and the filing of your habeas petition, it is very unlikely that a federal court will allow you to continue any

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[12] *See* Talton v. Mayes, 163 U.S. 376, 384, 16 S. Ct. 986, 989, 41 L. Ed. 196 (1896) (holding that the U.S. Constitution does not apply to tribal nations because their powers of self-governance existed before the United States). The tribe that sentenced you will also have its own constitution that gives you certain rights, so it is important to check what those specific rights are. If you believe your rights under your tribal constitution have been violated, you must bring this claim in tribal court, either through a habeas petition or a motion by another name, depending on the rules of your specific tribal court.

[13] *See* Indian Civil Rights Act, 25 U.S.C. §§ 1301–1304.

[14] Indian Civil Rights Act, 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.").

[15] *See, e.g.*, Chegup v. Ute Indian Tribe of the Uintah & Ouray Reservation, 28 F.4th 1051, 1060–1061 (10th Cir. 2022) (requiring exhaustion for § 1303 habeas petitions unless narrow exceptions apply, including: the tribe asserting jurisdiction illegally or in bad faith, and when the petitioner can demonstrate that it is futile pursuing the claim in tribal court); DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 516 (8th Cir. 1989) (requiring exhaustion for § 1303 habeas petitions unless the tribe is asserting jurisdiction illegally or in bad faith, or unless it would be futile to pursue the claim in tribal court).

[16] For more discussion on your rights as a tribally incarcerated person in habeas proceedings, see 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.09 (2023).

[17] 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.).

[18] By using LexisNexis and *Shepardizing*, you can make sure that the law has not changed. *See JLM*, Chapter 2, "Introduction to Legal Research," for an explanation of how to *Shepardize* a case.

[19] 28 U.S.C. § 2244 ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.").

further. However, the time that the state courts take to decide your state post-conviction petition does *not* count against your one-year deadline, as long as you meet the filing deadlines under state law while your case goes through the post-conviction process. But any time that passes after your direct appeal ends and before your state post-conviction is filed *does* count toward the one year. So, when the state courts finish deciding your state post-conviction petition, you almost always will have less than one year before you must file your federal habeas corpus petition. So, you often will have to move quickly to file a federal habeas petition after your state court remedies are exhausted. The table below summarizes what time does and does not count toward your one-year limit for filing a federal habeas petition. It is *very* important that you pay close attention to these time requirements, because missing the filing deadline very likely means you can no longer pursue your claims.

Stage of Proceedings	Does this Time Count Toward Your One-Year Limit?
After your direct appeal is finished and *before* filing your state post-conviction petition	**Yes.** It is important to file for post-conviction review very soon after your direct appeal is finished.
During your state post-conviction review (*after* you file your state post-conviction petition and *before* the court makes a decision on it)	**No.** As long as you meet your state's filing deadlines, the time it takes for the courts to review your post-conviction petition does *not* count toward the one-year limit.
After your state post-conviction is finished and *before* filing your federal habeas petition	**Yes.** In most cases, you have less than one year to file your federal habeas petition after the state courts have ruled against your state post-conviction petition.

3. Standard of Review

The "standard of review" described in section 2254(d) of the habeas statute is what tells federal courts how clear or obvious a state court's error of constitutional law in your case must be before the federal court can overturn your state conviction or sentence.[20] Section 2254(d) requires you to show that a state court ruling on a federal constitutional claim in your case either was *either* (1) "contrary to" or "an unreasonable application" of "clearly established" "Supreme Court precedent" *or* (2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court." The meaning of these quoted words, and how to meet this standard, are discussed below.

4. Harmless Error

If a federal habeas court concludes that a state court made a constitutional error in your case that was clear or obvious enough to meet section 2254(d)'s standard of review, it will then ask whether that error was "harmless." In most cases, a federal habeas court will *not* overturn your conviction or sentence unless that error "had a substantial and injurious effect or influence in determining the jury's verdict."[21] In other words, the court will ask whether your conviction or sentence would have likely been different if the error had never happened. This rule is explained further in Part G ("Defense to Habeas Corpus Claims: Harmless Error").

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[20] *See* 28 U.S.C. § 2254(d) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim—(1) resulted in a decision that *was contrary to*, or involved *an unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on *an unreasonable determination of the facts* in light of the evidence presented in the state court proceeding.") (emphasis added).

[21] Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); Brown v. Davenport, 142 S. Ct. 1510, 1517 (2022) (holding that a federal court cannot grant habeas relief based solely on an incarcerated person's satisfaction of the *Brecht* test alone and that both § 2254(d)(1) and the *Brecht* test must be satisfied); Reiner v. Woods, 955 F.3d 549, 561–562 (6th Cir. 2020) ("[I]t's important to reiterate what *Brecht* and *O'Neal* require, and what they do not. 'The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.'") (citing O'Neal v. McAninch, 513 U.S. 432, 438, 115 S. Ct. 992, 995, 130 L. Ed. 2d 947 (1995)).

C. Obtaining Counsel

If you were not sentenced to death, you do **not** have a constitutional right to a court-appointed lawyer in federal habeas proceedings. In non-capital (non-death sentence) cases, a court will *only* provide you with a lawyer if (1) you cannot afford to hire a lawyer yourself **and** (2) the "interests of justice" require the court to provide you with a lawyer.[22] Whether or not a court appoints a lawyer for you, you still have the right to at least some access either to a law library or to help from other incarcerated people who act as "jailhouse lawyers."[23] See *JLM*, Chapter 3, "Your Right to Learn the Law and Go to Court," for more information. If you are appointed a lawyer for your habeas petition, that lawyer has a *professional responsibility* to represent you effectively, under the rules for lawyers' professional conduct. However, professional rules for lawyers are *not* the same as laws: lawyers who violate these rules might get in trouble with their state's bar association, but you *cannot* rely on a violation of these rules in court. Unfortunately, the courts do not enforce a *legal* requirement on lawyers to effectively represent you in your habeas proceeding.[24] The legal right to effective assistance of counsel only applies only at your trial and in your direct appeal.

A federal court may decide that the "interests of justice" require them to appoint a lawyer for you if you can convince the court that **one** of the following is true:

(1) You are mentally or physically disabled;[25]

(2) Your case involves complex legal issues;[26]

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[22] 18 U.S.C. § 3006A(a)(2)(B); 28 U.S.C. § 2255(g); Rules Governing Section 2255 Cases 6(a), 8(c), *available at* https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf [https://perma.cc/2QT8-UF42] (last visited Oct. 1, 2023). For state incarcerated people, the court may appoint a lawyer for you if you are (or become) unable to afford one yourself. This does not mean you have to be considered "indigent" but instead means that you are "financially unable to obtain adequate representation." *See* Green v. United States, 262 F.3d 715, 716 (8th Cir. 2001) ("[I]ndigence connotes a greater financial need than is necessary to qualify for appointed counsel . . . ."). Again, the decision is governed by the "interests of justice." 28 U.S.C. § 2254(h); Rules Governing Section 2255 Cases 6(a), 8(c), *available at* https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf [https://perma.cc/87KT-RB9R] (last visited Oct 1, 2023); *see also* Reese v. Fulcomer, 946 F.2d 247, 263–264 (3d Cir. 1991), *superseded on other grounds by statute*, 28 U.S.C. § 2254(d) (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).

[23] *See* Lewis v. Casey, 518 U.S. 343, 351–353, 116 S. Ct. 2174, 2180–2181, 135 L. Ed. 2d 606, 617–619 (1996) (affirming that incarcerated people have the right to access law libraries and librarian staff but holding that, in order to prove this right was violated, an incarcerated person must show "actual injury" and demonstrate that their ability to pursue a legal claim actually suffered because of the lack of access to law libraries or librarian staff).

[24] 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.").

[25] *See* Hearn v. Dretke 376 F.3d 447, 455 (5th Cir. 2004) (holding that a colorable claim—meaning one that is plausible or has a reasonable chance of being true—of "mental retardation" is enough for an incarcerated person's petition for appointment of counsel); *see also* 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). *But see* Phelps v. United States Federal Government, 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 [he] was unable to understand the legal proceedings in which he was participating").

[26] *See, e.g.*, Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990) (stating that the district court was wrong for failing to appoint counsel because the factual and legal issues were sufficiently complex and numerous and also finding that the incarcerated person's imprisonment significantly hurt his ability to investigate the issues); *see also* 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. *Sequester*, BLACK'S LAW DICTIONARY (9th ed.). But you should know that a court won't always appoint counsel in these cases. *See, e.g.*, 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).

(3) You have a strong legal claim;[27]
(4) There are important facts in your case that need to be investigated, and you are not able to investigate them yourself or will need an expert's help to make your case;[28]
(5) The court allows you to conduct discovery to find out more about the facts of the case;[29]
(6) The court decides to hold a hearing in your case at which witnesses and evidence will be presented;[30] or
(7) The court of appeals grants you a "certificate of appealability" after your habeas petition is denied in district court.[31]

Except in capital cases (where the federal district judge *must* appoint counsel), the district judge has a lot of discretion in determining whether to assign you a lawyer for one of these reasons, and federal judges often are reluctant to appoint counsel. Appellate courts normally will *not* overturn a district judge's decision not to appoint counsel.

To request a court-appointed lawyer, you must prepare a "motion for appointment of counsel," which is a brief document that states the legal and factual reasons why the court should appoint you a lawyer. You also must file an application to proceed in the case *in forma pauperis* (also referred to as "IFP"), which is a brief document in which you explain why you do not have enough money to pay the fees that normally are required to file a case in court or to pay for a lawyer.[32]

You are allowed to request counsel at several different points during your habeas proceeding. For example, you may request a lawyer even before you file your petition, so that the lawyer can help you

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[27] *See* Williams v. Meese, 926 F.2d 994, 996 (10th Cir. 1991) (noting that relevant considerations in determining whether to appoint habeas counsel include the "merits of the litigant's claims" and the "nature of the factual issues raised in the claims"); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983) ("In deciding whether to appoint counsel in a habeas proceeding, the district court must evaluate the likelihood of success on the merits . . . ."); 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 it is satisfied that the incarcerated person has made out a prima facie case).

[28] *See*, *e.g.*, Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990) (requiring counsel 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 the incarcerated person does not have the 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 was "almost certainly lack[ing] a working knowledge of the American legal system" was 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").

[29] Rule 6(a) of the Rules Governing Section 2254 Cases, and of the Rules Governing Section 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. *Available at* https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf [https://perma.cc/87KT-RB9R] (last visited Oct. 1, 2023). For a discussion of discovery, *see* Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery."

[30] Rule 8 (c) of the Rules Governing Section 2254 Cases and of the Rules Governing Section 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. *Available at* https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf [https://perma.cc/87KT-RB9R] (last visited Oct. 1, 2023). *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); Crayton v. Carlsen, No. 02-CV-2565 (JSR)(KNF), 2003 U.S. Dist. LEXIS 961, at *2 (S.D.N.Y. Jan. 24, 2003) ("Among the factors which a court may consider in determining whether to grant a habeas corpus petitioner's application for appointment of counsel is whether an evidentiary hearing should be held in connection with the petition.").

[31] *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 [https://perma.cc/4HAB-NFFU] (last visited Oct. 1, 2023).

[32] An *in forma pauperis* is an application submitted by someone who cannot afford a lawyer.

prepare the petition. Courts, however, are especially unlikely to appoint an attorney at such an early stage because they do not know the nature or complexity of your claims. So, you might want to wait to ask for a lawyer until you submit your petition, or even after that point (like when you ask the court to let you conduct discovery, or when you have a hearing to present evidence).

D. Requirements for Filing a Federal Habeas Corpus Petition

1. Who Can File: Petitioner's "Custody" Requirement

To file a habeas petition, you must be "in custody" for the conviction or sentence that you are challenging.[33] This requirement usually is not difficult to meet because courts have interpreted "in custody" broadly. You are "in custody" any time you are physically held in a jail, prison, or other facility that you are not free to leave when you want to. Even if you are not actually physically confined, you still qualify as being "in custody" if your freedom of movement is restrained in ways that are not shared by the general public.[34] This means that you are "in custody" if you are in jail or prison, on parole, or on probation.[35]

You are also considered to be "in custody" if: (1) you are challenging a consecutive sentence that you have not yet begun to serve,[36] (2) you are challenging a sentence that has been temporarily postponed because you have been released on your own recognizance,[37] (3) you are challenging a sentence that you have finished serving and are serving another sentence that was ordered to run

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[33] 28 U.S.C. §§ 2241(c)(1)–(3), 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 their petition is filed). *See also* 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.").

[34] *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 the federal habeas corpus statutes).

[35] *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) (holding that a person serving consecutive sentences is "in custody" for any one of those sentences, even if the sentence has technically ended or not yet begun, when a successful challenge would shorten the total length of incarceration); Braden v. 30th Jud. Cir. Ct., 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, people subject to enlistment in the military, and paroled incarcerated people are all "in custody"); Jackson v. Coalter, 337 F.3d 74, 78–79 (1st Cir. 2003) (holding that custody includes supervised probation).

[36] *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 they are 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).

[37] *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 such as "an obligation to appear [as ordered by] state judicial officers . . . at any time and at a moment's notice, [for which] disobedience itself is a criminal offense"); *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" (quoting Jones v. Cunningham, 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963))).

concurrently with the one you are challenging,[38] or (4) you are out on bail pending trial or appeal[39] or pending an order telling you when to report to prison to begin serving a sentence.[40] Once someone is released from all current restraints on their freedom, they usually cannot file a habeas corpus petition based on what are called "collateral consequences," meaning the possibility that the conviction or sentence they want to challenge may later have consequences for them (for example, a higher sentence if they are convicted again in the future or difficulty finding a job).[41]

(a) Exception: Petition on Behalf of Another Person in Custody

Normally, you only may file a habeas petition on your own behalf if you are "in custody." Sometimes, however, another person may be permitted to file a habeas petition "on behalf of" the person who is in custody. In that case, the *petitioner* (the person who files the habeas petition) is called a "next friend." To be able to file a "next friend" petition on behalf of another person who is in custody, you must be a relative, close friend, lawyer, or other person with close connections to the person in custody. To be allowed to file a petition as a "next friend" in court, you must demonstrate to the court that (1) the incarcerated person is unable to file or to make a competent decision whether to file a petition (for example, because that person is not mentally competent or because of severe conditions that disable the person);[42] and (2) you have a significant enough relationship with the incarcerated person to ensure that you are acting in that person's best interests.[43]

In general, filing a habeas petition for a competent adult incarcerated person is not allowed if the petition goes against that person's wishes.[44] If the petition goes against that person's expressed wishes, the petitioner must show that the incarcerated person is not capable of knowingly, intelligently, and voluntarily waiving the rights that the third-party petitioner seeks to enforce through the habeas petition. In the initial pleading, the third-party petitioner must allege facts that if proved would

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[38] *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).

[39] *See* Hensley v. San Jose-Milpitas Mun. Ct., 411 U.S. 345, 348–351, 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).

[40] *See* United States v. Arthur, 367 F.3d 119, 121–122 (2d Cir. 2004) (finding that defendant who was free on bail awaiting surrender date was in custody and therefore able to seek habeas relief).

[41] *See* 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 person who has since been released from prison is not "in custody" and thus may not challenge an earlier parole revocation, notwithstanding collateral consequences that later may arise from the parole revocation). *But cf.* 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); D.S.A. v. Cir. Ct., 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).

[42] *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, although 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, 588–89 (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); Brewer v. Lewis, 989 F.2d 1021, 1027 (9th Cir. 1992) (holding that the incarcerated person's mother lacked standing to bring a claim on her incarcerated son's behalf because she failed to provide "meaningful evidence" that her son was incompetent to make his own decisions about whether to file a petition).

[43] *See* Whitmore v. Arkansas, 495 U.S. 149, 163–64, 110 S. Ct. 1717, 1727, 109 L. Ed. 2d 135, 150 (1990) (noting that courts do not want people posing as a "next friend" to use the litigation to advance their own interests instead of the interests of the person on whose behalf the petition is supposedly filed).

[44] *See* In re Zettlemoyer, 53 F.3d 24, 28 (3d Cir. 1995) (*per curiam*) (denying next friend petition brought by incarcerated person's former counsel and his mother because he competently chose to waive his right to file habeas petition, but not doubting a lawyer's ability to serve as a next friend for an incarcerated person who is shown to be an incompetent).

establish the incarcerated person's incompetence.[45] Courts may permit parents to petition on behalf of their underage children who are in governmental custody.[46] However, incarcerated people have no right to competence in habeas proceedings, meaning that if an incarcerated person is incompetent and no one steps forward to file a petition on that person's behalf, the court will not delay proceedings until the person regains competence.[47]

2. Violations of Federal Law You May Raise in Your Habeas Petition: How to Select and Argue Claims

For a court to grant you federal habeas relief, you must show that you are "in custody" in violation of your federal rights. Because (with rare exceptions) the Constitution is the only federal law that governs state criminal procedures, *habeas claims by state incarcerated people must almost always argue a violation of the Constitution*. In very rare instances, state incarcerated people may also rely on a federal statute or a federal treaty with another country. Federally incarcerated people may use Section 2255 motions to challenge violations of the U.S. Constitution, federal laws and rules (including the ones under which they were convicted or sentenced), and federal treaties with other countries.

Often, the U.S. Constitution and federal statutes and rules describe your rights in very broad language that needs definition before you can understand your rights. One important way to understand your legal rights is to read written decisions or "cases" in which courts explain and apply the right in question. Because the U.S. Supreme Court is the "highest court in the land," if it has written a decision explaining a federal constitutional, statutory, or treatise right, all other courts in the country must apply that right as the Supreme Court has explained it. Often, there also are important descriptions of federal rights, and important explanations of Supreme Court decisions, in cases decided by the United State Courts of Appeals and the United State District Courts. If you have a choice, it almost always is better to rely on Supreme Court decisions, rather than on Court of Appeals or District Court decisions. If there are no Supreme Court decisions, it often is better to rely on Court of Appeals decisions than on District Court decisions. It is fine to cite all three kinds of cases. All cases tell you the date they were decided. The more recent that date, the better it is to rely on the case. Different District Courts operate only in a single state or even in only part of a single state, and Courts of Appeals operate only in one area of the country. Their decisions apply with special force in the area where they operate, so it is much better, when you can do so, to rely on decisions from the District Court and Court of Appeals in which your federal petition and any subsequent appeal is filed.

As is discussed in other parts of this Chapter, you may not file a federal habeas corpus petition until after you have challenged your convictions or sentence in a direct appeal. And if you are in custody in a state prison, you often will have filed a state post-conviction petition before filing a federal habeas corpus petition. Very often, the appeals, petitions, legal briefs, and court opinions filed during your direct appeal and state post-conviction proceedings will discuss the rights you believe have been violated in your case and will cite court cases describing those rights. You often can use those same court cases in writing your federal habeas corpus petition. If you are a state incarcerated person, keep in mind, however, that cases decided by *state* courts that were cited in your direct appeal or your state post-conviction proceedings will not be nearly as helpful to you in *federal* court. You should aim to use *federal* cases when making claims in *federal* court. When you are writing your federal habeas corpus

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[45] *See* Wilson v. Lane, 870 F.2d 1250, 1253 (7th Cir. 1989) ("[A] next-friend applicant, among other things, must therefore explain why the detainee did not sign and verify the petition. If the next-friend cannot do so, 'the court is without jurisdiction to consider the petition.'") (quoting Weber v. Garza, 570 F.2d 511, 513 (5th Cir.1978))); *see also* Weber v. Garza, 570 F.2d 511, 513 (5th Cir. 1978) ("[T]he authority of one person to apply for a writ of habeas corpus for the release of another will be recognized only when the application for the writ establishes some reason or explanation, satisfactory to the court, showing . . . why the detained person did not sign and verify the petition . . . .").

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

[47] Ryan v. Gonzales, 568 U.S. 57, 77, 133 S. Ct. 696, 709, 184 L. Ed. 2d 528, 539 (2013).

petition, therefore, you should supplement or replace state court cases you or your lawyer relied on in the state court with federal court decisions. Whether you are a state or a federally incarcerated person, it is a good idea to rely on the most recent federal cases you can find that support your arguments, in addition to the federal cases cited in your direct appeal and state post-conviction petition.

To convince a federal habeas court to grant you relief, you first need to identify at least one violation of your federal rights that occurred in your case. This Part explains how to identify constitutional violations in your case. At the end of the Chapter, Appendix C lists many examples of violations of federal rights that habeas courts have found as a basis for granting relief from convictions and sentences. For each possible violation that you believe may have occurred in your case, you must determine what facts or conditions you will need to prove in order to convince a court that a violation of that kind did occur in your case. This part explains how to determine what it takes to prove that a violation of a particular kind has occurred in your case.

3. Violations You May Not Raise in Your Habeas Petition

As is stated in Parts A and B of this Chapter, to get federal habeas relief, you must show that your imprisonment violates the U.S. Constitution, a *federal* law, or a treaty between the United States and another country. This means that violations of *state* constitutions or *state* laws cannot be a basis for habeas corpus relief. Additionally, only federal violations that cause or contributed to your conviction or sentence may be a basis for federal habeas relief. This includes situations in which your sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution.[48] Prison conditions that are not part of your sentence are *not* a basis for habeas corpus relief, even if they violate the Constitution.

There also, however, are two situations in which violations of the Constitution that did lead to your conviction or sentence still may not be a basis for federal habeas relief. First, you may not receive habeas relief based on an illegal search and seizure that violates the Fourth Amendment. Additionally, you may not receive habeas corpus relief based on what is called "new law," meaning rights that were not recognized at the time of your trial and direct appeal but were newly recognized at some point after your direct appeal. This Section discusses the rule barring federal habeas corpus relief for Fourth Amendment violations and some exceptions to that rule.

The Fourth Amendment of the U.S. Constitution addresses the legality of searches and seizures. Evidence that is gathered in violation of these Fourth Amendment rights may not be introduced at a criminal trial.[49] In *Stone v. Powell*, however, the Supreme Court ruled that incarcerated people may not receive federal habeas corpus relief based on the introduction at their trial of evidence seized in violation of the Fourth Amendment, as long as the state provided them with a "full and fair" opportunity to object to the introduction of that evidence at their trial and on appeal.[50] This is true even if the federal court believes that the state courts ruled erroneously that no Fourth Amendment violation occurred. Each state has its own set of procedures for deciding whether there has been a "full and fair" opportunity to litigate a claim based on the Fourth Amendment. Because different states have different standards, you should check the law of the state where your trial occurred.

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[48] 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).

[49] 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).

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

(a) Meaning of Full and Fair Opportunity to Litigate

Federal habeas courts will find that a state has not provided a "full and fair" opportunity to challenge Fourth Amendment violations when the procedures available at your trial or on direct appeal did not allow any person in your situation to raise a claim.[51] To convince a federal habeas court to hear your Fourth Amendment claim, you must demonstrate to the court the ways the procedures available to you at your trial or on your direct appeal kept you from challenging the use of illegally obtained evidence against you at your trial.[52] For example, if you or your attorney raised a Fourth Amendment claim in the proper manner at your trial and on your direct appeal but the state courts failed to rule that the search or seizure was legal under the Fourth Amendment, the federal courts will find you were denied your "full and fair" opportunity to raise the Fourth Amendment claim in the state courts and will allow you to raise it in a federal habeas petition. In other words, you can complain about an illegal search and seizure problem in your federal habeas petition if the state courts: (1) never considered *whether* your factual arguments were right or wrong; or (2) never considered *why* your factual arguments were right or wrong.[53]

As an example, consider how Fourth Amendment claims work at trials and on direct appeals in New York state. Petitioners in New York generally have the opportunity to raise illegal search and seizure claims at several different stages during a trial. For example, the petitioner may notify the

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[51] *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).

[52] *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).

[53] 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, 1029 (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 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, 1494 (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, 527 (6th Cir. 1982).

judge of this problem during pretrial hearings and during the trial.[54] The petitioner may also raise this type of claim on direct appeal as long as the petitioner raised the claim in a proper manner[55] at the trial.[56] 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.

If you could have raised a Fourth Amendment claim at your trial and on your direct appeal but your lawyer failed to do so in a proper manner, the federal courts will find that you had a full and fair opportunity to raise the Fourth Amendment claim in state court and will not allow you to raise that claim in your habeas petition. However, it is important to note that your lawyer's failure to raise the Fourth Amendment issue in the proper way at your trial or on your direct appeal may allow you to get habeas corpus relief on the grounds that your lawyer provided you with ineffective assistance of counsel.[57]

If you decide to include a Fourth Amendment claim in your federal habeas petition, it is up to the state to raise the *Stone v. Powell* objection to raising that claim and to tell the court that you had a full and fair opportunity to litigate your Fourth Amendment claim in the state courts. If the state does not raise that objection, the federal habeas court should consider your Fourth Amendment claim and grant you relief if there was a Fourth Amendment violation in your case. If, however, the state does raise the *Stone v. Powell* objection to your Fourth Amendment claim, it then is up to you to prove that you did not have a full and fair opportunity to litigate your Fourth Amendment claim. If you decide to raise a Fourth Amendment claim in your federal habeas petition, you can expect that the state will object to that claim based on *Stone v. Powell*. So, it is a good idea when you include that claim in your habeas petition to explain in the petition why you did not have a full and fair opportunity to raise the Fourth Amendment claim in the state courts.

Stone v. Powell's bar to raising claims in federal habeas petitions that you had a full and fair opportunity to challenge in state court applies only when you claim that the trial court allowed the prosecutor to use evidence that should have been excluded under the Fourth Amendment. So far, this standard has not been applied to other constitutional claims based on constitutional rights other than those in the Fourth Amendment.[58]

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[54] N.Y. CRIM. PROC. LAW § 710.40 (McKinney 2011) (allowing a defendant to raise an illegal seizure claim in a pretrial motion or at trial if the defendant was unaware of the illegal seizure).

[55] 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*, "Appealing Your Conviction or Sentence," for more information on properly preserved claims.

[56] 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 D(iv), "New Laws: The *Teague* Rules," of this Chapter for more information on 28 U.S.C. § 2254 and its effect on procedural default.

[57] Failure to raise Fourth 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 Fourth Amendment rights had been respected. Kimmelman v. Morrison 477 U.S. 365, 375, 106 S. Ct. 2574, 2582–2583, 91 L. Ed. 2d 305, 319 (1986). See Part B(i)(a), "The Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments," of this Chapter for more information on ineffective assistance of counsel claims.

[58] Courts try to limit the rule from *Stone v. Powell*, which is sometimes referred to as the "exclusionary rule," where you are prevented from bringing your claim in federal court because you had the opportunity to bring the claim in state court. So, while this rule applies to Fourth Amendment claims, courts generally do not apply the rule to other constitutional claims. This means that even if you had the opportunity to fully raise other constitutional claims in state court, you may still be able to raise them in your federal habeas petition. *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*

4. When to File[59]

As noted throughout this Chapter, there is a one-year statute of limitations to file most habeas petitions.[60] This is true whether you are filing a Section 2254 motion (for state incarcerated people) or a Section 2255 motion (for federally incarcerated people).[61] If the petition is untimely (meaning filed after the one-year statute of limitations) the state must declare in its answer that there is "a statute of limitations" bar to your claim.[62] The key question is when does this one-year time limit begin running? In other words, what event triggers the clock to begin?

(a) Triggering Date

For most habeas petitions, the triggering date is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[63] For incarcerated people with capital sentences who must file a Section 2255 motion, the triggering date is most likely "the date on which the judgment of conviction became final."[64] While the laws governing habeas claims do not define what "becoming final" means, the Supreme Court has said its meaning depends on the context.

For example, if you—the petitioner—pursued a direct appeal in all courts where an appeal was available to you within the state or federal system (and any discretionary appeals that were available), the triggering event is the completing of *certiorari* proceedings in the U.S. Supreme Court. If you do not pursue *certiorari* with the Supreme Court, then the triggering event is the expiration of time for filing a petition for a writ of *certiorari* to the Supreme Court. Upon that date, the one-year statute of limitations for filing your habeas claim begins.

If you instead sought direct appeal after your trial, then the triggering event is the deadline for filing such an appeal.[65] If you appeal your judgment to the state intermediate appellate court but not

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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).

[59] 18 U.S.C. § 2244(d) establishes a one-year statute of limitations that gives you one year of "free time" to file your federal habeas corpus petition. While the statute of limitations also applies to capital (death sentence) cases, some courts may be more lenient in "tolling," or pausing, the time that counts toward your one-year limit. *See* Fahy v. Horn, 240 F.3d 239, 244–45 (3d Cir. 2001) (finding that capital cases require extra consideration); *but see* Rouse v. Lee, 339 F.3d 238, 256 (4th Cir. 2003) (*en banc*) (stating that death sentences are not relevant to the equitable tolling analysis), *cert. denied* 124 S. Ct. 1605 (2004). For more information about capital cases and the statute of limitations, *see* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 5.2(b)(vii), 5.2(c), 5.4.

[60] 28 U.S.C. § 2244(d).

[61] 28 U.S.C. § 2255. For habeas corpus petitions filed by state incarcerated people with capital sentences, this may be only 180 days. 28 U.S.C. § 2263. *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 5.2(a), 28.3(d) (2022). The limitation period for § 2255 motions also applies to second or successive motions. *See* Dodd v. United States, 545 U.S. 353, 358, 125 S. Ct. 2478, 2482, 162 L. Ed. 2d 343, 349 (2005).

[62] Rule 5(b) of the Rules Governing Section 2254 Cases in the United States District Courts. If this defense by the state is deliberately waived, your petition can continue despite being filed past the statute of limitations. Day v. McDonough, 547 U.S. 198, 210 n.11, 126 S. Ct. 1675, 1684, 164 L. Ed. 2d. 376 (2006) ("should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice."). If the state accidentally forgets to argue that the statute of limitations bars your petition, however, then the court may decide on its own to decline to hear your petition. Day v. McDonough, 547 U.S. 198, 209, 126 S. Ct. 1675, 1683, 164 L. Ed. 2d. (2006) (holding that a federal district court may invoke the limitations defense *sua sponte* (on its own) after the federal magistrate judge determined the State had miscalculated the tolling time and given the petitioner an opportunity to argue why the petition should not be dismissed). For further discussion, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b) (2022).

[63] 28 U.S.C. § 2244(d)(1); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(i) (2022).

[64] 28 U.S.C. § 2255(f)(1). For further discussion, see Chapter 5.2(b) and the accompanying footnotes of RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (2022).

[65] 28 U.S.C. § 2244(d)(1)(A) ("The limitation period shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.").

a direct appeal as of right to a higher appellate court, then the triggering event is the expiration of time for filing such an appeal to a higher appellate court.[66]

If you are unable to file a habeas petition or a particular claim because the State impeded your ability to do so, then the statute of limitations triggering date may be postponed.[67] This impediment by the State must have been in violation of the Constitution or federal laws.[68] Similarly, if the legal[69] or factual bases for your claim were not previously available, then the triggering date may also be postponed.[70] If your case has more than one potential triggering date, then the court will use the last of those triggering dates.[71] So for example, if your judgment became final on June 4, 2022 but new factual bases for filing your habeas claim appeared on August 10, 2022, then the court would consider August 10, 2022 as the "triggering date" upon which the statute of limitations begins to run.

If you have more than one claim and they have different triggering dates, it is still best to file as early as possible.[72] The safest course is to file within one year after the conclusion of direct review.[73]

(b) Statutory Tolling

Tolling is when the one-year limitations period is paused. In other words, the clock counting down your time to file your habeas petition stops moving temporarily. State postconviction and other collateral proceedings in state court that are "properly filed" toll the statute of limitations.[74] "Properly filed" simply means that the delivery and acceptance of your application complied with the applicable laws and rules governing filings, including timing requirements.[75] Second or successive

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[66] 28 U.S.C. § 2244(d)(1)(A).

[67] 28 U.S.C. § 2244(d)(1)(B) ("The limitation period shall run from . . . the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action.").

[68] 28 U.S.C. § 2244(d)(1)(B).

[69] 28 U.S.C. § 2244(d)(1)(C) ("The limitation period shall run from . . . the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.").

[70] 28 U.S.C. § 2244(d)(1)(D) ("The limitation period shall run from . . . the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.").

[71] 28 U.S.C. § 2244(d)(1) ("The limitation period shall run *from the latest of*—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

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

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.") (emphasis added).

[72] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(i) (2022). While the language of AEDPA suggests that the petitioner "has until the end of the *latest* of the claims' limitations periods to file the application," lawyers should be "highly risk averse when endeavoring to avoid expiration of AEDPA's statute of limitations, and because of the many risk-creating judgment calls that have to be made in favor of the prisoner in order to invoke any of the provision's later triggering dates." RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(i) (2022).

[73] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(i) (2022). Note that Rule 15(c)(1)(B) of the Federal Rules of Civil Procedure allows an amendment once as of right, as "long as the original and amended petitions state claims that are tied to a common core of operative facts." This "relation back" standard applies to federal habeas corpus proceedings. Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 2563, 162 L. Ed. 2d 582, 582 (2005). *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(v) (2022)

[74] 28 U.S.C. § 2244(d)(2).

[75] *See* Pace v. DiGuglielmo, 544 U.S. 408, 413, 125 S. Ct. 1807, 1811, 161 L. Ed. 2d 669 (2005); Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361, 364, 148 L. Ed. 2d 213 (2000) (holding that "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings"). The time it

state postconviction petitions that are properly filed will also toll the statute of limitations.[76] However, the tolling period does *not* include *certiorari* review by the U.S. Supreme Court of a state courts' denial of postconviction relief.[77]

(c) Equitable Tolling

A court may toll (pause) the statute of limitations for equitable reasons.[78] Courts have tolled the statute of limitations if part of or all of the delay is caused by:

(1) Judicial actions or omissions[79]

(2) Government interference[80]

(3) Actions or omissions of the incarcerated person's counsel[81]

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takes for the state's appellate courts to review the denial of a postconviction petition is also tolled, as well as the time between a trial court's denial of relief and the timely filing of a notice of appeal. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(ii), n.74 (2022).

[76] 28 U.S.C. § 2244(b); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2 (2022) ("The tolling provision applies not only to the first state postconviction petition but also to any second or successive state postconviction petition that is "properly filed" as a matter of state procedural law.").

[77] *See* Lawrence v. Florida, 549 U.S. 327, 332, 127 S. Ct. 1079, 1083, 166 L. Ed. 2d 924 (2007) ("The application for state postconviction review is therefore not 'pending' after the state court's postconviction review is complete, and § 2244(d)(2) does not toll the 1–year limitations period during the pendency of a petition for certiorari."); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(ii) (2022).

[78] *See* Holland v. Florida, 560 U.S. 631, 646, 130 S. Ct. 2549, 2560, 177 L. Ed. 2d 130 (2010) (holding that the one-year statute of limitations for habeas cases is subject to equitable tolling and noting that "'equitable principles' have traditionally 'governed' the substantive law of habeas corpus" (quoting Munaf v. Geren, 553 U.S. 674, 693, 128 S. Ct. 2207, 171 L.Ed.2d 1 (2008))); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(iii) (2022).

[79] *See, e.g.*, Pliler v. Ford, 542 U.S. 225, 234, 124 S. Ct. 2441, 2447, 159 L. Ed. 2d. 338 (2004) (holding that the statute of limitations may be equitably tolled if the respondent had been "affirmatively misled" by the magistrate judge); Jackson v. Davis, 933 F.3d 408, 410–411 (5th Cir. 2019) (holding that the district court erred in denying equitable tolling for 18-month period during which *pro se* petitioner was waiting for notice from the Texas Court of Criminal Appeals on whether his state habeas application had been denied); Favourite v. Colvin, 758 Fed. App'x 68, 69–70 (2d Cir. 2018) (holding that the petitioner was entitled to three months tolling, because it took three months for him to receive notice of the appellate court's denial of his request for leave to appeal). For a more exhaustive list of examples of judicial actions or omissions, *see* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(iii), n.82 (2022).

[80] *See, e.g.*, Pliler v. Ford, 542 U.S. 225, 235, 124 S. Ct. 2441, 2448, 159 L. Ed. 2d. 338 (2004) (O'Connor, J., concurring) (noting that equitable tolling "might well be appropriate" if the State affirmatively misleads the petitioner); Grant v. Swarthout, 862 F.3d 914, 917–926 (9th Cir. 2017) (holding that if the prisoner is "dependent on prison officials to complete a task necessary to file a federal habeas petition and the staff fails to do so promptly, this constitutes an extraordinary circumstance" for purposes of equitable tolling); Pabon v. Mahanoy, 654 F.3d 385, 399–400 (3d Cir. 2011), *cert. denied*, 566 U.S. 1017 (2012) (joining the Second and Ninth Circuits in holding that "equitable tolling might be warranted when a non-English speaking petitioner could not comply with AEDPA's statute of limitations because the prison did not provide access to [current federal habeas corpus law materials], translation, or legal assistance in his or her language"); Espinoza-Matthews v. California, 432 F.3d 1021, 1027–1028 (9th Cir. 2005) (granting equitable tolling for the eleven months in which the prisoner was in administrative segregation and despite his best efforts, he could not obtain his legal papers); King v. Bell, 378 F.3d 550, 553–554 (6th Cir. 2004) (granting equitable tolling because the government failed to produce required transcripts to the petitioner in a timely manner). For a more exhaustive list of examples of government interference, see Chapter 5.2(b)(iii) and accompanying footnotes of RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(iii), n.83 (2022).

[81] Normal negligence is usually not sufficient for equitable tolling. However, when the attorney's conduct is "egregious" or "extraordinary," that may be enough for equitable tolling. *See* Holland v. Florida, 560 U.S. 631, 651, 130 S. Ct. 2549, 2564, 177 L. Ed. 2d. 130 (2010). Examples of egregious conduct include when an attorney effectively abandons their client, when a last-minute change in representation out of the client's control prejudices the client, when an attorney fails to perform an essential service (like communicating with the client), when an attorney denies client access to files, when an attorney fails to prepare a petition, when an attorney fails to respond to their client's communication, and more. *See* Maples v. Thomas, 565 U.S. 266, 283, 132 S. Ct. 912, 924, 181 L. Ed. 2d. 807, 823 (2012) (holding that, while simply failing to file on time is not sufficient, an attorney effectively abandoning a client is extraordinary enough to warrant equitable tolling); Pabon v. Mahanoy, 654 F.3d 385, 403 (3d Cir. 2011) (holding that, when a petitioner who could not speak English is reasonably diligent in seeking translation services, and his attorney, along with other legal professionals he contacted, did not provide those services, his situation was extraordinary for equitable tolling); Calderon v. U.S. Dist. Ct. for the Cent. Dist. of

(4) The incarcerated person's mental incompetence[82]
(5) Other psychiatric, physical, or medical impairments[83] or
(6) An incarcerated person's lack of notice of the filing deadline.[84]

The court may also grant equitable tolling if you filed your habeas petition on time but the federal court dismissed the petition for a curable defect after it was too late for you to refile.[85] If you are a pro se petitioner (you are representing yourself), federal courts may be more lenient when granting equitable tolling.[86]

(d) Actual Innocence

If you are actually innocent and prove it, then you may continue with your federal habeas claim, regardless of whether there is a procedural bar or the statute of limitations has expired.[87] This means that you may overcome the "time bar" by making "a convincing showing that [you] committed no crime."[88]

5. Exhaustion of State Remedies by Persons Incarcerated for State Convictions

(a) Overview of the Exhaustion Requirement

If you are incarcerated for a state offense, you may not file a federal habeas corpus petition until you have "exhausted" all state procedures available to correct any constitutional violations in the process of convicting and sentencing you.[89] To "exhaust state remedies" sufficiently to file a federal habeas corpus petition, you first must do all you can to get the state courts to correct any federal

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Cal., 163 F.3d 530, 535 (9th Cir. 1998), *abrogated on other grounds by* Woodford v. Garceau, 538 U.S. 202, 206, 123 S. Ct. 1398, 1401, 155 L. Ed. 2d 363 (2003); Baldayaque v. United States, 338 F.3d 145, 152–153 (2d Cir. 2003); Spitsyn v. Moore, 345 F.3d 796, 800–802 (9th Cir. 2003). For a more exhaustive list of examples of actions or omissions of an incarcerated person's counsel, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(iii) n.84 (7th ed. 2023).

[82] *See, e.g.*, Milam v. Harrington, 953 F.3d 1128, 1130 (holding that only if the petitioner's mental impairment was a "but-for cause" of his untimely filing—meaning he would have filed on time if he were not impaired—would he be entitled to equitable tolling); Forbess v. Franke, 749 F.3d 837, 838 (9th Cir. 2014) (holding that the petitioner was entitled to equitable tolling because his severe delusions rendered him unable to understand the need to timely file his petition, and the "unique nature of [his] delusions made it impossible for him to timely file"). For a more exhaustive list of examples of the prisoner's mental incompetence, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(iii) n.85 (7th ed. 2023).

[83] *See, e.g.*, Perry v. Brown, 950 F.3d 410, 411–412 (7th Cir. 2020) (holding that the prisoner's aphasia [unable to use or understand words] can be a basis for equitable tolling); Harper v. Ercole, 648 F.3d 132, 137–138 (2d Cir. 2011) (holding that both physical and psychiatric conditions can cause extraordinary circumstances and result in equitable tolling; this may include periods of hospitalization). For a more exhaustive list of examples of other psychiatric, physical, or mental impairments, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(iii) n.86 (7th ed. 2023).

[84] Because the one-year statute of limitations for non-capital cases has been in effect for over 25 years, it is unlikely that the court will grant equitable tolling for lack of notice or knowledge of the filing deadline based on lack of knowledge of the law. However, petitioners who lack timely notice of the disposition of final appeals and do not have "meaningful access" to court records may be granted equitable tolling. Brandon v. United States, 89 F. Supp. 2d 731, 734 (E.D. Va. 2000). For a more exhaustive list of examples of an incarcerated person's lack of notice of the filing deadline, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(iii) n.87 (7th ed. 2023).

[85] *See, e.g.*, Butler v. Long, 752 F.3d 1177, 1178–1181 (9th Cir. 2014) (per curiam) (holding that dismissal of a petition containing both exhausted and unexhausted claims, without an option to amend, requires equitable tolling of the statute of limitations from the date the petition "was dismissed until the date a new federal habeas petition is filed, assuming ordinary diligence."); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(iii) (7th ed. 2023).

[86] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 5.2(b)(iii), 15.1, 15.2(c)(ii) (7th ed. 2023).

[87] McQuiggin v. Perkins, 569 U.S. 383, 383–384, 133 S. Ct. 1924, 1925–1927, 185 L. Ed. 2d. 1019 (2013).

[88] McQuiggin v. Perkins, 569 U.S. 383, 386, 133 S. Ct. 1924, 1928, 185 L. Ed. 2d. 1019 (2013); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(iv) (7th ed. 2023).

[89] 28 U.S.C. § 2254(b)–(c).

constitutional errors in your conviction or sentence that you want to challenge in a federal habeas corpus petition. The purpose of the exhaustion requirement is to give the state courts a chance to correct any mistakes of federal law that led to your conviction or sentence and to respect the state court's ability to conduct criminal proceedings and to correct them if they make an error.[90] In order to exhaust their state remedies, people incarcerated for state convictions should always file a direct appeal of their conviction and/or sentence and in many cases, discussed in more detail below, they should file a full set of state post-conviction proceedings, which may require them to file papers, in succession over time, in more than one court.

People incarcerated for federal crimes do not need to exhaust any remedies in *state* court. Before filing a Section 2255 motion, however, they must file a direct appeal to the United State Court of Appeals that is available to hear appeals from the federal district court in which they were convicted and sentenced.

If you are incarcerated in a state prison for a state conviction, you must do the following things in order to meet the exhaustion requirement and to be permitted to file a federal habeas corpus petition:

(1) You must give all state courts available to hear your federal constitutional claims an opportunity to do so. Each state has its own rules about which courts are available to hear your claims, but exhaustion of state remedies almost always requires you to present any federal constitutional claims that arise before or at your trial to the trial court itself and then to all courts available on "direct appeal." In many states, to complete the direct appeal process, you first must file an appeal in a state "lower" or "intermediate" court of appeals, and then you must present your claims in a petition asking the highest state court (usually but not always called the state "supreme court") to review your federal constitutional claims. If you raised a federal constitutional claim at trial and in all courts available on direct appeal, the claim usually is exhausted, and you do not need to raise it again in state post-conviction proceedings. But often you will discover federal claims after trial or appeal that you did not raise at trial or on direct appeal. To exhaust your state remedies on those claims, you must file a state post-conviction petition (which also can involve proceedings in a state trial court and in state appellate courts). And sometimes you will find new facts that support claims that you did previously raise at trial and on appeal. That is another situation in which, in order to exhaust your state remedies on those new facts, you will need to present that claim again in state post-conviction proceedings and tell that court about the new facts that you discovered.

(2) In each state court in which you present your federal claims, you must present them in a manner that gives the state courts what is called a "full and fair opportunity" to understand and rule on your claims. This "fair presentation rule" requires that you tell the state courts very clearly about (a) which federal law—usually, an amendment to the U.S. Constitution—you are arguing was violated in your case; and (b) all of the facts and circumstances in your case that lead you to believe that a violation of law occurred.

The following Sections discuss these requirements. Keep in mind that there are very few exceptions to the exhaustion requirement, and it is not safe to rely on those exceptions. For that reason, you should take all the steps needed to exhaust state remedies for all your federal claims. Otherwise, you risk losing the chance to get a federal court to rule on your federal habeas claims![91]

While exhausting your claims in state court, it is important to remember that you have only one year after your direct appeal is fully completed to file in federal court for federal habeas relief.[92] Although the clock on that one year stops ticking while your case is going through state post-conviction procedures, the clock on that one year runs at all times after your direct appeal is over and *before* you file a state post-conviction petition, if you decide to file a petition in order to exhaust your state

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[90] *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."), *modified 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).

[91] Rose v. Lundy, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379, 387 (1982).

[92] For more information about time limits for bringing federal habeas claims, see Section D(5) of this Chapter.

remedies. And the one-year clock also runs *after* you have finished any state post-conviction proceedings you filed and before you file a federal habeas corpus petition. Even if your state gives you more than one year to file the state post-conviction procedures necessary to exhaust your claims, if you take more than a year to do so, you will violate the one-year time limit on filing a federal habeas corpus petition, and *you will lose any chance of federal habeas corpus relief*. The courts are very strict in enforcing the one-year time limit on filing federal habeas petitions.[93]

You must exhaust *all* of your federal constitutional claims in your habeas petition in state court before including *any* of those claims in a federal habeas petition. For example, if you file a petition in federal court claiming there were ten violations in your case, nine of which were exhausted in state court but one of which was *not* exhausted in state court, a federal court will likely dismiss your *entire* habeas petition.[94] If that happens, the dismissal of your claims is likely to be "without prejudice," meaning that after you have gone back to state court and exhausted your state remedies on the one remaining claim, you then can refile all of your claims in federal court in a new petition.[95]

Keep in mind, however, that if there once was an available state court remedy for your unexhausted claim, but that remedy is no longer available (for example, because you missed a filing deadline for the claim in state court), then the claim now is "exhausted," because no state court remedy remains. Note, though, that in this situation, the state is likely to argue that you cannot receive federal habeas relief on that claim because you "procedurally defaulted" it by failing to raise it in state court in a proper and timely manner.

Also keep in mind that, if you do have to go back to state court to exhaust a claim, the time that passes before you file the claim in state court will count against your one-year deadline on filing your federal habeas petition after you finish your state direct appeal. Once you do file the claim in state court, most courts have ruled that the time the state courts take to decide that claim will not count against the one-year deadline. (Courts describe the effect of a properly filed state court petition to exhaust any remaining claims as "tolling"[96] the one-year time limit for your habeas petition—meaning that the clock on your one-year deadline will temporarily stop once you file your state post-conviction petition, and will stay stopped during all of the time it takes the state courts to rule.)[97] Once the state court rules, however, the clock on the one-year deadline starts running again, until you refile your federal habeas petition with all of your exhausted claims. For this reason, it is risky to file a federal petition that includes even one claim that was not previously exhausted in state court, because the federal habeas court will likely dismiss that petition and the time it takes to file a new state petition and exhaust that one remaining claim could lead you to miss your one-year deadline to file your habeas petition on *all* of your claims. Consider, instead, removing the unexhausted claim from your federal petition to allow the court to consider the rest of the claims in the petition immediately. Once you remove the unexhausted claim and ask the federal court to go forward with all of the remaining claims, you almost certainly will never again be able to get federal habeas review of the claim that you removed from the petition, even if you later exhaust your state court remedies on that claim.

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[93] *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 and if the petitioner has been pursuing his rights diligently).

[94] A court has the right to dismiss the entire petition if it contains at least one claim was not exhausted in state court. In very limited circumstances, the court may issue a "stay and abeyance," which would allow the court to hold the petition until you exhaust your state remedies. *See* Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (noting that courts can issue a stay and abeyance only when the petitioner shows they had a "good cause" for not exhausting their options in state court and when the underlying claims are not meritless).

[95] See Part D(5) of this Chapter for more information on successive petitions.

[96] "Tolling" means that the running of the statute of limitations time period is paused. Time that is tolled does not count toward the one-year time limit for bringing your claim. See Part D(2), Subsection D(2)(d), and Part I, "Post Trials and Appeals," of this Chapter for more information on time limits and tolling.

[97] *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.").

(b) The State's Burden to Object to Your Federal Petition on Exhaustion Grounds

Before a federal court can dismiss your petition because one or more of the claims in it is unexhausted, it is generally up to the state to raise that "non-exhaustion" objection to your petition.[98] The state can "waive" the exhaustion requirement in your case—meaning it can give up that objection.[99] To waive the exhaustion requirement, the state must say directly and expressly, through its lawyer, that it does not want to raise the non-exhaustion objection.[100] If the state waives the exhaustion requirement, the court can choose to address the merits of your petition or to dismiss it for non-exhaustion.[101] You can point to various reasons why the court should reach the merits and not require exhaustion on its own, including "the parties' mutual desire to waive exhaustion"[102] and "to avoid unnecessary delay in granting relief that is plainly warranted."[103]

(c) The Requirements for Exhausting Your Claims in State Court

(i) *Opportunity for Highest State Court to Hear Your Federal Claims*[104]

Before you can petition for federal habeas corpus in federal court, you first must "exhaust state remedies" on each claim that you want to include in your federal petition. This requires you to present each claim in either a full set of state appeals following your trial and conviction (these procedures usually are called the "direct appeal" process) or in a full set of state post-conviction procedures.[105] The difference between direct appeal and state post-conviction procedures is explained more fully in Section A(1) ("What Is Habeas Corpus?") of this Chapter. You should include *all* claims arising under federal law that arose before or during your trial and sentencing in your direct appeal papers. Then, you should present *all* claims arising under federal law that you learned about after your trial and direct appeal, such as a claim that your lawyer at trial or on direct appeal provided you with ineffective representation or that the police or prosecutors failed to inform you and your lawyer at trial about evidence they had that would have enabled you to avoid being convicted or to obtain a lower sentence.

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[98] *See* Rules Governing Section 2254 Cases 5(b); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.2(a) (7th ed. 2023).

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

[100] 28 U.S.C. § 2254(b)(3); *see also* 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).

[101] *See* Granberry v. Greer, 481 U.S. 129, 134, 107 S. Ct. 1671, 1675, 95 L. Ed. 2d 119, 125 (1987) ("The court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim.").

[102] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.2(a) (7th ed. 2023).

[103] Granberry v. Greer, 481 U.S. 129, 135, 107 S. Ct. 1671, 1676, 95 L. Ed. 2d 119, 126 (1987).

[104] 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 to appeal a decision of the intermediate appellate court. Even though the granting of 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).

[105] *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).

If you have raised claims in one full set of direct review courts, you need not raise them again in one full set of state post-conviction proceedings in order to satisfy the exhaustion rule. If, however, you did raise a claim on direct appeal, but you later learn of evidence supporting that claim that was not available to you at trial and during your direct appeal, you should raise that claim and tell the courts about that new evidence in a full set of state post-conviction proceedings. If you included all of your federal claims in a full set of direct appeal courts, and if you know of no other federal claims in your case and no new evidence supporting those claims, you can file your federal habeas petition immediately after finishing your direct appeal proceedings. If, however, you have finished your direct appeal, but you have other federal claims that you could not include in your direct appeal, you should present all of those claims in a full set of state post-conviction proceedings, and you should finish those state post-conviction proceedings *before* you file your federal habeas petition on *any* of your claims. Except in rare circumstances, you can file only one federal habeas petition, so that petition must include all the federal claims you know about, and it must include *all* claims on which you have exhausted your state remedies and may include no claims that are not exhausted.

A key point is that you must assure that all state courts that are part of the direct appeal chain of courts or all state courts that are part of the state post-conviction chain of courts have a full opportunity to rule on each of your claims before you file your federal habeas petition. For example, to "exhaust" a claim on direct appeal immediately after trial, it often is not enough to present the claim to the first appellate court that is available on direct appeal (often called an "intermediate appellate court"). In many states, the law allows you to take or to request an appeal to the highest court in that state (usually called the state "supreme court").[106] In those states, the exhaustion rule requires you to present your claims to the state supreme court or to request that the state supreme court agree to hear your claims.

This paragraph provides additional information on how to "exhaust" your federal claims on *direct appeal*. Once your trial is completed, you will have a set amount of time under state law to challenge your conviction through all levels of the state appellate process.[107] As long as you meet all the deadlines for doing so, you have a right to argue first to an intermediate appellate court, and then to the state's highest court, all of the reasons under both state and federal law as to why your conviction or sentence is illegal.[108]

You only need to present your claims arising under federal law to the state courts in order to exhaust them and be able to raise them in a federal habeas petition. And you may not raise claims arising only under state law in your federal petition. But you still want to raise all of your claims arising under state law in your state direct appeal, in order to give the state courts a chance to correct errors of state law and possibly get a new trial without having to go to federal court. Keep in mind that some of your claims may arise under both state and federal law, and you should present them to the state courts as arising under both state and federal law.

If the intermediate appellate court rejects your claims, you should then take your case to the state's highest court, which in most states is done through a petition of some sort that "requests leave"[109] or permission to appeal. If the highest state court grants your leave to appeal and then rejects your claim, or if that court simply denies your request to appeal, you have satisfied the exhaustion requirement by giving the state court a chance to rule on your claims arising under federal law.

At this point, you also can petition for permission to bring your case to the U.S. Supreme Court through a "petition for a writ of certiorari." You do *not* have to file such a petition, however, in order to satisfy the exhaustion requirement. In other words, a lower federal court may hear your federal

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[106] Most states call their highest court the "State Supreme Court." However, each state may have different names for their courts. For example, in New York, the "New York Supreme Court" is a *trial* court, and the "New York Court of Appeals" is the highest state court. See Chapter 2 of the *JLM*, "Introduction to Legal Research," for more information on the court system.

[107] See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," and Section B(1), "Time Limits," for an explanation of the time limits for appealing your conviction.

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

[109] To "request leave" means to ask for permission.

habeas petition even if you did not petition the Supreme Court for a writ of certiorari after you complete your state direct appeal.[110] Note that the U.S. Supreme Court rarely grants petitions for a writ of certiorari. If your direct appeal included all claims arising under federal law that you know about and all evidence in support of those claims that you know about, you do not need to file post-conviction proceedings in order to have exhausted your state remedies on your federal claims.[111] At that point, therefore, you may immediately file your federal habeas petition including all of your federal claims.[112]

There are a number of reasons, however, why you may need, or you may want, to file a state post-conviction petition. To satisfy the exhaustion requirement, you must file a state post-conviction petition and pursue it through a full set of state post-conviction procedures if any of the following are true:

(1) you missed the deadline for filing a direct appeal;
(2) you did file a direct appeal but
    (a) you failed to include a federal claim that you knew about in the direct appeal;
    (b) you failed to pursue the direct appeal through all available levels of appeal;
    (c) you recently learned about a new claim arising under federal law that you failed to include in your direct appeal; or
    (d) you did raise a claim on direct appeal but you only recently learned about evidence supporting that claim that you did not yet have a chance to present to the state courts.[113]

Keep in mind that you may wish to file a state post-conviction petition to raise new claims arising under *state law* or new evidence supporting state-law claims raised on direct appeal even if you included all of your *federal* claims and all of the evidence supporting those claims in your direct appeal. You do not want to give up the chance to get a new trial based on claims arising under state law, which may happen if you do not file a state post-conviction petition at this point. As long as you are pursuing state post-conviction remedies (on state claims, federal claims, or both types of claims) and following the correct procedures and deadlines, the one-year clock on your deadline for filing a federal habeas petition will be paused.[114] You will have to do additional research to learn about your state's laws for filing post-conviction petitions to raise new state law claims.[115]

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[110] *See*, *e.g.*, Cnty. Ct. of Ulster Cnty. 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).

[111] *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. Att'y 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.").

[112] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.3[b] (7th ed. 2022).

[113] 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, 488–89, 106 S. Ct. 2639, 2645–46, 91 L. Ed. 2d 397, 408–09 (1986) (holding that the exhaustion doctrine generally requires that a habeas petitioner raise an ineffective assistance of counsel claim as an independent claim in state court before it may be raised in federal court).

[114] *See* Bishop v. Dormire, 526 F.3d 382, 384 (8th Cir. 2008); Cowherd v. Million, 380 F.3d 909, 912, 914 (6th Cir. 2004) (*en banc*); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(2) n.72 (7th ed. 2023) ("[T]he express language of section 2244(d)(2) makes clear that tolling is appropriate, without regard to the nature of the claims in the state pleading, as long as the state application challenged the 'pertinent judgment.'"). For more information on how to "toll" (pause) the one-year time limit, see Subsection D(5)(b) of this Chapter.

[115] In New York, you can choose between two post-conviction remedies: an Article 440 motion or a petition for state habeas corpus. See Chapter 20 of the *JLM* for a discussion of Article 440 motions and Chapter 21 of the *JLM* for an explanation of New York State habeas corpus procedure. You should generally use an Article 440 motion because it is the most modern and has the best-developed state post-conviction procedure. The New York

(ii) *Fair Presentation*

To exhaust your state remedies, you must make a "fair presentation" of each of your federal claims to the state courts, which means that you must "reasonably inform" the state courts about each claim. To satisfy this requirement, you first must clearly say that you seeking a new trial or sentence or other relief based on a violation of a specific part of the U.S. Constitution.[116] You do not fairly present a claim if your petition, your brief, or both fail to tell the state court that the claim arises under a particular part of the federal Constitution, which in most (but not all) cases will be the First, Fourth, Second, Fifth, Sixth, Eighth, or Fourteenth Amendment to the Constitution.[117] In almost all cases, you should cite the Fourteenth Amendment, along with any of the other amendments to the Constitution on which you rely. 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 specifically identified only a state evidence law that he said was violated, without mentioning any federal constitutional rights.[118] Although the petitioner's federal due process rights under the Fourteenth Amendment to the Constitution may have been violated, the court held that he had not "fairly presented" the federal law part of his claim to the state courts, and the federal court dismissed his habeas petition for that reason.[119]

It is best to say exactly what part or provision of the federal Constitution you are relying on.[120] In doing so, it almost always is useful to refer to the Fourteenth Amendment, in addition to one or more of the other Amendments listed above. You cannot assume the state judges will know which constitutional provision provides a basis for any particular claim, so you need to specify that provision in your papers in state court. Keep in mind that it generally is not enough to discuss a state claim that is similar to a federal claim.[121] 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.[122] It is appropriate, however,

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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 Chapter 14, "The Prison Litigation Reform Act," for a discussion of exhausting your administrative remedies.

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. *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)

[116] *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).

[117] *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.").

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

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

[120] *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) ("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.'" (citation omitted) (quoting Dougan v. Ponte, 727 F.2d 199, 201 (1st Cir. 1984))).

[121] *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 cited only state cases in his appellate brief).

[122] *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").

to refer to *both* the state *and* federal law that is the basis for a particular claim. Although you do not need to quote the relevant part of the Constitution word for word,[123] you must be specific in saying that the claim arises under the federal Constitution and in saying which part of the Constitution is the basis for each of your federal claims.[124] Be as specific as possible in explaining the violation of a federal law to the state court.

There are several ways you can satisfy the "fair presentation" requirement in the state courts in order to satisfy the exhaustion requirement in regard to the legal claims on which you plan to rely in your federal habeas petition:

(1) Cite a specific provision of the federal Constitution;[125]
(2) Name or describe a particular right guaranteed by the Constitution;[126]
(3) Cite state or federal cases that support your claim and make clear that they are relying on particular provisions of the federal Constitution or on other court decisions that interpret those federal constitutional provisions;[127] or
(4) Alert the state court to the claims' federal nature through the substance of your arguments.[128]

It is best to rely on all four of these strategies in your state papers. It is much better to use one or more of the first three of the strategies than to rely entirely on the fourth strategy.

In addition to drawing the state courts' attention to the same federal legal provisions and violations on which you later plan to rely in your federal habeas petition, you also must present the state courts with the same facts and evidence relating to your claims that you plan to rely in your federal petition.[129] Although it is important to present the state courts with essentially the same legal

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

[124] *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).

[125] *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. Att'y 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.").

[126] *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) ("[T]he petitioner assiduously pursued a constitutionally focused ineffective assistance claim before all the affected state courts, thus satisfying the exhaustion requirement.").

[127] *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).

[128] *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).

[129] *See* Landano v. Rafferty, 897 F.2d 661, 669–670 (3d Cir. 1990) ("[I]n complying with the exhaustion requirement a habeas petitioner must not only provide the state courts with his legal theory as to why his constitutional rights have been violated, but also the factual predicate on which that legal theory rests.").

principles and factual allegations as those you plan to include in your federal habeas petition, some federal habeas courts have shown some flexibility when it comes to the allowing modest differences between the factual claims on which you relied in state court compared to those you on which you rely in federal court.[130] The federal courts are rarely flexible when it comes to differences in the legal arguments you made in the state courts compared to those included in your federal petition.

It is important for you to raise all of your legal and factual arguments in *all* state courts that are part of a full state review process. That requirement is satisfied if you present those arguments (1) at trial and on direct appeal; *or* (2) through a full set of state post-conviction proceedings including trial and state post-conviction appeals;[131] *or* (3) if you want to do so (though it is not required that you do so) in both a trial and direct appeal procedure *and* a full set of state post-conviction proceedings. If you raised a particular claim at trial and on direct appeal to the highest available state court, you do not have to (although you may decide to) raise it again in state post-conviction proceedings.[132] Be sure that you present the *same* factual arguments and legal theories regarding a federal claim in all of the state courts in either (or both) of those state review processes before presenting them in your federal habeas petition. To exhaust your state remedies on a federal claim, you do not need to seek *certiorari* review in the United States Supreme Court after direct appeal or after state post-conviction proceedings, although you may decide to do so.

If you discover new evidence about your claim, or learn more about the law concerning your claim, after you have already raised that claim on direct appeal and the state court has decided against you, you should raise it again and all relevant supporting facts and evidence in state post-conviction proceedings. This is because it is very important to raise *all* facts and arguments in state court. In *Cullen v. Pinholster*, the Supreme Court said that federal courts may only consider facts and arguments that were before the state courts[133] and cannot consider new evidence discovered afterwards or developed at an evidentiary hearing in federal court.[134] If the new information that you wish to include in your habeas petition was not presented to the state courts, and state relief remains available to you, a federal court may dismiss your federal claim as not properly exhausted in state court as to the new evidence or arguments.[135] In that case, you probably should go back to state court with the new evidence before raising it in federal court. If you do so, however, remember that you have a one-year time limit to file your federal habeas petition. The time when your case actually is filed in and being adjudicated by the state courts will not count against that one-year time limit, but the time it takes to prepare your state petition before you file it will count against your one year, as will any

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[130] *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). However, you should ideally present all the relevant facts as directly and clearly as possible.

[131] *See* O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732, 144 L. Ed. 2d 1, 9 (1999) ("[S]tate 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.").

[132] 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).

[133] Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557, 570 (2011) (holding that federal habeas courts must analyze the reasonableness of state court judgments under 28 U.S.C. § 2254(d)(1) solely in light of the record that was before the state court).

[134] Cullen v. Pinholster, 563 U.S. 170, 182–184, 131 S. Ct. 1388, 1398–1400, 179 L. Ed. 2d 557, 570–571 (2011) (holding that evidence introduced in a federal evidentiary hearing cannot be considered in the 28 U.S.C. § 2254(d)(1) analysis). However, *Pinholster*'s limitation only applies to claims that were adjudicated on the merits in state court and therefore subject to 28 U.S.C. § 2254(d)'s deferential standard of review. For more on this deferential standard of review and when it applies, see Subsection D(9)(d) ("Section 2254(d) Standard of Relief") of this Chapter.

[135] *See*, *e.g.*, Graham v. Johnson, 94 F.3d 958, 970–971 (5th Cir. 1996) (rejecting the state's waiver of the exhaustion requirement because the issues were "almost exclusively factual," extensive evidence had not been presented to the state court, and the state's reason for waiving exhaustion was "questionable at best").

time that passes after you finish state proceedings and before you refile in federal court.[136] Importantly, the time you spend litigating your habeas case before the federal court counts toward your one-year limit if it is dismissed and you seek to renew it with any amendments.[137]

(d) Exceptions to Exhaustion

There are few narrow situations in which exhaustion may not be required. These situations are called "exceptions" to the exhaustion requirement. First, you do not need to go to state court if no state court remedies are available as of the time you file your federal habeas petition.[138] For example, in Indiana, "individual decisions of the state prison disciplinary system" are not reviewable in state post-conviction proceedings.[139] Because the Indiana Supreme Court decided that there was no constitutionally protected right to judicial review of individual decisions of the prison disciplinary system, there was no state remedy available to the petitioner. Because there was no state remedy, the exhaustion requirement did not apply, and the Seventh Circuit Court of Appeals held that the petitioner was not barred from seeking habeas corpus relief.[140]

Second, you need not pursue state court remedies that are found to be "ineffective" or, as it sometimes is said, if it would be "futile" to raise the claim in the state courts because they are certain to rule against you.[141] For example, a federal court found that state remedies were ineffective to protect the rights of an incarcerated person because he would be raising exactly the same constitutional issue to the state supreme court as a fellow incarcerated person had recently raised in that court, and that person had already been denied relief on the same issue.[142] In this situation, bringing the same issue before the same court that had recently denied the claim would most likely be unsuccessful (or would be "futile") and would waste the resources of the state system. So, the court ruled that he did not need to exhaust his state court remedies.[143]

Federal courts may find that state court remedies are ineffective if you file your claims in a state court, after which an unusually long and unjustified delay occurs without any proceedings occurring in the state court and without any ruling being issued by the state court.[144] Most federal courts,

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[136] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(ii) (7th ed. 2023) ("The tolling period includes the time during which the denial of a state postconviction petition is on appeal within the state judicial system—including the time following a trial court's denial of state postconviction relief and before a timely notice of appeal is filed.").

[137] *See* Duncan v. Walker, 533 U.S. 167, 181–82, 121 S. Ct. 2120, 2129, 150 L. Ed. 2d 251 (2001) ("[A]n application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2). Section 2244(d)(2) therefore [does] not toll the limitation period during the pendency of [an incarcerated person's] first federal habeas petition."). For this reason, it is generally not advisable to go to federal courts before you are sure that your petition will not be dismissed for failure to exhaust your remedies in the state courts.

[138] 28 U.S.C. § 2254(b)(1)(B)(i). For a discussion of various situations in which courts have found this exception to apply, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.4[a][i] (7th ed. 2022). Note that courts often refer to claims as "technically exhausted" if there is no available state remedy. *See, e.g.*, Woodford v. Ngo, 548 U.S. 81, 92–93, 126 S. Ct. 2378, 2387, 165 L.Ed.2d 368, 379–380 (2006).

[139] Harris v. Duckworth, 909 F.2d 1057, 1058–1059 (7th Cir. 1990).

[140] Harris v. Duckworth, 909 F.2d 1057, 1058–1059 (7th Cir. 1990).

[141] 28 U.S.C. § 2254(b)(1)(B)(ii). For a discussion of various situations in which courts have found this exception to apply, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.4[a][ii] (7th ed. 2022).

[142] Lynce v. Mathis, 519 U.S. 433, 436 n.4, 117 S. Ct. 891, 893 (1997); Evans v. Cunningham, 335 F.2d 491, 492–494 (4th Cir. 1964).

[143] Lynce v. Mathis, 519 U.S. 433, 436 n.4, 117 S. Ct. 891, 893 (1997); Evans v. Cunningham, 335 F.2d 491, 492–494 (4th Cir. 1964).

[144] *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).

however, will require you to continue pursuing your state remedies until at least a few years have passed without any proceedings or a ruling in the state court.[145] In such a situation, the courts may be more inclined to declare an exception to the exhaustion requirement if there is reason to believe that the delay in state court will keep you from ever pursuing your claim in federal court. For example, in one case, exhaustion of state remedies was not required after the incarcerated person had filed papers in state court raising a federal claim, the state court had delayed ruling on the claim, and it was shown that a key witness whose testimony was necessary to prove the claim was elderly, somewhat incompetent, and in poor health. The federal court ruled that further exhaustion of state remedies was not required because there was a good chance that further delay might prevent the witness from testifying in support of the federal claim.[146]

Courts will occasionally also not require you to exhaust state remedies for reasons aside from those mentioned in 28 U.S.C § 2254(b)(1)(B). For more information on those nonstatutory exceptions, see Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 23.4[b] (7th ed. 2022).

The exceptions to the exhaustion rule are narrow, however, and federal courts rarely rely on them to excuse the exhaustion requirement. Worse, when the federal courts do excuse the exhaustion requirement on the ground that state court remedies that once were available are no longer available, you will likely face another problem known as "procedural default." Procedural default is explained in more detail in Part F ("Defense to Habeas Corpus Petition: Procedural Default") of this Chapter. Procedural default occurs, and usually bars federal habeas review, if (1) you failed to raise a federal claim in a timely and proper manner either at trial, on direct appeal in the state courts, or in a state post-conviction proceeding, and if (2) the state courts either do, or likely would, rule that you are barred from raising the claim now because of that "procedural default." In one case, for example, a person incarcerated in New York was found to have exhausted state remedies on a federal claim even though he did not clearly raise the issue on direct appeal.[147] New York State law provided that he would not be allowed to raise the claim in a state post-conviction petition (called an "Article 440 motion" under New York law) because he had failed to raise the claim in a timely and proper manner on direct appeal in state court.[148] Because no state court remedy remained available, the federal court excused the petitioner's failure to exhaust the claim in state court. However, faced with similar situations, the federal courts with jurisdiction in New York have ruled that federal habeas review is also barred in this situation. Federal habeas review is barred not because of a failure to exhaust state remedies, but because of the "procedural default" that occurred in state court when the incarcerated person failed to

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[145] 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 issues on appeal [are] no more complex than in most criminal appeals").

[146] 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.").

[147] The incarcerated person filed a petition for federal habeas corpus on the ground that his confession was involuntary, even though he had not explicitly raised the issue of voluntariness on direct appeal. However, he was found to have adequately exhausted his state remedies because he challenged the confession's admissibility and provided the courts with the relevant factual information, and the judge 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 (2d Cir. 1989).

[148] *See* Quartararo v. Mantello, 715 F. Supp. 449, 464 (E.D.N.Y. 1989), *aff'd*, 888 F.2d 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) (McKinney 2023).

raise the claim on direct appeal as required by state law.[149] So even though that failure helped the incarcerated person avoid the exhaustion requirement, the same failure likely will qualify as a procedural default that will prevent him from receiving federal habeas review.[150] For this reason, it is much better to find and pursue a state court remedy on federal claims before coming to federal court, rather than arguing that no state court remedy remains on those claims and asking the federal court to excuse the failure to exhaust on that basis. Otherwise, although (to use a common phrase), by escaping the "frying pan" of the exhaustion requirement, you may fall into the "fire" of the procedural default bar.

(e) What Happens If You Do Not Exhaust State Remedies?

If you file your federal habeas petition in federal court, and it finds that you have not exhausted your state remedies on at least one of the claims in that petition, there are several things the federal court may do. First, the court may take a look at the unexhausted claims and decide that they clearly are not deserving of relief and simply deny you relief on those claims, or it may deny you relief on *all* of the claims in your federal petition once and for all, even though you have not finished presenting them to the lower courts.[151] The risk that a federal court will be tempted to deny your habeas petition in its entirety, rather than requiring further exhaustion proceedings in state court on some of your claims, is another reason not to file a federal petition with claims that you fear are not fully exhausted.

The most likely result of a federal court's conclusion that you failed to exhaust your federal remedies on at least one claim in your petition is that the federal court will dismiss it "without prejudice," meaning that after returning to the state courts to exhaust your remedies on the unexhausted claims, you will be permitted to file a new federal habeas petition with all of your exhausted claims in it. In these circumstances, the new federal petition will be treated as your first petition, and you will not be subject to the rules barring most second and successive petitions.[152] The remainder of this Subsection describes what you should do if a federal court threatens to or does dismisses your petition without prejudice due to the fact that you have not exhausted your state remedies on some or all of our claims.

Once it is suggested by the state or by the federal court that your federal petition should be dismissed because some or all of the claims in it are unexhausted, your first step is to demonstrate that, in fact, you did raise each claim in at least one full series of state-court proceedings, either on direct appeal or in state post-conviction proceedings. At the same time, you should check to see if the state has "waived" the exhaustion requirement in your case, meaning that the state has told the federal court that it would rather have the federal court rule on your claims now, rather than take the time to have you return to state court, then come back to federal court.[153] Generally, federal courts will not conclude that the state waived the exhaustion requirement in your case unless there is a clear statement by an authorized state attorney that the exhaustion requirement in your case has been

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[149] *See* Daye v. Att'y Gen., 696 F.2d 186, 190 n.3 (2d Cir. 1982) (en banc) (explaining that if a petitioner fails to follow a state rule and as a result is barred from challenging his conviction in state court, federal review will be barred unless he meets a narrow exception).

[150] *See* Gray v. Netherland, 518 U.S. 152, 162, 116 S. Ct. 2074, 2080, 135 L.Ed.2d 457, 470 (1996) ("[T]he procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default.").

[151] 28 U.S.C. § 2254(b)(2).

[152] *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 H ("Successive Petitions") of this Chapter.

[153] A state waiver of a requirement means that you do not have to fulfill the requirement. *See* Sharrieff v. Cathel, 574 F.3d 225, 228–230 (3d Cir. 2009) (holding that states can waive exhaustion through an express concession of exhaustion).

waived.[154] A final strategy, although one that rarely succeeds, is to argue that there is an exception to the exhaustion requirement that applies in your case.[155]

If none of these strategies succeeds and the federal court dismisses your petition "without prejudice" because some or all of the claims in it are not exhausted, you must return to state court and seek relief there on the unexhausted claims. If this occurs, it is essential that you *remember the one-year time limit* on filing a valid federal habeas petition.[156] As is discussed in more detail in Part D(5)("When to File") of this chapter, you have only one year after your direct appeal in state court is completed to file a valid federal habeas petition. The clock stops running while your case is in state post-conviction proceedings, but it does run at all other times before a valid federal petition is filed. If, for example, you took four months after your direct appeal before filing state post-conviction proceedings, then took two months after those proceedings before filing your federal habeas petition, and if the federal court then concludes that your federal petition has to be dismissed without prejudice because some or all of the claims in it are not exhausted, you would have only six months left on your one-year time limit—that is before taking into account the time between when you filed the claim and when the court dismissed it. (Because, in this example, you already used up six months of the one year, you have only six more months left). It is important, therefore, to file new state court proceedings quickly. Again, once you do file those proceedings, the clock on your one year will stop running.[157] But it will start running again once you finish your new state court proceedings and before your file your new federal habeas petition. Keep in mind that when the federal court dismisses your petition without prejudice, it usually is not required to warn you that your federal claims may be time-barred upon your return to federal court if you take too much time to file your new state court proceedings or wait too long after those proceedings are finished before returning to federal court.[158] The strict timelines on habeas petitions provide one more reason why it is important to include all of your federal claims either on state direct review or in a single set of state post-conviction proceedings before filing your federal petition. Going back to state court for a second set of state post-conviction proceedings may cause your one-year limit to run out before you are able to file a valid federal petition.

(f) What If You Worry that Further Exhaustion Proceedings in State Court Will Cause Your One-Year Time Limit to Run Out?

What should you do if you file a federal habeas petition that is found to include at least one claim that was not properly exhausted in state courts, and if you worry that the time required to file new state-court proceedings to exhaust that claim will cause your one-year time limitation on filing a properly exhausted federal habeas petition to run out before you can return to federal court? One solution is to ask the federal court in a motion or other papers filed on the exhaustion requirement to "stay" rather than "dismiss" the federal petition that you filed with the unexhausted claim in it and to "hold the petition in abeyance" while you complete exhaustion proceedings in the state courts.[159] Holding a petition in "abeyance" means there would be a temporary suspension of activity in the federal court while your unexhausted claim works its way through the state court. You should explain to the federal court that this procedure is necessary to avoid having the clock start running again on your one-year deadline with the risk that you will not have enough time to get a state petition filed

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[154] 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).

[155] See Subsection D(6)(d) ("Exceptions to Exhaustion") of this Chapter.

[156] See Section D(5) ("When to File") of this Chapter.

[157] Tolling is discussed in Subsection D(6)(a) ("Overview of the Exhaustion Requirement"), Subsection D(6)(e) ("What Happens if You Do Not Exhaust State Remedies?"), and Part I ("Post Trials and Appeals") of this Chapter.

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

[159] *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).

before your one-year time limit runs out.[160] Some federal courts may require that you voluntarily remove the unexhausted claims from your federal petition at the same time as you file a "stay and abeyance" motion.[161] Once you have exhausted your state remedies on those claims, you can return to federal court and amend those claims back into the federal petition that has been stayed in federal court. By issuing that kind of order, the federal court can keep the federal petition you initially filed "alive" in federal court, while giving you a short amount of time to present your unexhausted claims to the state court, without causing the clock on your one-year deadline for filing in federal court from starting to tick again.[162] It is up to the federal court to decide whether to issue a "stay and abeyance" order or instead to dismiss your whole petition. The Supreme Court has held that district court should grant a stay and hold the initial petition in abeyance if "petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics."[163]

If the federal court denies your stay and abeyance motion, and if you believe it is at least somewhat likely that you will run out of time before being able to exhaust the unexhausted claims in your federal petition your only option is to *remove* the unexhausted claims from your federal petition and proceed with that petition in federal court on only the exhausted claims.[164] If you do that, however, you will not be allowed to raise those unexhausted claims in federal court later on, even after you exhaust your state remedies on those claims. Instead, you will permanently "waive" (give up any chance of federal habeas relief on) the unexhausted claims. Before doing that, you will need to decide whether proceeding in federal court without the unexhausted claims is a better option than trying to exhaust all of the claims in state court. The question for you then will be whether it is better to give up on the unexhausted claims than to risk running out of time to pursue all of your claims in federal court.

6. Whom to Name as Respondent in Your Petition

Habeas petitions under Section 2254 that are filed by people incarcerated in a state jail or prison must name a person as a respondent—the person you are claiming holds you in custody in violation of federal law. Section 2255 motions filed by people incarcerated in a federal prison do not need to name a person as respondent and instead should file the motion against the "United States."[165]

As a state incarcerated person, your habeas petition is a civil, not a criminal, action. You can think of a habeas petition as a lawsuit—but instead of suing a private person for money, you are suing a state government official to stop holding you in prison in violation of federal law. Your petition must

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[160] Note that federal courts in a number of circuits, including the Third, Seventh, Ninth, and Tenth Circuits, recognize that the *Rhines* stay-and-abeyance procedure is available for petitions that contain *only* unexhausted claims, as well as those with some exhausted and some unexhausted federal claims. *See, e.g.,* Mena v. Long, 813 F.3d 907, 908, 911 (9th Cir. 2016) ("holding that the *Rhines* stay-and-abeyance procedure is not limited to mixed petitions [ones that mix both exhausted and unexhausted claims], and a district court may stay a petition that raises *only* unexhausted claims").

[161] Pliler v. Ford, 542 U.S. 225, 230–231, 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 dismissed, resolved in state court, and then re-added to the pending federal court claims that were already exhausted).

[162] *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 D(6)(a) ("Overview of the Exhaustion Requirement"), Part D(6)(e) ("What Happens if You Do Not Exhaust State Remedies?") for more information on tolling and time limits.

[163] Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005)).

[164] *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.").

[165] 28 U.S.C. § 2255(b). 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.

name the person detaining you as the one you are suing. That person is called the "respondent" and is the person who has control over your custody.[166]

Generally, the person who controls your custody and thus the person you should name in the petition as the one you are suing is either the warden of your prison or the state official who is in charge of all prisons in the state (often called the "Commissioner of Corrections" or something like that).[167] However, there are a few times when 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.[168] If you are not under physical custody of the state,[169] you should name the person who has legal control over your custody as your respondent.[170] For example, if you are on parole, you should name the agency that supervises your parole (often called the Parole Board) as the respondent.[171]

7. What Court to File in

People convicted and sentenced by a state court and incarcerated in state prison must file their federal habeas petition in a federal district court. Federal district courts can hear cases arising only from a single state. In some states, there are multiple federal district courts, each of which can hear cases only from one part of that state. The area in a state from which federal district courts may hear cases is called the "district." State incarcerated people may file their habeas petition either in the district court for the district in which they were convicted and sentenced or in the district court for the district where they are imprisoned.[172] For some people, that district will be the same—they were convicted and they are now imprisoned in the same federal district. But, for example, a person convicted in a state court in Knoxville, Tennessee (which is in the "Eastern District of Tennessee") who is incarcerated in a state prison near Nashville, Tennessee (which is in the "Middle District of Tennessee") has a choice. That person may choose to file a federal habeas petition either in the Federal District Court for the Eastern District of Tennessee in Knoxville (the district court for the district of conviction) or in the Federal District Court for the Middle District of Tennessee in Nashville (the district court for the district of incarceration).

If you have this choice, you may consider a number of factors in making the choice, including the following one:

- People choosing where to file lawsuits often consider whether the judges in different places are more or less likely to be sympathetic to their legal claims and then file their petition in the court where the judges are likely to be more sympathetic to their case. Individuals in the prison where you are held who have knowledge of the law may have information about the judges in different federal districts.
- If you have a lawyer who you know will represent you in your federal habeas case, that lawyer may prefer to file the petition in the district court near where the lawyer practices

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166 This is called the "immediate custodian rule." Rumsfeld v. Padilla, 542 U.S. 426, 435, 124 S. Ct. 2711, 2718, 159 L. Ed. 2d 513, 527 (2004). See Section D(1) ("Who Can File: Petitioner's 'Custody' Requirement") of this Chapter for more information on custody.

167 "[T]he state officer having custody of the applicant [shall] be named as respondent." Rules Governing Section 2254 Cases 2(a) 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.

168 Rules Governing Section 2254 Cases 2(b) advisory committee's note to 2004 amendment.

169 See Section D(1) ("Who Can File: Petitioner's 'Custody' Requirement") of this Chapter for more information on custody.

170 *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.'").

171 *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].").

172 28 U.S.C. § 2241(d).

law, including because the lawyer knows the judges in that district court better than the judges in the other district court.

- If you do not yet have a lawyer who will represent you in your federal habeas case, you may wish to choose the district court located in a place where there are more lawyers available to represent you in court. There tend to be more such lawyers in cities than in towns or rural areas. Keep in mind, though, that if you cannot pay for your own lawyer, you may *not* have a right to have a lawyer appointed for you, and you may have to represent yourself.[173]
- You may wish to file in the district court that is nearer to where your family and friends live, because they may be able to help you with your case or to come to court on days when you are required or permitted to be in court.
- You may wish to file in the district court where you were convicted because (1) the records of your trial and sentencing are likely to be closer to that court than to the district court for the district where you are incarcerated, and (2) additional evidence or witnesses that you may wish to produce in court are likely be located closer to the district court of conviction than to the district court of incarceration.
- Some federal district courts have a rule that they will accept petitions only from people who were convicted and sentenced in that district. If that is true, you may be required to file your petition in the district of conviction and not the district of incarceration. If the court in which you file your petition follows this rule, and if that court is the district court of incarceration, not conviction, that court will likely "transfer" your petition to the district court for the district where you were convicted.[174]

If you are filing a Section 2255 motion because you are incarcerated in a *federal prison* based on a conviction for a federal crime, 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.[175]

8. Selecting and Framing Claims

As discussed above, habeas petitions by state incarcerated people must claim that their conviction or sentence violates federal law, which nearly always requires proof of a violation of one of a constitutional amendment. Just below is a general description of the rights in constitutional amendments. Appendix C at the end of this Chapter contains a more detailed list of the kinds of violations of constitutional amendments that federal courts have recognized as a basis for habeas corpus relief from state convictions and sentences. Often, you will not be able to understand fully what it will take to prove a violation without first reading court cases that discuss that type of legal claim. You should start by looking over the list below. If you think one of these amendments contains a right that may have been violated in your case, go look at the more detailed list in Appendix C. To use the list in Appendix C, locate the amendment there that you believe was violated. Then carefully read the examples in that section of Appendix C to see if you experienced anything similar to the violations listed there. After that, you should read the cases in the footnotes there to get a better idea of what courts require in order to provide that each kind of violation has occurred.

Keep in mind, however, that these lists are incomplete. The examples provided in this Chapter include only some of the actions or problems leading to criminal convictions and sentences that courts have found to violate the U.S. Constitution. If you think that something that is not mentioned here (1) happened in your case, (2) was unfair or unjust or led to a false finding that you committed a crime, and (3) was challenged in your direct appeal or in your state post-conviction petition (if a state post-conviction petition was filed in your case), you may be right! If so, you may be able to get habeas corpus relief on that basis. In that situation, you will have to do your own research into the court cases to find more support for your belief that actions or problems occurring in your case violated federal law and provide a basis for habeas corpus relief.

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[173] See Part C ("Obtaining Counsel") of this Chapter for more information on finding a lawyer.

[174] *See, e.g.*, U.S. DIST. CT. RULES S.D.N.Y. & E.D.N.Y., LOCAL CIV. R. 83.3.

[175] *See, e.g.*, Haugh v. Booker, 210 F.3d 1147, 1150 (10th Cir. 2000).

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

(i) *First Amendment*

This Amendment protects your right to free speech, to free association with other people for non-criminal purposes, and to practice your religion. In rare cases, criminal convictions or sentences may interfere with these rights. If you were convicted in state court, and if you believe that *any one* of your First Amendment rights was violated, you should state in your habeas petition that your claim arises under both the First Amendment and under the Fourteenth Amendment Due Process Clause, because it is the Fourteenth Amendment Due Process Clause that assures that the First Amendment applies to you as a state incarcerated person. (Because violations of these rights through criminal convictions and sentences are rare, they are not discussed in Appendix C.)

(ii) *Second Amendment*

This Amendment protects your right to own, carry, and use a firearm for non-criminal purposes, assuming you have not previously been convicted of a felony and that you are not subject to an order of protection or other court order restricting you use of firearms. In rare cases, criminal convictions or sentences may interfere with this right. If you were convicted in state court, and if you believe that your Second Amendment rights were violated, you should state in your habeas petition that your claim arises under both the Second Amendment and under the Fourteenth Amendment Due Process Clause, because it is the Fourteenth Amendment Due Process Clause that assures that the Second Amendment applies to you as a state incarcerated person. (Because violations of these rights through criminal convictions and sentences are rare, they are not discussed in Appendix C.)

(iii) *Fourth Amendment*

This Amendment protects your right to be free from unlawful search or seizure. This Amendment is why the police need to have a warrant and probable cause in order to search you, arrest you, or take your property in many situations. Note, however, that habeas corpus relief often is not available for Fourth Amendment violations.[176] If you were convicted in state court, and if you believe that your Fourth Amendment rights were violated in ways that you are permitted to raise in your federal habeas petition, you should state in your petition that your claim arises under both the Fourth Amendment and under the Fourteenth Amendment Due Process Clause, because it is the Fourteenth Amendment Due Process Clause that assures that the Fourth Amendment applies to you as a state incarcerated person.

(iv) *Fifth Amendment*

This Amendment protects more than one right. All the rights it protects apply to people convicted in federal court of federal crimes, but only some of them apply to people convicted in state court of state crimes.

First, the Fifth Amendment gives the right to be indicted by a grand jury for serious crimes.[177] This right applies to people convicted of federal crimes but not to people convicted of state crimes.

Second, the Fifth Amendment includes a 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. This right applies to people tried twice for the same state offense or for the same federal offense, but it does not apply to bar you from being tried once under federal law and again under state law (or vice versa).

Third, the Fifth Amendment has the right to be free from self-incrimination. This right protected you from being forced by the police, prosecutors, or judges to make statements that could be used as a

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[176] See Section D(3) ("Violations You May Not Raise in Your Habeas Petition") above for a discussion on Fourth Amendment violations and when you can raise them in your habeas petition.

[177] This provision requires the federal government to present its case to a grand jury and obtain an indictment before trying you. It applies to felony offenses. *See* Stirone v. United States, 361 U.S. 212, 215, 80 S. Ct. 270, 272, 4 L. Ed. 2d 252, 256 (1960).

basis for convicting you of a crime. It allows you to refuse to answer questions put to you by police or prosecutors or to testify as a witness in your own trial.

Finally, the Fifth Amendment has the right to due process. Due process basically means that police, prosecutors, and courts must use fair procedures in arresting you, investigating your case, and trying you in court. The courts have identified many aspects of due process that must be provided in criminal cases. If you were convicted of a federal crime, you are protected by the Fifth Amendment Due Process Clause. If you were convicted of a state crime, you still have a right to due process, but you are protected by the Due Process Clause in the Fourteenth Amendment, not by the Due Process Clause in the Fifth Amendment. If you were convicted in state court, and if you believe that *any one* of your Fifth Amendment rights was violated, you should state in your habeas petition that your claim arises under both the Fifth Amendment and under the Fourteenth Amendment Due Process Clause, because it is the Fourteenth Amendment Due Process Clause that assures that the Fifth Amendment applies to you as a state incarcerated person.

(v) *Sixth Amendment*

This Amendment has several rights in it, almost all of which apply to people convicted of either state or federal crimes. First, it has the right to a speedy and public trial. Second, it has the right to trial in front of an impartial jury.[178] Third, it has the right to have your trial in the state and district where the crime occurred. This is the only right in the Sixth Amendment that might only apply if you were convicted of a federal crime. Fourth, it has the right to be told the crime with which you are charged. Fifth, it has the right to confront (meaning, usually, to cross-examine) witnesses against you and to be able to obtain witnesses to testify on your behalf. Lastly, it has the right to have effective assistance[179] from a lawyer provided to you by the state if you have not been able to retain your own lawyer.[180] If you were convicted in state court, and if you believe that *any one* of your Sixth Amendment rights was violated, you should state in your habeas petition that your claim arises under both the Sixth Amendment and under the Fourteenth Amendment Due Process Clause, because it is the Fourteenth Amendment Due Process Clause that assures that the Sixth Amendment applies to you as a state incarcerated person.

(vi) *Eighth Amendment*

This is the right to be free from excessive bail, excessive fines, or cruel and unusual punishment. If you were convicted in state court, and if you believe that *any one* of your Eighth Amendment rights was violated, you should state in your habeas petition that your claim arises under both the Eighth Amendment and under the Fourteenth Amendment Due Process Clause, because it is the Fourteenth Amendment Due Process Clause that assures that the Eighth Amendment applies to you as a state incarcerated person.

(vii) *Fourteenth Amendment*

This Amendment again guarantees that people convicted and sentenced in *state* court are provided with procedural due process as is described in the discussion just above, about the Fifth Amendment right to due process. Additionally, if you were convicted in state court and you believe that *any one* of your First, Second, Fourth, Fifth, Sixth, or Eighth Amendment rights as described above was violated in your criminal case, you should state in your habeas petition that your claim arises under *both* the relevant one of those amendments *and* under the Fourteenth Amendment Due Process Clause, because it is the Fourteenth Amendment Due Process Clause that assures that those various amendments

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[178] 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. Murphy v. Florida, 421 U.S. 794, 799, 95 S. Ct. 2031, 2036, 44 L. Ed. 2d 589, 594 (1975) ("The constitutional standard of fairness requires that a defendant 'have a panel of impartial, indifferent jurors.'") (quoting Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751, 755 (1961))).

[179] *See* Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063–2064, 80 L. Ed. 2d 674, 692 (1984).

[180] *See* Gideon v. Wainwright, 372 U.S. 335, 344–345, 83 S. Ct. 792, 797, 9 L. Ed. 2d 799, 805–806 (1963).

apply to you as a state incarcerated person. Finally, the Fourteenth Amendment also contains the Equal Protection Clause, which protects you from government discrimination based on characteristics like race or sex.

If you are a state incarcerated person, remember that you may only raise violations of the Constitution and its amendments in your habeas petition. If you are a federal incarcerated person, you may raise violations of the Constitution and its amendments or violations of federal criminal statutes or treaties.[181]

(b) Standards and Tests for Claims of Violations

Once you have found at least one possible violation of federal law that you think occurred when you were convicted or sentenced, 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 petitioner must meet in order to prove to the court that each violation occurred. Examples may be found in this footnote.[182]

After you have identified the applicable federal legal standard for each claim you intend to raise in your habeas petition, 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 and circumstances 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 legal standard for each claim was met (meaning that you have shown that your conviction or sentence violates federal law), you still may not be entitled to habeas relief for one of three reasons that are discussed later in this Chapter. First, if you were convicted of a state offense in state court, you usually will have to show that when the state courts ruled against you on the claim, they not only made an error of federal law in denying you relief but also that the error they made either was "contrary to" or was an "unreasonable application" of Supreme Court law that was clearly established as of the time of your direct appeal.[183] Second, if you were convicted of either a state or a federal offense, you may have to overcome an argument by the state or government (sometimes called a "defense") that you "procedurally defaulted" the claim by not raising it at the right time or in the proper manner at trial, on appeal, or in state post-conviction proceedings.[184] Third, if you were convicted of either a state or a federal offense, you may have to overcome an argument (or "defense") by the state or government that any violation that occurred was "harmless" because it did not actually change the result in your case. To show harm, you will need to convince the court that the violation negatively affected the outcome of your trial (discussed in Part G of this Chapter).

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[181] See Title 18 of the United States Code for information on federal criminal law.

[182] 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 balancing four factors (that there was a delay in your trial, that the delay occurred for no good reason, that you asked for a speedy trial, and that the delay prejudiced you) demonstrates you were deprived of your fundamental right to a speedy trial. 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, 439 (1977).

[183] See Subsections D(8)(d)(iii)(a)(1) ("State Court Decision Was 'Contrary to' Standard") and D(8)(d)(iii)(a)(2) ("State Court Decision Meets the 'Unreasonable Application' Standard") for a discussion on how to meet these standards.

[184] *See* Part F ("Defense to a Habeas Corpus Claim: Procedural Default").

(i) *Finding the Standard that the Court Uses to Assess Each Claimed Violation*

To find the standard the court will use to judge your claim, you have to look at court decisions in 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 there in the relevant footnotes. Reading those cases will give you 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 kind of language you should look for to find the standard. Once you find the test used by the courts to review the kind of claim you are making, your next step is to figure out if there is any way to argue that the facts and circumstances of your case satisfy that standard.

Here is one example of a violation and its standard. (This is just one example—although it is very commonly raised—of the many types of federal legal violations that may have occurred in your case.) At your trial and on your direct appeal, you have a constitutional right to the "effective assistance" of an attorney.[185] If your trial or appellate lawyer did not effectively investigate your case and effectively defend you and present your evidence at trial, you might have a claim that he or she did not provide you with your right to effective assistance. In a case called *Strickland v. Washington,* the Supreme Court defined the standard that you must meet in order to prove a violation of this right.[186] The *Strickland* test for determining whether your right to effective counsel was violated has two requirements. To meet the standard required to show ineffective assistance of counsel, you must show that both requirements are met in your case: (1) that your lawyer acted unreasonably and (2) that his or her actions "prejudiced" you.[187] In more detail, these two requirements are as follows:

The first requirement is that you show that your lawyer's representation "fell below an objective standard of reasonableness," considering all the circumstances under existing "professional norms."[188] This means that the court can grant you relief on this claim only if it finds that what you show that your attorney did, or failed to do, while representing you at trial or on appeal was "unreasonable" or offered representation below the level of competence that most lawyers provide.[189]

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[185] *See* Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063–2064, 80 L. Ed. 2d 674, 692 (1984). (right to effective assistance of counsel at trial based on the 6th Amendment); Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985) (right to effective assistance of counsel on appeal based on the due process and equal protection clauses of the 14th Amendment).

[186] 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).

[187] Strickland v. Washington, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 2064–2065, 80 L. Ed. 2d 674, 693–694 (1984). The Supreme Court has made it difficult to prove you had ineffective assistance of counsel. 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 a valid legal objection during sentencing, but the Supreme Court held that this was not enough to meet the *Strickland* "prejudice" test. To win relief for ineffective assistance of counsel based on that kind of failure to object to legal error at trial, the petitioner had to show *both* a reasonable probability that the outcome would have been different had trial counsel objected *and* that the petitioner was deprived of a fundamentally fair trial with a "reliable result." In Williams v. Taylor, 529 U.S. 362, 397–399, 120 S. Ct. 1495, 1515–1516, 146 L. Ed. 2d 389, 420–421 (2000) (Terry Williams), however, the Supreme Court held that failure to produce available mitigating evidence at Williams' capital sentencing hearing (the evidence neglected by William's trial counsel showed that Williams had suffered childhood neglect and abuse, was borderline mentally deficient, and had a favorable prison record), violated the standard of *Strickland*. The Court ruled that *Lockhart* did not apply in this case because the defendant had a constitutionally protected right to offer evidence in mitigation of the death penalty. Williams v. Taylor, 529 U.S. 362, 391–393, 120 S. Ct. 1495, 1512–1514, 146 L. Ed. 2d 389, 416–1418 (2000) (Terry Williams).

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

[189] 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

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.[190] To find prejudice, the court must conclude that there is a "reasonable probability"[191] that the result of your trial or appeal would have been different, and more favorable to you, if your lawyer had provided effective representation.[192]

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*[193] the cases cited in the footnotes, especially those in Appendix C.

(ii) *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 effective assistance of counsel was violated, you should use the *Strickland*[194] standard. Under the *Strickland* standard, you must show that you had a right to counsel at the time (there is a right to effectively counsel in the investigation that leads up to your trial, at your trial, and on direct appeal of your conviction or sentence, but not in state post-conviction proceedings),[195] that you did not receive adequate representation, and that the failure to provide adequate representation prejudiced you. It is very important that you tell the court in your petition about all of the facts and circumstances in your case that show when and how the representation you received was poor or ineffective and how the failure to provide effective representation weakened your case for avoiding conviction or led to a more serious

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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 another 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.

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

191 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").

192 Vickers v. Superintendent Graterford Sci, 858 F.3d 841, 857 (3d Cir. 2017) ("[W]here a defendant claims ineffective assistance based on a pre-trial process that caused him to forfeit a constitutional right, the proper prejudice inquiry is whether the defendant can demonstrate a reasonable probability that, but for counsel's ineffectiveness, he would have opted to exercise that right.").

193 By *Shepardizing*, you can make sure that the law has not changed. See Subsection E(2)(a) ("Shepard's") of Chapter 2 of the *JLM*, "Introduction to Legal Research," for an explanation of how to Shepardize a case.

194 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 effective assistance of counsel, see Subsection D(8)(b) ("Standards and Tests for Claims of Violations") of this Chapter.

195 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 were not violated by admission of confession he made to undercover agent while in jail because no charges had been filed based on the confession and there was no right to counsel).

sentence. If you do not tell the court about the facts that prove both parts of the violation and how those facts satisfy the requirements for a violation, your claim may be denied.[196]

In other words, it is not enough just to say that a violation of a particular right occurred. You must show exactly when and how the violation occurred. Give as many details about the violation as you can, mentioned all facts that you know of or that you suspect occurred and that are relevant to showing that a violation occurred. If you believe, but don't know for sure that certain facts or circumstances were present, you can refer to that fact in your petition as being "*on information and belief*"—meaning that you believe the fact is true but you don't know for sure. If a statement relevant to the violation you are claiming was made during your trial or on direct appeal—it could be a statement by a witness, a lawyer, a judge, or anyone else, find those exact words in the transcript of your trial or in the recording or the argument being made in court on appeal and quote those words in your habeas petition. Note in your petition the page and line in the transcript where the words can be found.

In some cases, you may be able to get a court order giving you the right to obtain additional information from the government or other sources in order to show the facts that apply to the violation you are asserting. 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." Discovery for federal habeas corpus petitions is discussed in this chapter in Subsection E(4) ("Discovery in Federal Habeas Corpus"). 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.[197] You can show good cause when the facts you are alleging, if correct, would entitle you to habeas relief.[198]

(c) New Laws: The *Teague* Rule

In most cases, you can receive federal habeas relief only based on violations of federal constitutional law that was clearly in effect as of the time of your direct appeal.[199] This means that if the Supreme Court or another federal court establishes a new interpretation of federal law *after* your direct appeal was complete, you usually may not rely on that new law as a basis for habeas relief.[200] The Supreme Court established this rule in the case of *Teague v. Lane*,[201] and it is therefore called the *Teague* Rule.

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[196] *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.

[197] *See* Rules Governing Section 2254 Cases 6; Rules Governing Section 2255 Cases 6; 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).

[198] *See* Bracy v. Gramley, 520 U.S. 899, 908–909, 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 into whether petitioner's allegations, when fully developed, may demonstrate that the petitioner is entitled to relief); Laws v. Lamarque, 351 F.3d 919, 924 (9th Cir. 2003) (holding that the district court abused its discretion by summarily denying habeas petitioner's claim of equitable tolling and concluding that the district court should have "allowed discovery or ordered expansion of the factual record . . . [under] Rules Governing Section 2254 Cases 6 & 7 . . . to evaluate the strength of [the equitable tolling] claim").

[199] Although a federal habeas petitioner cannot use a new rule as grounds for his petition, courts might be able to use a new rule to *deny* a habeas petition. *See* Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180, 191 (1993) (suggesting in *dicta* that the *Teague* rule does not apply to new rules limiting the rights of criminal defendants and habeas petitioner). *But see* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.8 & nn.10–13 (discussing this issue and explaining reasons why *Teague*'s limit on retroactively applying rules should also apply to rules limiting the rights of criminal defendants and habeas petitioners).

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

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

The *Teague* Rule applies to people convicted of either federal or state crimes and incarcerated in either federal or state institutions. As Subsection D(8)(d) ("Section 2254(d) Standard of Relief") below will describe, however, an additional, related rule applies only to people incarcerated in state prison for a state crime. Their conviction or sentence may be reversed only if the state decision denying the relevant federal constitutional claim on appeal or in state post-conviction proceedings was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[202] The *Teague* rule and the "contrary to/unreasonable application" rules are somewhat similar. One important difference is that people incarcerated in *federal* prison for a federal crime may rely on cases from the federal circuit court in which they were convicted. They may rely on these cases to show that the law on which they are relying was in effect as of the time of their direct appeal and thus is "not new," even if the Supreme Court has not discussed the relevant claim. By contrast, people incarcerated in *state* prison for state crimes may rely only on legal principles that the U.S. Supreme Court itself had clearly established as of the time of their direct appeal.[203]

This Section discusses the *Teague* rule that applies to people incarcerated in both federal and state prisons. The next Section discusses the rule requiring state incarcerated people to prove that the state decision denying their claim was "contrary to" or an "unreasonable application" of clearly established Supreme Court law.

(i) *Burden of Proof*

It is up to the *state or government* to allege in its answer to your brief that the *Teague* rule bars relief in your case. If the state or government does not ask the court to bar relief in your case based on the *Teague* rule, the court should not deny you relief on the ground that your claim relies on new law.[204] It is up to the *government* to bring up the *Teague* issue first. Therefore, only if the government first objects to your petition on the basis of the *Teague* rule should you respond that the law on which you are relying was decided before direct appeal ended or that a *Teague* exception applies in your case and allows you to rely on new law.

(ii) *What Is a New Rule?*

In order to find that the federal rule of law that you claim was violated in your case is not "new" (meaning that relief is not barred by the *Teague* rule), the federal courts must conclude that the rule of law on which you rely was "*dictated* by"[205] previously decided federal court cases, known as "precedents." This means that federal cases decided as of the time of your direct appeal must *demand* or *require* the conclusion that your conviction or sentence is illegal. For example, in *Teague*, the prosecutor used "peremptory challenges" to keep all African Americans off the jury (peremptory challenges are used by lawyers to disqualify potential jurors without giving any reason for doing so). The all-white jury then convicted the black petitioner of murder. Two and a half years after the petitioner's conviction, the Supreme Court ruled in a different case that a petitioner 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.[206]

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[202] 28 U.S.C. § 2254(d)(1). For more information on the "contrary to or involving an unreasonable application" requirement, see Subsection D(8)(d)(iii)(a) ("State Court Decision Was Badly Wrong on the Law") of this Chapter.

[203] *See* Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389, 430 (2000) (Terry Williams) ("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).

[204] See RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.3 (2022) (discussing the burden of pleading and proof for the *Teague* rule).

[205] Teague v. Lane, 489 U.S. 288, 302 (1989).

[206] Batson v. Kentucky, 476 U.S. 79, 91–92, 106 S. Ct. 1712, 1720–1721, 90 L. Ed. 2d 69, 84 (1986).

The *Teague* petitioner 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."[207] That is, the second decision was not "dictated by" or required or commanded by any prior decisions.

A rule of law is considered "new" even if it is based *in part* on earlier cases, as long as there is a part of the rule on which you rely that became established after your direct appeal. The Supreme Court also has found that a rule is "new" if lower courts disagreed significantly about the question as of the time of your direct appeal and if the court ruling that clarified the matter was issued after your direct appeal was over.[208] Unfortunately if you are in this situation, the law will usually be called "new."[209] If "debate among reasonable minds"[210] was possible as to what rule applied as of the time of your direct appeal, courts will find that any later decisions that more clearly specify the law are "new."

If courts find that a rule is "dictated by prior precedent," the rule is not "new." Courts will find that the rule on which you rely is "dictated by prior precedent" if, as of the time of your direct appeal, there was a court decision finding the same violation that you claim occurred in your case, based on facts and circumstances that are the same or nearly the same as those in your case. Even, however, if at the time of your direct review, there was no prior court decision in a case exactly like yours, a federal habeas judge still may conclude that prior court decisions were sufficiently similar to your case to have "dictated" the rule on which you rely. The same may be true even if no decision as of the time of your direct appeal articulated exactly the rule on which you rely in your habeas petition. In other words, a court may find that the rule of law on which you rely is "dictated by precedent" (and therefore is not new law) if court decisions in effect at the time of your direct appeal *strongly implied* the rule of law on which you now rely. If that is true, the fact that there is a case decided after your direct appeal that more clearly states the rule of law on which you rely will not make that rule of law "new."[211]

In *Caspari v. Bohlen*,[212] the Supreme Court summarized the three steps a habeas court must take to see if the *Teague* rule applies. First, the court must identify the date on which the petitioner's conviction and sentence became "final" as of the date when the petitioner's direct appeal ended. Second, the court must decide whether cases decided before that "finality" date would have led the trial or direct appeal courts to understand that the rule on which the petitioner now relies was then in effect and thus that the rule is not "new." Third, if the rule is deemed to be "new," because it was not dictated by law in effect at the time of trial or direct appeal, then the habeas court must decide if the petitioner's case falls into an exception to the *Teague* rule. (For a discussion of the exceptions to the *Teague* rule, see Subsection (c)(iv) ("Exception to the New Law Rule") below).

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

[208] *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").

[209] 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'").

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

[211] *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"). Even what is called "dictum" (or "dicta" for the plural form) in a prior decision ("dictum" is all of the statements in a judge's opinion that are outside of the main ruling they are making in the case before them) may be used to show that the rule of law on which you rely was in effect as of the time of your direct appeal, even though the dictum itself does not count as clearly establishing the law, since it is not binding. *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").

[212] 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).

Consider the following four examples of the Supreme Court rejecting habeas relief because the petitioner's habeas claim was based on new law[213]:

(1) In *Saffle v. Parks*,[214] the petitioner sought habeas relief because, at his trial, the judge had instructed the jury that, in deciding whether to sentence the defendant to die, it should "avoid any influence of sympathy."[215] The petitioner argued that this instruction was unconstitutional because it caused the jury to ignore evidence that might have warranted a sentence less than death. The Supreme Court decided that, even though the objection to this instruction was based on earlier cases that required that jurors be able to consider all "mitigating" evidence about the crime or defendant that might lead to a sentence less than death, the earlier cases did not say *how* the court should ask the jury to listen to mitigating evidence. So, the Court held that the habeas petitioner's objection to the instruction was based on a new rule of constitutional law, not a previously established rule and the Court denied habeas relief on that basis.

(2) In *Butler v. McKellar*,[216] Butler filed a federal habeas petition four years after his murder conviction was approved on direct appeal. Two years after his direct appeal was completed, the Supreme Court decided a case called *Arizona v. Roberson*, which barred police from interrogating a suspect about a possible crime after he had requested a lawyer on a different charge.[217] The Supreme Court rejected Butler's petition because it concluded that the *Roberson* case announced a "new" rule of law. Butler's lawyer argued that the *Roberson* rule was not a new rule because it was based on an earlier case, *Edwards v. Arizona*, which was decided before Butler's direct appeal was finished.[218] The Supreme Court disagreed because the *Edwards* rule prohibited interrogating a suspect on a particular charge after he had requested a lawyer to defend himself against that very charge. The *Roberson* rule covered interrogations about a crime that was *different* from the one that had led the defendant to request a lawyer. The Court concluded that no one could have predicted that the *Edwards* rule would extend to the different situation in *Roberson*. Therefore, *Roberson* was not "dictated by" *Edwards* and instead announced a new rule of law on which the petitioner could not rely.

(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" because there would be appeals after the jury ruled.[219] A year after the petitioner's direct appeal ended, the Supreme Court ruled in *Caldwell v. Mississippi* that it is not constitutional for a prosecutor to make remarks reducing the jury's sense of responsibility for the death penalty decision.[220] The *Sawyer* petitioner asked the court to apply the *Caldwell* rule to his

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[213] For more cases, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.5 (2022).

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

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

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

[217] 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)).

[218] 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 offense had not waived his right to counsel).

[219] 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).

[220] 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

conviction. He argued that the *Caldwell* case did not create a "new rule" of law because earlier cases predicted the rule that prosecutors could not diminish the seriousness of jury death penalty decisions. The Supreme Court disagreed and ruled that the *Caldwell* rule was a "new rule of law" because it was not predictable based on earlier cases.[221]

(4) In *Chaidez v. United States*, 568 U.S. 342 (2013),[222] the petitioner had pled guilty to an offense that would subject her to mandatory deportation. Her attorney, however, did not advise her of that fact before she agreed to plead guilty. After her conviction had become final as a result of her guilty plea (no direct appeal was taken), and while her post-conviction petition was pending, the Supreme Court decided *Padilla v. Kentucky*. *Padilla* held that it was ineffective assistance of counsel under the Supreme Court's longstanding *Strickland* rules for a criminal defense attorney to fail to inform a non-citizen client of the risks of deportation arising from a guilty plea. In deciding whether Chaidez could get the benefit of the *Padilla* decision, the Supreme Court reasoned that the question in *Padilla* was not *how* the well-established *Strickland* test applied in such a case but *whether* the *Strickland* test applied at all in the context of guilty pleas with immigration implications. The Court concluded that *Padilla's* extension of the *Strickland* test to that new context constituted a new rule of criminal procedure, decided after Chaidez's case had become final. As a result, *Teague* barred Chaidez from relying on *Padilla* in her post-conviction case.

To summarize, under the *Teague* rule, your federal habeas corpus petition cannot rely on new law—that is, on law that was established after your case became final at the end of direct review. But you can base your habeas petition on established law and ask the court to apply that old law to the facts of your case, even if the Supreme Court has never previously applied that law to a case exactly like yours. In many cases, the Supreme Court expects that decisions it issues in one factual situation will be applied to decide cases with somewhat different situations. If that is true, then the federal habeas corpus court in your case may apply the established general legal principle to your particular fact situation.[223] To support your claims when you draft your petition, you should cite cases that were decided before your case became final as of the end of your direct appeal. It is best to cite Supreme Court cases, although citing supportive lower federal court and state cases can also help. Doing that will make clear that the law you are relying on is not new law. But you should not actually mention the *Teague* standard in your habeas petition because it is up to the *government* to raise the *Teague* issue first. If the government fails to do so when it responds to your petition, then the government "waives" (gives up) the *Teague* objection and cannot raise it later. Only if the government first objects to your petition on the basis of the *Teague* rule should you then respond that the law on which you are relying was decided before your case became final on direct appeal. You can also respond that one of the *Teague* exceptions applies in your case and allows you to rely on new law.

(iii) *When Does Your Case Become "Final" for* Teague *Purposes*

Under the *Teague* rule, rules of law established after your case becomes "final" are deemed to be new. Your case becomes final when your direct appeal is completed. If you file a direct appeal, your case becomes final after the highest state court on direct appeal rules in your case and when the U.S. Supreme Court denies a timely petition for a writ of certiorari seeking review in that court. If you do not file a direct appeal, your case becomes final as of the last date on which you could have filed a timely direct appeal. If you do file a direct appeal but do not file a petition for a writ of certiorari in the

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responsibility, the heightened requirements of the 8th Amendment are not met, and the sentence of death cannot stand).

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

[222] Chaidez v. United States, 568 U.S. 342, 349, 113 S. Ct. 1103, 1108, 185 L. Ed. 2d 149, 157 (2013).

[223] *See* Hart v. Att'y 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").

U.S. Supreme Court, your case becomes final as of the last date on which you could have filed a timely certiorari petition.[224]

(iv) *Exceptions to the New Law Rule*

You should do everything you can to avoid basing your habeas petition on "new law"—that is, on law that was not clearly established as of the date when your conviction becomes final with the completion of the direct appeal process. Only in rare situations is habeas corpus relief available based on rules of law that were established after your conviction became final.

In announcing a new rule, the Supreme Court has the power to declare the rule to be "retroactive." The rule would then apply to all cases (whether brought by a state or federal incarcerated person) that are then in the courts, cases that are filed afterwards, or to some subset of cases, in addition to cases that had not yet become final as of the date of the new decision.[225] Decades ago, the Supreme Court regularly declared new rules of law to be retroactive, but today, the Supreme Court almost never does so.[226]

Today, there is only one viable exception to the *Teague* rule. This exception covers changes to substantive criminal law, including (1) new rules holding that specified conduct does not or cannot qualify as any or as a particular crime and (2) new rules that exclude specified punishments, such as the death penalty, for specified offenses or offenders. Even if the law being relied upon by a habeas petitioner is "new"—that is, was not yet clearly established law as of the time a conviction became final at the end of the direct appeal process—federal habeas relief could be based on the new rule of federal law in this situation.[227] *Teague* made clear that this exception would be interpreted very narrowly, expecting it to apply only rarely. There was a second exception to the *Teague* rule regarding procedure, but the Supreme Court eventually eliminated that second exception.[228] Therefore, the only viable exception to the *Teague* rule is new rules of law declaring that certain conduct (1) does not or cannot constitute a crime or (2) cannot be a basis for a particular sentence, such as a sentence of death. The remainder of this Section discusses the two parts to this exception.

a. New Rules Decriminalizing Behavior in All or Certain Situations

The viable *Teague* exception allows you to rely on a new rule of law if that rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[229] This means that, if the behavior for which you were convicted is no longer criminal under the new law, you can use this new law as a basis for habeas corpus relief. For example, in *Griswold v. Connecticut*, the Supreme Court ruled that the Connecticut law making it a crime to use or advise people about the use of contraceptives violated the constitutional right to marital privacy.[230] Therefore, the Court reversed the conviction of a Connecticut doctor who had been convicted of the

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[224] Caspari v. Bohlen, 510 U.S. 383, 390, 114 S. Ct. 948, 953 127 L. Ed. 2d 236, 246 (1994). The time period to seek *certiorari* from the Supreme Court is typically 90 days. SUP. CT. R. 13.1. It was briefly extended to 150 days due to the Covid-19 pandemic, for judgments between December 19, 2019 and July 18, 2021. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(i) n.47 (2023).

[225] Teague v. Lane, 489 U.S. 288, 310–312, 109 S. Ct. 1060, 1075–1076, 103 L. Ed. 2d 334, 355–357 (1989); Welch v. United States, 578 U.S. 120, 120-122, 136 S. Ct. 1257, 1259–1260, 194 L. Ed. 387, 395 (2016); Schriro v. Summerlin, 542 U.S. 348, 351, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

[226] *See, e.g.,* Chaidez v. United States, 568 U.S. 342, 358, 133 S. Ct. 1103, 1113, 185 L. Ed. 2d 149, 162 (2013) (holding that the new rule established by Padilla v. Kentucky did not apply to petitioners whose convictions became final prior to *Padilla*, because the Court did not make the change retroactive, and it does not fall within the specific exceptions set out in *Teague*).

[227] *See* Teague v. Lane, 489 U.S. 288, 311–312, 109 S. Ct. 1060, 1076, 103 L. Ed. 2d 334, 356–357 (1989); Penry v. Lynaugh, 492 U.S. 302, 329-330, 109 S. Ct. 2934, 2952-2953, 106 L. Ed. 256 (1989).

[228] *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1562, 209 L. Ed. 2d 651 (2021).

[229] 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, 1180, 28 L. Ed. 2d 404, 420 (1971)).

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

crime of giving advice about birth control to a married couple.[231] This part of the exception applies most frequently to people who have been convicted of *federal* crimes under interpretations of federal criminal statutes that the Supreme Court later concludes must be interpreted more narrowly than before. Because such rulings narrow the range of conduct that can be deemed to be a violation of the federal criminal statute in question, these new rules of law fall within this *Teague* exception.[232]

b. New Rules Prohibiting Punishments in All or Certain Situations

You may rely on a new rule of law if it bars a certain type of punishment for a certain crime or for certain individuals.[233] For example, in *Ford v. Wainwright*, the Supreme Court prohibited states from executing petitioners who are not mentally competent at the time of their execution.[234] In *Roper v. Simmons*, the Supreme Court held that incarcerated people who were less than eighteen years old when their crimes were committed may not receive the death penalty.[235] If a Supreme Court decision states that the punishment you received is unconstitutional, you may rely on that decision as a basis for federal habeas corpus relief even if the Supreme Court decision was issued after your case became final on direct appeal.

Because this *Teague* exception is so narrow, you always should try to base your habeas claim on federal law that was already clearly established as of the time your case became final on direct appeal. Because the state or government has the burden to argue that your claim is barred by the *Teague* rule, you should not mention the *Teague* rule or its exception in your petition. Instead, you should wait to see if the government first claims that your habeas petition should be denied because it is based on new law and violates the *Teague* rule. Once the government has made that argument, you should then defend your claim by showing that the rule of law on which you are relying either is not new or that it fits within the *Teague* exception just described.

(d) Section 2254(d) Standard of Relief

In order to secure habeas corpus relief from a *state* conviction and sentence, it is not enough to prove that a constitutional violation occurred in your case under law that was in force when you completed your direct appeal. If the state courts rejected your habeas claim *on the merits* of your case, then you must show something additional. You must show under Section 2254(d) of the habeas statute that the state court decision that denied you relief on your claim was either *"contrary to"* or *"an unreasonable application"* of *Supreme Court* law that was *clearly established* when the last state court

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[231] *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).

[232] For example, in *Bousley v. United States*, the Supreme Court held that its prior interpretation of a federal drug-related firearm statute—which limited prosecutions to those in which the government could prove that a defendant "active[ly] employ[ed]" a firearm—applied retroactively in a habeas petition challenging a guilty plea under that same statute. *See* 523 U.S. 614, 621, 118 S. Ct. 1604, 1610, 140 L. Ed. 2d 828 (1998) ("[I]t would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid.") (citing Bailey v. United States, 516 U.S. 137, 143, 116 S. Ct. 501, 505, 133 L. Ed. 2d 472 (1995))). For other cases in which the Court found that recently announced narrow interpretations of federal criminal statutes applied retroactively for the purpose of habeas, see, for example, Welch v. United States, 578 U.S. 120, 130, 136 S. Ct. 1257, 1265, 194 L. Ed. 2d 387 (2016); Montgomery v. Louisiana, 577 U.S. 190, 206, 136 S. Ct. 718, 732, 193 L. Ed. 2d 599 (2016).

[233] *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).

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

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

ruled against you on the merits.[236] In other words, you not only must show that the state court was *in error* in failing to identify and grant you relief from the constitutional violation in your case. You also must show that the state court's error was directly "contrary to" or an "unreasonable application" of Supreme Court law in existence at that time. For example, if the highest state court to rule on your claim concluded that any constitutional error in your case was harmless (it did not affect the outcome of your case), your habeas petition will have to convince the federal court that the state court's decision that the violation was harmless not only was wrong, but was *unreasonably* wrong.[237]

To show that a state court ruling on a federal constitutional claim was unreasonable, you must show that *all* "fair-minded" judges as of the time that the state court ruled would find your claim to be valid and would disagree with the state court that ruled against you. In other words, "if fair-minded jurists could disagree"[238] about whether a constitutional violation was or was not present under existing Supreme Court law as of the time the highest state court ruled against you, you will not be able to overturn the state court decision in your habeas corpus proceeding. Proving that *all* "fair-minded" judges would agree that a constitutional violation occurred, based on Supreme Court law in existence when the state court ruled, is a difficult task. It is much more difficult than convincing the single federal judge hearing your federal habeas petition that, on balance, a violation of federal law occurred at your trial or during your direct appeal.

(i) *Last State Court Decision on the Merits*

Section 2254(d) is designed to give state courts the benefit of the doubt. It provides that if the last state court to rule on a federal constitutional claim decided that claim against you, then your habeas petition must show not only that the state court was wrong in how it decided that claim, but that it was badly or "unreasonably" wrong. This only applies if the last state court to rule against your claim did so "on the merits," meaning that it actually decided whether your trial or direct appeal violated the U.S. Constitution in the way that you claim it did. Note that "the last state court to rule against you" might be your state trial judge, or it might be a state appellate court during the direct appeal process, or it might a state post-conviction court at some point during state post-conviction proceedings (if any) in your case—whichever occurred most recently.

If, instead, the last state court to rule on your claim decided that claim against you for some other reason—without actually deciding whether there was a federal constitutional violation at your trial or on your direct appeal—then Section 2254(d) does not apply. If it does not apply, the federal court can rule on your constitutional claim as it believes is appropriate without deciding whether the state courts were badly wrong.[239] For example, if the state court rejected your federal constitutional claim by ruling that it was invalid as a matter of *state* law, and did not actually rule that it was invalid under *federal* constitutional law, then you can get relief from a federal habeas corpus court by proving only that a federal constitutional violation occurred. You wouldn't have to also prove that the state court was badly wrong in ruling against you.

Things get complicated when considering the interaction between state court rulings on whether a constitutional violation occurred and whether, if so, that violation was "harmless." (For a discussion of harmless error, see Part G of this Chapter). Consider three different situations:

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[236] Davis v. Ayala, 576 U.S. 257, 268, 135 S. Ct. 2187, 2198, 192 L. Ed. 2d 323 (2015) (citing 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.

[237] *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)).

[238] Davis v. Ayala, 576 U.S. 257, 269, 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)).

[239] Harrington v. Richter, 562 U.S. 86, 97–104, 131 S. Ct. 770, 783–787, 178 L. Ed. 2d 624, 638–642 (2011).

- What happens if the state court found that a federal constitutional violation did not occur, and the state court did not discuss the issue of harmless error? In that case, the federal habeas court will require you to show both that a federal constitutional violation did occur *and* that the state court was badly wrong in deciding your constitutional claim for one of the three reasons listed below. On the harmless error question, however, you will need to prove only that the federal constitutional error harmed you. You will not have to meet any of the three tests below on the harmless error question because the state court did not decide that question against you, and you therefore do not have to show that it was badly wrong in the way that it decided the question.
- If instead the state court finds that a constitutional violation did occur but decides that the error was harmless, then you will have a different set of burdens. Because the state court did not decide your federal constitutional claim against you, you will only need to show the federal habeas court that a federal constitutional violation occurred—as the state court itself ruled. But because the state court ruled again you on harmless error, on that question you will have to show both that the error did harm you, and that the state court was badly wrong in one of the three ways listed below in ruling that the violation was not harmful.
- Finally, it may be that the state court found that there was no constitutional violation and also ruled that if a violation *had* occurred, it would be harmless. In that case, the state court has both ruled against your federal constitutional claim and ruled against you on the harmless error question. In that case, you will have to prove four things: (1) that there was a constitutional violation; (2) that the state court was badly wrong in one of the three ways listed above in deciding that there was no constitutional violation; (3) that the error was harmful; and (4) that the state court was badly wrong in one of the three ways listed below in deciding that any error was harmless.

Another reason why there is no state court decision on the merits, and thus why Section 2254(d) does not apply, is that you were permitted to file your federal habeas petition without exhausting your remedies in state court. Usually, people incarcerated for state crimes must first bring habeas claims to state courts before bringing them to federal court in order to "exhaust state remedies." In rare cases, however, you may bring claims to federal court that have not been previously brought to state courts. This is allowed when the claim falls under one of the narrow exceptions to the exhaustion rule. You should review Section D(5) of this Chapter, "Exhaustion of State Remedies by Persons Incarcerated for State Convictions," which discusses the "exhaustion of state remedies" rule. In these rare circumstances, you will only need to prove that a federal constitutional violation occurred. You will not have to show that a state court decision was badly wrong on either the constitutional violation or harmless error claim, because there is no state court decision on the claim.

Keep in mind, however, that the most common (but not the only) reason why the last state court decided your claim against you without deciding whether a constitutional violation actually occurred is that the state court found that you "procedurally defaulted" the claim. A procedural default means that you are denied relief on a claim not because no violation occurred but because you did not raise the claims at the proper time, in a proper way at trial, or on direct appeal and you are denied relief for that "procedural" reason. Because the federal courts often (but not always) will refuse to review and grant relief on a procedurally defaulted claim, you may be denied federal habeas relief for that reason even though Section 2254(d) does not apply.[240] To avoid Section 2254(d)'s deferential standard of review and also get a federal habeas court to decide a federal claim in your favor, you must first show that the last state court failed to reach the "merits" of your federal constitutional claim. Then you must *also* show that the state court failed to reach the merits either (1) for some reason other than a procedural default or (2) because of a procedural default that does not bar you from receiving federal habeas review and relief.[241]

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[240] See Part F of this Chapter, "Defense to a Habeas Corpus Claim: Procedural Default."

[241] See RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.2(e), n.58 (2022) for examples of state court failures to decide claims on the merits for reasons of procedural default where

Section 2254(d)'s requirement of proof that the state court decision was badly wrong applies only if the "last state court to rule on the claim" did so by ruling against you "on the merits" (meaning that the state court actually decided that no constitutional violation occurred). If the last state court to rule against you on a claim does not clearly say whether it ruled "on the merits" or denied your claim for some other reason, the federal court must try to figure out whether that "silent" ruling was or was not "on the merits." In that situation you should do your best to convince the federal court that the last state court did not rule against you "on the merits."[242]

(ii) *Error Based on "Clearly Established" Supreme Court Law*

Section 2254(d) prevents people incarcerated on the basis of state convictions from receiving federal habeas relief unless they show that the last state court to rule on the merits made a bad mistake in applying federal law as "clearly established" by the U.S. Supreme Court as of the time the state court ruled. As a result, you must show that the state court made a bad, or unreasonable, error in applying a rule of federal law that the U.S. Supreme Court had clearly established as of the time the last state court ruled against your claim. That means you cannot get relief based on either (1) a rule of federal law that the U.S. Supreme Court established *after* the last state court ruled in your case or (2) a rule of federal law that a court *other* than the U.S. Supreme Court had established as of the time when the last state court ruled against your claim. Section D(8) of this Chapter ("Selecting and Framing Claims") and Appendix C to this Chapter contain lists of common constitutional violations. Many of the examples of constitutional violations listed there are supported by law that the Supreme Court clearly established a long time ago. Because that law is *not new*, you can rely on it to show that the state court decision in your case was badly wrong.

This "clearly established law" requirement is similar to, but not the same as, the Supreme Court's *Teague* rule, which prohibits federal habeas corpus petitioners from relying on new law.[243] The *Teague* rule bars relief based on "new" rules of law established after your case became final at the end of direct appeal. Under *Teague*, it may be possible for a rule of law to become clearly established by a federal court other than the U.S. Supreme Court. Section 2254(d) is different.[244] First, Section 2254(d) allows relief based only on bad mistakes in applying rules of federal law that were "clearly established" by the Supreme Court, not by other courts. In that sense, Section 2254(d) allows less relief than the *Teague* rule. On the other hand, Section 2254(d) may allow more relief than the *Teague* rule: If the last state court to rule on your claim did so during state post-conviction proceedings that occurred after your direct appeal ended, and if that court made a bad mistake in applying a rule of law established by the Supreme Court after your direct appeal ended but before the last state court ruled against you during state post-conviction proceedings, you can get relief under Section 2254(d). The exact relationship between Section 2254(d) and the *Teague* rule is not clear, including as to whether the one

federal courts nonetheless end up finding an excuse or an exception to the procedural default rule and therefore reach the merits of the petitioner's constitutional claim.

[242] The Supreme Court has provided some guidance on this analysis. *See* Wilson v. Sellers, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530, 535 (2018) (holding that if the higher court's denial of habeas relief does not provide an explanation, the federal court "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and then "presume that the unexplained decision adopted the same reasoning."); Harrington v. Richter, 562 U.S. 86, 100–101, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624, 640 (2011) (holding that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been "adjudicated on the merits", and under § 2254(d), a habeas court must "determine what arguments or theories supported, or could have supported, the state-court decision and then ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with a prior decision of [the Supreme Court]."). For a more extensive discussion of what qualifies as the last state court decision on the merits, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.2 (2022).

[243] Teague v. Lane, 489 U.S. 288, 310–312, 109 S. Ct. 1060, 1075–1076, 103 L. Ed. 2d 334, 355–357 (1989). See Subsection D(8)(c) ("New Laws: The *Teague* Rule") above for a discussion of the *Teague* Rule.

[244] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.1 (2022) (introducing nonretroactivity under the *Teague* Rule).

Teague exception also applies as an exception to Section 2254(d).[245] If you are a person incarcerated under a state conviction, you should research how your federal district court or federal court of appeals has understood the relationship between Section 2254(d) and the *Teague* rule.

(iii) *Ways of Showing that the State Court Was Badly Wrong or "Unreasonable" in Refusing to Grant You Relief*[246]

As described above, if you are a state incarcerated person, you can only get federal habeas relief if you first presented that claim to the state courts before filing a federal habeas petition.[247] Under Section 2254(d), if the last state court to rule on your claim decided it against you "on the merits" (as just discussed in Subsection D(8)(d)(i), "Last State Court Decision on the Merits"), you may receive federal habeas relief only if you prove to the federal court that *both* (1) your federal constitutional rights were violated *and* (2) the state court was *badly wrong* when it ruled against you on your claim and decided that your constitutional rights were not violated. Under Section 2254(d), you can show that the state court was badly wrong if at least one of the following three tests is met:

(1) The last state court decision on the claim was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States;"[248]
(2) The last state court decision on the claim was "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States;"[249] or,
(3) The last state court decision on the claim was based on an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding."[250]

The first two tests—known as the "contrary to" and "unreasonable application" tests—are used to determine whether the state court was badly wrong as to the *law*. The third test—known as the "unreasonable determination" standard—is used to determine whether the state court was badly wrong as to the *facts* of your case. Because it is very difficult to meet *any* of these three tests, you should argue that your case satisfies as many of them as you can. These following Subsections discuss each of these three ways of showing that the last state court decision on the merits of a claim was badly wrong, beginning with its decision on the law and then continuing to its decision on the facts.

a. State Court Decision Was Badly Wrong on the Law

There are two ways to show that the last state court to rule against your claim was badly wrong on the *law*. The first is that the state court decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court."[251] The second is that state court decision was "an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court."[252] The Supreme Court explained how both of these tests work in *Williams v. Taylor*.[253] In

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[245] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.3 & nn.16–17 (2022) (discussing the relationship between Section 2254(d) and the *Teague* rule, including the applicability of the *Teague* exception).

[246] The requirement discussed in this Section to show that the state court decision was badly wrong applies only to state people incarcerated for state crimes. For people incarcerated for federal crimes, federal habeas corpus courts review questions of law *de novo*, and questions of fact for clear error. This means that habeas courts will apply their own judgments to questions of law but will assume that the factual findings of the court that originally ruled against you "correct" and require you to prove that the prior factual finding was "clearly erroneous." Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999) (citing Nelson v. Walker, 121 F.3d 828, 833 (2d. Cir. 1994)).

[247] *See* Subsection D(5)(c) of this Chapter ("The Requirements for Exhausting Your Claims in State Court.").

[248] 28 U.S.C. § 2254(d)(1).

[249] 28 U.S.C. § 2254(d)(1).

[250] 28 U.S.C. § 2254(d)(2).

[251] 28 U.S.C. § 2254(d)(1).

[252] 28 U.S.C. § 2254(d)(1); The third test to fulfill the unreasonableness requirement under the habeas statute is to show "unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).

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

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 also had shown that the state court was badly wrong in deciding that claim against Williams. Therefore, the Court granted habeas relief.[254]

Both tests for state court decisions that are badly wrong on the law require you to show that your claimed violation is based on *federal law that the Supreme Court had clearly established as of the last time a state court ruled against your federal claim*.[255] As noted in more detail in Subsection D(8)(d)(ii) ("Error Based on 'Clearly Established' Supreme Court Law") just above under this part of the test, you must show that the federal law on which your constitutional claim relies is not new. You must show that the Supreme Court itself had already clearly said what law applies to this kind of claim, as of the date on which the state courts last ruled against the constitutional claim in your case.[256] For example, in Mr. Williams' case, the Supreme Court found that, as of the time of his state direct appeal, the Supreme Court had clearly established the legal standards that determine whether a trial lawyer did or did not provide ineffective representation.

Once you show that you are relying on federal law that was clearly established by the Supreme Court as of the time of the last state court decision in your case, your next step is to show either that the final state court decision on your direct appeal was *contrary to* that established Supreme Court law, or that the final state court decision on your direct appeal applied that established Supreme Court law in an *unreasonable manner*. In either case, your goal is to show the federal court that the last state court decision in your case was badly wrong as a matter of clearly established Supreme Court law. One final point to keep in mind is that when assessing whether either the "contrary to" or "unreasonable application" standard was met in your case, federal courts will only consider the evidence that was before the state court at the time it made its decision.[257]

b. State Court Decision Was "Contrary to" Standard

The first way to prove that the last state court decision on a claim was badly wrong is to show that the court's decision was contrary to clearly established federal law.[258] This is a difficult standard to meet. To satisfy the "contrary to" standard, you must show that the state court decision against you

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[254] In determining that Mr. Williams' counsel was ineffective, the Court found that Mr. Williams had met the standard for ineffective assistance that the Supreme Court had clearly established in 1984 in a case called Strickland v. Washington, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 2064–2065, 80 L. Ed. 2d 674, 693–694 (1984) To learn more about the *Strickland* standard, see Subsection D(8)(b)(i) ("Finding the Standard the Court Uses to Assess Each Claimed Violation") of this Chapter.

[255] *See* Greene v. Fisher, 565 U.S. 34, 38, 132 S. Ct. 38, 44, 181 L. Ed. 2d 336, 340 (2011) (clarifying that to be "clearly established," the Supreme Court decision on which you rely must have been issued before the date on which the most recent state court decision against you on your claim was issues, regardless of when your conviction became final).

[256] For an explanation of how to establish that the law you are relying on is not new, see Subsection D(8)(c) ("New Laws: The *Teague* Rule") of this Chapter.

[257] *See* Cullen v. Pinholster, 562 U.S. 170, S. Ct. 1388, 1392, 179 L. Ed. 2d 557 (2011) (holding that "review under § 2245(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.").

[258] It is important to note that statements by the Supreme Court that suggest what the law *might be* (such statements are called *dicta*) are not considered to be clearly established federal law. Only things that the Supreme Court says *are* the law and that it relies upon to decide the case before it are considered to be law that is 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) (Terry Williams); Schriro v. Landerigan, 550 U.S. 465, 473, 127 S. Ct, 1933, 1939, 167 L. Ed. 2d 836 (2007); Knowles v. Mirzayance, 556 U.S. 111, 129 S.Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009). Also to be clearly established, Supreme Court law must focus on a situation that is based on the actual facts of the case, not on a very general statement of the possible facts of many cases. *See, e.g.*, Woods v. Donald, 575 U.S. 312, 318, 135 S. Ct. 1372, 1377, 191 L. Ed. 2d 464 (2015) (*per curiam*) (the 6th Circuit "framed the issue at too high a level of generality" in viewing *United States v. Cronic*'s rule of *per se* prejudice for denials of counsel at a "critical stage" of the trial as the "clearly established" rule on point for the facts of the case); Lopez v. Smith, 574 U.S. 1, 3, 4–5, 135 S. Ct. 1, 3, 4–5, 190 L. Ed. 2d 1 (2015) (*per curiam*) (holding that the Supreme Court decisions that circuit court viewed as "clearly establish[ing]" relevant rule were framed by lower court at too "'high [a] level of generality.'").

applied "a rule that contradicts the governing law" established by the Supreme Court's cases.[259] This means that the state court in your case either applied the wrong standard or stated the correct standard but interpreted it in a way that is clearly wrong under established Supreme Court law. For example, in a case on ineffective assistance of counsel, the Supreme Court's *Strickland* standard governs.[260] If the court state applies the *Strickland* standard in a way that is different from how the Supreme Court has stated that standard should be applied, then the state court decision is "contrary" to clearly established law. In that case, the state court decision qualifies as being badly wrong, and habeas corpus relief may be appropriate. Also, if the state court stated the *Strickland* standard correctly but then clearly interpreted it to mean something different from what the standards say, the state court decision, again, is contrary to clearly established federal law, and habeas corpus relief may be granted.[261] However, if the state court stated the correct standard, it often is difficult to persuade a federal habeas court that the state court gave that standard the wrong meaning in a way that is directly "contrary to" clearly established federal law.[262]

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 identical or very similar to yours, and the Supreme Court reached a different conclusion from the one reached by your state court.[263] This means that if you can find a Supreme Court case with facts that are similar to your case, and if the state court ruled differently from the Supreme Court, you might be entitled to relief.[264] This applies only when you are able to point to a case with facts very like those in your case. Even small differences between your case and the Supreme Court case may keep a federal habeas court from finding that the state court decision in your case was "contrary to" the Supreme Court decision.[265]

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[259] Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 1519, 146 L. Ed. 2d 389, 425 (2000) (Terry Williams) (O'Connor, J., concurring); Wilson v. Sellers, 138 S. Ct. 1188, 1191, 200 L. Ed. 530 (2018); Grueninger v. Director, 813 F.3d 517, 525–526 (4th Cir. 2016); Loden v. McCarty, 778 F.3d 484, 494–495 (5th Cir. 2015).

[260] 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 there is a reasonable probability that the deficient performance changed the outcome of the trial). To learn more about the *Strickland* standard, see Subsection D(8)(b)(i) ("Finding the Standard the Court Uses to Assess Each Claimed Violation") of this Chapter.

[261] In Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct. 1495, 1512, 146 L. Ed. 2d 389, 416–417 (2000) (Terry Williams), the Court found that the state court decision was contrary to federal law, because the state 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 the state court should have used. Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984).

[262] *See*, *e.g.*, Harrington v. Richter, 562 U.S. 86, 89, 131 S. Ct. 770, 779, 178 L. Ed. 2d 624, 633 (2011) (holding that the state court properly interpreted the *Strickland* test, because a competent attorney may choose not to consult expert blood testimony for a variety of strategic reasons, including time constraints, legal strategy, and reduction of risk for defendant; also holding that petitioner was not entitled to habeas relief because the 9th Circuit should have given the California Supreme Court's decision more deference); Bell v. Cone, 535 U.S. 685, 693, 122 S. Ct. 1843, 1849, 152 L. Ed. 2d 914, 926 (2002) (holding 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").

[263] Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 1519, 146 L. Ed. 2d 389, 425 (2000) (Terry Williams) ("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.").

[264] *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)).

[265] *See, e.g.,* Kernan v. Cuero, 583 U.S. 1, 7, 138 S. Ct. 4, 8, 199 L. Ed. 2d 236, 241 (2017) (holding that for purpose of federal habeas corpus proceedings, the Supreme Court's own precedent did not "clearly establish" that a state court *must* impose a lower sentence that the parties originally agreed upon, rather allowing the state to amend its complaint to seek a higher sentence and the defendant to withdraw his guilty plea).

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: (1) show that the court relied on the wrong standard in determining whether a violation had occurred;[266] (2) show that the court chose the right standard, but then interpreted it to mean something different in your case; or (3) point to a Supreme Court case with very similar facts and claims to those in 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 to" standard you must point to a violation of a federal right,[267] identify the standard that the Supreme Court says applies to that violation,[268] show that the violation in your case meets that standard,[269] and then argue that the state court used the wrong standard or interpreted the right standard to mean something different from what that standard actually requires.

c. State Court Decision Meets the "Unreasonable Application" Standard

If the state court used the correct standard and if its rejection of your federal constitutional claims was not directly and obviously contrary to federal law, you still may be able to get relief. Under the "unreasonable application" standard, you are entitled to relief if the state court applied the right standard to the facts of your case in an *unreasonable*,[270] or what the courts often refer to as an "*objectively unreasonable*," way or a way that was not "fair-minded."[271] What this means is that the state court exercised clearly bad judgment in the way it applied the law to the facts of your case or that it did so in a way that shows that the state court was hostile to the federal constitutional rights that apply to your case or was trying to avoid enforcing those rights to reverse an invalid state conviction or sentence. This standard sometimes overlaps with the "contrary to" standard—because interpreting the right standard to *mean the wrong thing* is very similar to applying the right standard in an *unreasonable way*.[272] For this reason, *you should always argue that your case meets both standards*.

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[266] To find out what standard the court should have applied, see Subsection D(8)(b)(i) ("Finding the Standard the Court Uses to Assess Each Claimed Violation") of this Chapter.

[267] See Section D(8) ("Selecting and Framing Claims") and Appendix C of this Chapter for examples of constitutional violations.

[268] See Section D(8) ("Selecting and Framing Claims") of this Chapter.

[269] See Subsection D(8)(b) ("Standards and Tests for Claims of Violations") of this Chapter.

[270] Williams v. Taylor, 529 U.S. 362, 409, 120 S. Ct. 1495, 1521, 146 L. Ed. 2d 389, 427 (2000) (Terry Williams) (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.").

[271] Williams v. Taylor, 529 U.S. 362, 409–410, 120 S. Ct. 1495, 1521–1522, 146 L. Ed. 2d 389, 428 (2000) (Terry Williams) (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); *accord* Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624, 632 (2011) ("The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. . . A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." (quoting Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 2149, 158 L. Ed. 2d 938, 951 (2004))); *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).

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

To establish that the last state court decision meets the "unreasonable application" standard, you should show that there are one or more Supreme Court decisions that required the state court to reach a result that it is different from the result it reached. In doing so, it is important to show that the facts and circumstances of the Supreme Court decision or decisions on which you rely were very similar to specific facts and circumstances in your case.[273] The Supreme Court has said that an "unreasonable" application of federal law is more than just an "incorrect" application of federal law, and that a state court decision is not unreasonable just because it is "imprecise."[274]

Instead, to be "unreasonable," the state court's application of federal law to the facts of your case must be badly wrong.[275] To meet this standard, try to show that the state court's conclusion was wrong *and* that its analysis and reasoning were badly or seriously flawed or make no rational sense. If you can show a significant error in the court's reasoning, you may be able to show that its actions were unreasonable.[276] Another way to do this is to show that the state court's point of view in your case is different from how most or all other judges would see the situation, and that no reasonable judge would reach the decision that the state court reached in your case.[277] Federal circuit courts have different interpretations of what an "unreasonable application" requires. You should check how your federal circuit defines "unreasonable" in this context by Shepardizing the main Supreme Court case on this point, *Williams v. Taylor*,[278] and finding decisions in your circuit that cite or discuss *Williams.*

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[273] *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).

[274] *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).

[275] Williams v. Taylor, 529 U.S. 362, 410–411, 120 S. Ct. 1495, 1522, 146 L. Ed. 2d 389, 428–429 (2000) (Terry Williams). *See, e.g.*, 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).

[276] *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).

[277] *Cf.* Rice v. Collins, 546 U.S. 333, 338–339, 126 S. Ct. 969, 974, 163 L. Ed. 2d 824, 832 (2006) (holding that it was not unreasonable for the state court to find there was no *Batson* violation, because reasonable minds reviewing the record, might assess the prosecutor's credibility differently, so that the trial court's decision was within the range of reasonable judgments);

[278] Williams v. Taylor, 529 U.S. 362, 409–414, 120 S. Ct. 1495, 1521–1524, 146 L. Ed. 2d 389, 427-31 (2000) (Terry Williams). 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, 713–714 (6th Cir. 2004) (finding that requiring

d. Badly Wrong on the Facts

This Subsection discusses a different standard for getting habeas relief that focuses not on the state court's *legal* analysis but on how it understood the *facts* of your case. A person incarcerated on a state conviction can obtain habeas relief by convincing a federal judge that a constitutional violation occurred in the case and that the last state court decision against the claim in question involved an "unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding."[279] In other words, you can receive habeas relief from a constitutional violation if the last state court to rule against you in your case got the *facts* of your case badly wrong. This may occur because the state court (1) said it did not believe testimony or evidence that was presented in your case that clearly was both reliable and strongly supportive of your claim of constitutional error; (2) clearly understood some of the evidence in your case incorrectly or described your evidence inaccurately and based a ruling on that misunderstanding of the evidence; (3) ignored legally relevant evidence or facts that it needed to consider in order to reach a fair and correct decision; or (4) rested its decision denying you relief on facts that have no logical or important bearing on the constitutional violation you claim occurred in your case.

Keep in mind that an unreasonable "determination of the facts" must be one that the state court made on the evidence that actually was in the record at the time the state court ruled.[280] The "unreasonable determination of the facts" provision in Section 2254(d) does not apply if your claim is that evidence that needed to be considered by the state courts in order to reach a fair conclusion was improperly *excluded* from the record because of actions of the state or state courts. It does not apply, for example, if your claim is that the police or prosecutors failed to disclose evidence in their possession that supports your claim, the trial judge excluded important evidence at trial that supports your claim, or a court denied an evidentiary hearing on evidence that you offered in support of your claim. For

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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, 603–604 (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) (citing 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 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).

[279] 28 U.S.C. § 2254(d)(2).

[280] *See* 28 U.S.C. § 2254(d)(2); *accord* Cullen v. Pinholster, 563 U.S. 170, 185 n.7, 131 S. Ct 1388, 1400 n.7, 179 L. Ed. 2d 557, 572 n.7 (2011) (noting Section 2254(d)(2)'s "additional clarity" that this reasonableness analysis refers to the record at the time of the state court decision on the merits).

steps you should take if your claim is that key evidence or facts were excluded from the record, see Section E(5)("Expanding the Record").

If the federal court decides that the state court's understanding of the facts or evidence in the record with bearing on your constitutional claim is unreasonable, and if the state court based its decision denying relief on its unreasonable interpretation, then the federal court can grant habeas relief on that claim if it believes that a constitutional violation occurred.[281] On the other hand, if the federal court decides that the state court was reasonable in its treatment of the facts in the record, it cannot grant relief on the ground that the state court decision was badly wrong on the facts—although it still may grant relief based on a finding that the state court was badly wrong on the *law*.

In applying the "unreasonable determination of the facts" standard, federal judges generally will start with the assumption that the state court based its decision on a correct reading of the evidence in the record.[282] It is up to you, therefore, to prove that the court did not interpret or apply the record facts correctly because it either ignored important evidence or interpreted 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 in making this showing is to identify the place in the state court decision where it made an important determination of the facts—for example, choosing to believe one witness over another or making some other kind of credibility determinations. You often cannot 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 because the evidence in the record strongly supports the facts that you claim establish a constitutional violation, you might obtain relief by arguing that a failure to find facts at all is actually an unreasonable determination of facts.[283]

The second step is to prove that at least one state court determination of fact in rejecting your claim was unreasonable. One way to do this is to show that the fact-finding *procedure* the court used was inadequate.[284] This means that the court made conclusions without looking at or giving fair attention to important evidence you presented. This way of showing an unreasonable determination of facts deals with *how* the state court went about making factual determinations, not what those determinations were.

Another way of proving that a state court's factual determinations were unreasonable is to show that they were *substantively* unreasonable. This requires you to show that, even though the state court reviewed the relevant evidence in the record, its assessment or understanding of that evidence in determining what happened was unreasonable and not at all supported by the evidence in the

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[281] *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)).

[282] 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).

[283] *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"); Nunes v. Mueller, 350 F.3d 1045, 1054–1055 (9th Cir. 2003) (finding that the state court's "factual" findings were unreasonable, because 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 state court's "factual findings" a presumption of correctness because they were only conclusions, not factual findings).

[284] *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 (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).

record.[285] The standard you must meet in this instance is to show by "clear and convincing" evidence that the state court's understanding of the facts was wrong.[286] You cannot simply assert that the state court determined the facts erroneously. Instead, you must demonstrate to the federal court that the state court's factual judgements in deciding what happened were clearly and convincingly wrong.[287]

2. Fact Pleading Requirement

The court rules governing the filing of habeas corpus petitions require that your petition "state the facts supporting each ground."[288] In your petition, you should (1) include all of the facts relating to *each* claim you are raising, and (2) explain how the facts support your claim. If you fail to meet this "fact pleading" requirement, the federal court may refuse to hear your petition. It is important to describe the *specific* facts of your case, rather than making vague or general statements. For example, if you are claiming that the prosecutor unconstitutionally forced you to take a guilty plea against your will, you should try to include in the petition the name of the prosecutor, what the prosecutor said that threatened you, the time and place of the threat, and the name of any people who witnessed the threat.[289] Or, if you want to make an "ineffective assistance of counsel" claim, you should list all of the things your lawyer could and should have done but failed to do, all of the specific errors your lawyer made, and the facts that show how those failings and errors harmed you and weakened your case at trial.[290] After you lay out the specific facts, you should try to cite the relevant constitutional, statutory, or case law supporting your claim.

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[285] *See, e.g.*, 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" was not a reasonable basis for finding that defendant had inflicted the blows while the victim was conscious, because other uncontradicted evidence in the record indicated that the victim had been stabbed after death).

[286] 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."). The clear and convincing standard falls "somewhere between 'preponderance of evidence' and 'beyond a reasonable doubt.'" *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 30.2 (2023).

[287] *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).

[288] Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 2(c)(2) ("The petition must (1) specify all the grounds for relief available to the petitioner; (2) state the facts supporting each ground."); *see also* Advisory Committee Note to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (noting that a habeas corpus "petition is expected to state facts that point to a 'real possibility of constitutional error'" (quoting Aubut v. State of Maine, 431 F.2d 688, 689 (1st Cir. 1970)). For a more detailed discussion of this pleading standard, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.6 (2023).

[289] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.6 n.8 (2023) ("[P]etitioner should state 'name of the prosecutor who made the threat, what exactly the threat was, the date when the threat was made, the place where it was made, who, if anyone, was present at the time other than the defendant and the prosecutor, and why the defendant instead of not disclosing the threat to the judge, answered, 'No,' when asked in court if anyone had threatened him[.]'") (quoting ROBERT POPPER, POST-CONVICTION REMEDIES IN A NUTSHELL 153–154 (1978)).

[290] *See* Heath v. U.S. Parole Comm'n, 788 F.2d 85, 90 (2d Cir. 1986) (finding that the general allegation of ineffective assistance of counsel is insufficient to demonstrate prejudice); Smith v. Wainwright, 777 F.2d 609, 616

The fact pleading requirement applies in federal habeas proceedings. It also, however, is wise to follow this pleading rule in any state post-conviction proceedings that you file in order to assure that you "exhaust" all of your factual allegations in state court that you intend to make in federal court and to assure that you avoid any procedural defaults by failing to raise facts in the state court at the proper time.[291] There have been instances where federal courts refused to hear a claim because the petitioner did not present the relevant facts in earlier state post-conviction proceeding.[292] Therefore, it is better to mention all the relevant facts for each claim in your state post-conviction petition.

If you believe a later fact-development proceeding would uncover new facts that are not currently present in the state court record but support your claims, you may refer to those facts. You must tell the court in your petition that you expect to prove those facts through a later hearing or other fact-development procedure during your habeas corpus case. You then should show how those facts support your claim.[293] However, you should base your claims for relief as much as possible on facts that are already present or supported in the state court record. This is because there are strict limits on the availability of fact-development proceedings for state incarcerated individuals during habeas corpus proceedings.[294]

3. How to Frame Prayer for Relief

In your petition, you should state your request for relief by asking the court to "issue a writ of habeas corpus so that you may be discharged from your unconstitutional confinement and restraint." After asking for that relief, you may also ask for other remedies until the court rules on your habeas petition. For instance, you may request discovery,[295] an evidentiary hearing to develop additional

(11th Cir. 1985) ("Where, however, a petitioner demonstrates that circumstances surrounding his representation give rise to a presumption of prejudice, he will prevail.").

[291] See Section D(5) ("Exhaustion of State Remedies by Persons Incarcerated for State Convictions") for more on the state exhaustion requirement, and Part F ("Defense to a Habeas Corpus Claim: Procedural Default") for more on avoiding procedural defaults.

[292] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.6 n.8 (2023) (advising to follow the fact pleading requirement at the state post-conviction stage to avoid exhaustion and procedural defenses); *see also* Flieger v. Delo, 16 F.3d 878, 885 (8th Cir. 1994) (failure to raise certain instances of ineffectiveness in state appellate court was procedural default barring federal habeas corpus review of those claims); Givens v. Green, 12 F.3d 1041, 1043–1044 (11th Cir. 1994) (*per curiam*) (dismissing the petition for failing to present the claim in previous state proceedings).

[293] In *McCleskey v. Zant*, the Supreme Court dismissed a capital petitioner's second habeas corpus petition that raised a 6th Amendment claim against the police's use of a prison informant to secure a guilty statement from the petitioner who did not have a lawyer present. 499 U.S. 467, 111 S. Ct 1454, 113 L. Ed. 2d 517 (1991). Although the petitioner could not get evidence because of police officers' false denials during state post-conviction hearing, the Court dismissed the claim because the petitioner's lawyer could have easily discovered evidence during the first habeas petition. This case shows that sometimes petitioners and their lawyers may have special responsibilities to "plead reasonably believed but unconfirmed fact-based claims, using less factual specificity than is normally required and giving explanation." RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.6 n.7 (2023); *see also* United States v. Rodriguez-Rodriguez, 929 F.2d 747, 752 (1st Cir. 1991) (any lack of factual specificity in the petition caused by the petitioner's failure to name potential witness in original petition was cured by naming of witness in objections to magistrate's proposed decision); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.3(b) nn.12–15 (2023).

[294] The habeas statute severely limits the availability of evidentiary hearings. The district court can choose to grant an evidentiary hearing only when you show 1) you are now relying on *new* facts that could not be uncovered earlier during the state proceedings through your reasonable effort and 2) under the new facts, no reasonable jury would find you guilty. *See* 28 U.S.C. § 2254(e)(2)(A)(i), (ii). For more on evidentiary hearings, see Section E(6) ("Evidentiary Hearing").

[295] *See* Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 6 ("A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.").

facts,[296] financial assistance to employ an expert witness to help prove your case,[297] or appointment of counsel.[298] If you do request those other remedies, you also need to file a separate motion asking for each of those procedures to be provided in your case. Finally, you may ask the court to "grant such other relief as may be appropriate and to dispose of the matter as law and justice require."[299]

4. Amending the Petition

After you file your habeas petition, you may have to change some portions of the petition. Sometimes, the state may ask the court to dismiss your petition because the petition is "defective" either in form or substance. Defective means that there is a problem or error in how you wrote your petition. This means there is something wrong with the way the petition looks (the form) or with the content of what you have written (the substance). Your petition may be defective in form if you fail to follow the habeas rules governing the form[300] or filing[301] of your petition. For example, the habeas rules require a petitioner to use the standard form provided by the local district court,[302] timely[303] file an original and two copies of the petition with the clerk,[304] and file a separate petition if you are seeking relief from judgments from more than one state court.[305] On the other hand, substantive defects arise because of reasons relating to how you describe the claims in the petition. If you did not include all relevant facts or laws to support your claim, your petition may be defective in substance.

To avoid the court dismissing your petition, you may amend the petition to cure any defects. If you amend the petition within twenty-one days after first filing the petition, you may amend your petition once without the court's permission.[306] However, after that, you must ask for the court's permission to

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[296] *See* Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 8 ("If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.").

[297] The federal *in forma pauperis* ("IFP") statute permits indigent litigants to defend any proceeding—including habeas petitions—without prepayment of costs or fees. *See* 28 U.S.C. § 1915; Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 3(a) (allowing IFP orders for habeas petitions).

[298] There is no constitutional right to counsel in non-capital cases in federal habeas proceedings. However, a court may provide you with a lawyer if cannot pay for one yourself and when the "interests of justice" require the court to do so. *See* 18 U.S.C. § 3006A(a)(2)(B) (allowing federal courts to provide counsel in § 2254 cases and § 2255 motions).

[299] *See* 28 U.S.C. § 2243 ("The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 33 (2023) (discussing the different types of relief available in habeas corpus cases).

[300] *See* Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 2 (governing the form of the petition).

[301] *See* Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 3 (governing the filing of the petition).

[302] Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 2(d) ("The petition must substantially follow either the form appended to these rules[,] or a form prescribed by a local district-court rule.").

[303] "Timely" means that your habeas corpus petition is filed according to the statute of limitations under the law. Generally, this means that you must file your petition within one-year of exhausting all state remedies. *See* 28 U.S.C. §§ 2244(d), 2255(f). If you are a capital prisoner in state-custody, be careful. If you're in a state that has "opted in" to the habeas statute's "Special Habeas Corpus Procedures in Capital Cases," you will likely only have 180 days to file your petition. 28 U.S.C. § 2263(a).

[304] Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 3(a) ("An original and two copies of the petition must be filed with the clerk…."); Rule 3(c) ("The time for filing a petition is governed by 28 U.S.C. § 2244(d)").

[305] Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 2(e) ("A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.").

[306] FED. R. CIV. P. 15(a)(1) ("A party may amend its pleading once as a matter of course within (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion. . . .").

amend the petition, or get the opposing party's agreement to let you do so.[307] Usually, district courts allow you to amend the petition when you are trying to cure any defects in the petition, so you should not hesitate to ask the court.[308]

You may also have to amend your petition if new claims become available for the first time after you file your petition. In this case, you may need to include the newly available claims or facts in your petition. Although the courts are generally open to amendments, you have to be sure that the new claim satisfies the strict one-year time limit on filing habeas claims.[309] To amend the petition to add a new claim, you must show that the claim was filed less than one year after the end of your direct appeal process, minus any time you spent in state post-conviction proceedings (during which the one-year clock stops running).[310] If the new claim is filed beyond the one-year time limit, you must show that the new claim arises out of the "*same conduct, transaction, or occurrence*" as one or more of the claims in your original petition.[311] If the original and the new claim are tied to a common set of facts or arise from the same incident, the new claim will be said to "arises out of the same conduct or transaction," and the court will allow you to amend in the new, related claim. On the other hand, if the new claim is supported by different facts that arose at a different time, the new claim does *not* arise out of the same conduct, transaction, or occurrence, and the court will not let you file the new

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[307] FED. R. CIV. P. 15(a)(2) ("In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave.)".

[308] FED. R. CIV. P. 15(a)(2) ("The court should freely give leave when justice so requires."); *see also* Advisory Committee Notes to the Rules Governing Section 2254 Cases in the United States District Courts, Rule 5 (encouraging amendments "called for by the contents of the answer"); Wilwording v. Swenson, 502 F.2d 844, 847 n.4 (8th Cir. 1974) ("[W]henever [amendments] can assist the court in clarifying a *pro se* petition, the trial court should welcome the [amendments]."); Mayle v. Felix, 545 U.S. 644, 655, 125 S. Ct. 2562, 2569–2570,162 L. Ed. 2d 582 (2005) (noting that Rule 15 of the Federal Rule of Civil Procedure is applicable to habeas proceedings); Withrow v. Williams, 507 U.S. 680, 696, 113 S. Ct. 1745, 1755, 123 L. Ed. 2d 407 n.7 (1993) (citing the proposition that "Rule 15 applies in habeas actions"); Miller v. United States, 561 Fed. App'x. 485, 487 n.1 (6th Cir. 2014) (*unpublished*) (*pro se* incarcerated person, who filed Rule 15(d) motion to supplement Section 2255 motion, "could have filed a Rule 15(a) motion, which allows habeas petitioners to amend their petition 'under the liberal standards of Civil Rule 15.'"); Gillette v. Tansy, 17 F.3d 308, 312 (10th Cir. 1994) (citing to Rule 15(a) and noting that "[a] court should freely grant leave to amend when justice so requires."). Federal courts long have permitted amendments that cure formal, procedural, or substantive defects of the petition. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.6 (2022); *see also* Roman v. Estelle, 917 F.2d 1505, 1506 (9th Cir. 1990) (granting leave to amend petition to include only exhausted claims); Porcaro v. United States, 784 F.2d 38, 41 (1st Cir. 1986) (allegations in recusal motion prevented dismissal of previously filed and otherwise insufficient application); Johnson v. Onion, 761 F.2d 224, 225 (5th Cir. 1985) (incarcerated person appealed the district court's dismissal of his case for want of prosecution when he refused to refile his claim as a federal habeas corpus petition, but the appeal failed after the Circuit judge found a lack of an actual controversy); Williams v. Kullman, 722 F.2d 1048, 1050 (2d Cir. 1983) (the Circuit judge cites to Rule 4 of the Rules Governing Section 2254, explaining that district courts should apply a liberal construction of Rule 4 and "should not summarily dismiss prisoner petitions containing sufficient allegations of constitutional violations."); Ham v. North Carolina, 471 F.2d 406, 407 (4th Cir. 1973) ("[P]ro se petitions are to be viewed with great liberality, looking to the attainment of full justice."); United States *ex rel.* Ellington v. Conboy, 459 F.2d 76, 79 (2d Cir. 1972) (incarcerated persons' failure to exhaust state remedies did not dismiss the petition, and he should be given the opportunity to amend the application for writ and district court reconsideration); *see also* Pearson v. Gatto, 933 F.2d 521, 527 (7th Cir. 1991) (*pro se* incarcerated person's letter, filed shortly before expiration of statute of limitations and indicating intention to amend complaint, should have been "broadly construe[d]" as amended complaint in order to preserve jurisdiction); Reynoldson v. Shillinger, 907 F.2d 124, 125–126 (10th Cir. 1990) (when error in pleading was result of the pro se litigant's unfamiliarity with the law, court should allow amendment); Balistreri v. Pacifica Police Dept., 901 F.2d 696, 701 (9th Cir. 1990) (noting that if court can "conceive of facts" that would render plaintiff's claim viable, amendment shall be freely granted even if only in formally requested).

[309] *See* 28 U.S.C. § 2244(d) (imposing a one-year statute of limitation on filing habeas corpus petitions).

[310] See Section D(4)("When to File") discussing the one-year statutes of limitation.

[311] FED. R. CIV. P. 15(c)(1)(B) ("An amendment to a pleading relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading…."); *see also* Mayle v. Felix, 545 U.S. 644 at 656–664, 125 S. Ct. 2562, 2570–2575, 162 L. Ed. 2d 582, 594–599 (2005) (interpreting and applying the rule that is now numbered as FED. R. CIV. P. 15(c)(1)(B)).

claim.[312] Suppose, for example, that a claim in your original petition is that a videotaped statement of a witness admitted against you at your trial violated your Sixth Amendment right to confront (that is, to cross-examine) that witness. If, two years later, you find out that you also have a Fourteenth Amendment Due Process claim because the police used coercive tactics to force the same witness to make false claims about you in the videotaped statement, a court may find that the new claim arises out of the same conduct or transaction as the claim in your original petition. The court could then allow you to add the new claim even if more than one year has passed since direct appeal. If, however, your new claim is that the police coerced damaging statements from *you* in a separate police interrogation, the federal court will likely find that the admission at trial of the videotaped witness statement and the admission at trial of your separate coerced statement are unrelated and separate incidents. Therefore, because the new claim "does not arise from the same conduct, transaction, or occurrence," you can no longer amend the petition to include the new claim after the one-year time limit has expired.[313]

E. Fact-Developing Procedure in Federal Habeas Corpus

1. Importance of Fact-Developing Procedures

Because federal habeas corpus is usually the petitioner's last opportunity to get relief, it is important to take full advantage of the various federal procedures available to develop the factual bases for your claims.[314] The Habeas Rules allow you to use fact-developing procedures to help develop relevant facts showing a constitutional violation. These fact-developing procedures include discovery, provision of funds to indigent petitioners for investigative assistance, expansion of record, and evidentiary hearings. Discovery and expansion of record are fact-development procedures used before or instead of holding an evidentiary hearing that can help strengthen your habeas corpus claims. In 1996, Congress changed the habeas law to limit very severely the ability of habeas petitioners to get an evidentiary hearing.[315] As a result, fact-development procedures other than an evidentiary hearing have become especially important to incarcerated people.

2. The State or Government Is Responsible for Providing the Prior Record in your Case

In every habeas corpus case, the main facts and evidence on which the federal court will rely are those in the prior "record" in the case. Among other things, that record includes all of the motions filed in your case before and after your trial, the transcript of pretrial hearings in your case, the transcript of your trial, the briefs and motions filed by the various parties at each stage of your direct appeal, your state post-conviction petition (if any was filed in your case), any motions and briefs filed during your state post-conviction proceedings, the transcript of any hearings that occurred during your state post-conviction proceedings, and any opinions issued by the trial court, appellate courts, and state post-conviction courts in your case.[316] To enable the federal court to rule on your petition, therefore, it

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[312] *See* Mayle v. Felix, 545 U.S. 644, 650, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005) (finding that the petition cannot be amended because the new claim is "supported by facts that differed in both time and type" from the original claim).

[313] This example is based on *Mayle v. Felix*, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005).

[314] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 19.1 (2022).

[315] See Section E(6) ("Evidentiary Hearing") in this Chapter for how the habeas statute limits evidentiary hearings for state incarcerated people.

[316] State court proceedings include pretrial, trial, sentencing, and state post-conviction proceedings. *See* Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 5(c) ("The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available. . ."). Habeas Rule 5(c) requires that the state provide "transcripts." Transcripts are documents that record what actually occurred at the state court proceedings. *See* Sizemore v. District Ct., 735 F.2d 204, 207 (6th Cir. 1984); Kraus v. Taylor, 715 F.3d 589, 597 (6th Cir. 2013) (finding that warden's "disclosures to the district court were inadequate" because they omitted video recordings of trials proceedings, as to which no other

is important that the entire prior record in the case be filed in the federal habeas corpus court as part of your habeas case.

After you file your habeas petition, the state or government is responsible for filing the relevant prior record in the court as described above along with the state's or government's initial answer to your petition.[317] Sometimes, you may ask the federal court to provide you with access to the prior record *before* you file your petition. You can do so by showing that you are indigent (meaning you have don't have enough money to pay for the record to be produced) and that the petition you are planning to file is not "frivolous."[318]

If you find that some relevant part of the record is missing from the state's or the government's answer, you should promptly request the court to order the state to provide the missing records.[319] It is important for you to make this motion as soon as possible, because otherwise the district court may dismiss your petition based on the incomplete record.[320]

3. Financial Assistance in Fact-Finding

The district court may provide you with financial assistance to employ an investigator or an expert witness to help you develop the facts in your case.[321] To request financial assistance, you should file (1) a motion for leave to proceed *in forma pauperis ("IFP")*,[322] (2) a recent affidavit of indigence (that is, an affidavit saying that you do not have enough money to employ an investigator or expert

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"transcripts" were made or available; "Rule 5(c) specifies that the 'transcript'—that is, the record of what actually occurred at trial as opposed to briefs that merely describe what occurred—must be provided").

[317] Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 5(c) ("The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant.").

[318] Indigent prisoners may secure a free copy of the record *before* filing a habeas corpus petition to enable them to file the petition. Section 753(f) requires the prospective petitioner to establish indigence under 28 U.S.C. § 1915 (federal *in forma pauperis* "IFP" statute), which in turn requires the prisoner to demonstrate that the claims the petition would present are not "frivolous." *See* 28 U.S.C. § 753(f) ("[F]ees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous."). To satisfy the statutory "non frivolousness" standard, you only need to show that one or more of the claims in the petition state a legal cause of action, that the facts alleged support that cause of action, and that there is no obvious and wholly sufficient legal defense to the claims raised. *See* Denton v. Hernandez, 504 U.S. 25, 33 (1992) ("[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible…."); *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 12.1. n.31 and accompanying test (2022) (discussing the IFP statute).

[319] Rule 5(c) of the Rules Governing Section 2254 Cases in the United States District Courts (court may order state to arrange for transcription of untranscribed portions of record); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 19.2 (2022) (emphasizing the importance of asking the court to obtain the missing records as soon as possible). *See* Kraus v. Taylor, 715 F.3d 589, 591, 595, 598 (6th Cir. 2013) (reversing district court's denial of relief and remanding to district court for expansion of record to add video recordings of trial proceedings, as to which no other "transcripts" were made or available, and which district court should have reviewed before ruling on claims, given district court's general obligation to "consider portions of th[e] transcript that are 'relevant to the petitioner's . . . claim,' " and especially given that "[a]ll of Kraus's claims are fact-intensive and require close examination of what actually transpired at trial").

[320] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 19.2 (2022).

[321] The federal *in forma pauperis* ("IFP") statute permits indigent litigants to defend any proceeding—including habeas petitions--without prepayment of fees or security. *See* 28 U.S.C § 1915; *see also* Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 3(a) (allowing IFP orders for habeas petitions). An IFP order by the court will waive the filing fees and may be the basis for the court to appoint a counsel or provide other essential financial assistance. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 12.1—12.5 (2022). In noncapital cases, requests for financial assistance should be made under the Criminal Justice Act by showing that investigative services are necessary, you are financially unable to engage in necessary investigations, and "the interests of justice so require." *See* 18 U.S.C. §§ 3006A(a), (e).

[322] Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 3(a)(2).

yourself),[323] and (3) a certificate from the warden or other appropriate officer showing the amount of money in your prison account.[324] In addition, you should include one or more detailed affidavits by the prospective investigator or expert, or at least by your lawyer or by you, specifying (1) the types of assistance and amount of funds required, and (2) why such assistance is necessary for a fair habeas proceeding.[325]

4. Discovery in Federal Habeas Corpus

Discovery allows you to get access to evidence that the state or government has in its possession that is not part of the prior record in the case and that might support one or more of your habeas claims.[326] You may file the motion for discovery at the same time as you file your petition or shortly after the state's initial answer to your petition.[327] In your discovery motion, you should identify the claims in your petition that you think discovery would help you to prove and explain why you believe discovery is necessary to enable you to support your claim in a full and fair manner. Your motion should also explain why the prior proceedings in the case did not adequately develop the information your now seek and why that was not your fault.[328]

Habeas Rule 6 requires that you show "good cause" for discovery.[329] "Good cause" does not require a showing that the additional discovery would definitely lead to relief, but you must at least show that

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[323] Rule 3(a)(2) requires a filing of "the affidavit required by 28 U.S.C. § 1915" along with the IFP motion. Section 1915 requires a filing of petitioner-signed affidavit that "includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor." § 1915.

[324] *See* 28 U.S.C. § 1915(a)(2) (The petitioner "shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.").

[325] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 19.2 n.30 and accompanying text (2022). It is important to show the court why the financial assistance is necessary and relevant. *See* Caldwell v. Mississippi, 472 U.S. 320, 323 n.1, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) ("Given that [the defendant at trial] offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's [denial]."); United States v. Samples, 897 F.2d 193, 195–196 (5th Cir. 1990) (*per curiam*) (finding that the magistrate judge did not err in issuing subpoenas at government expense for only those individuals whose testimony would be relevant). It is also helpful to get the prospective expert to agree on a reduced fee in light of the petitioner's indigence.

[326] Federal courts allow various discovery devices such as depositions, production of documents or other physical materials, admissions, written interrogatories, physical and mental examinations. *See* FED. R. CIV. P. 26(a)(1) (Initial Required Disclosure), 27—32 (Depositions), 33 (Interrogatories), 34 (Document Production), 35 (Medical Examination), 36 (Requests for Admission).

[327] *See* Bracy v. Gramley, 520 U.S. 899, 902, 909, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997) (holding that, under circumstances of case, district court abused discretion in denying the petitioner's discovery motion filed simultaneously with habeas corpus petition). It is always better to file the motion early in the process because discovery is a valuable tool to allow you to gather relevant facts and strengthen your chance of getting a relief.

[328] *See* Advisory Committee Notes to Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts (finding that a motion should "advise the judge of the necessity for discovery and enable him to make certain that the inquiry is relevant and appropriately narrow"); Maynard v. Dixon, 943 F.2d 407, 412 (4th Cir. 1991) (finding that district court did not abuse discretion in denying discovery motion because petitioner "had ample opportunity to seek the[] [requested] documents at the state post-conviction proceeding, but chose not to").

[329] *See* Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 6(a) ("A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery."). The Supreme Court has defined "good cause" as specific allegations that would show you are entitled to relief if the facts were fully developed. *See* Harris v. Nelson, 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969) ("[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief."). However, Rule 6 has been interpreted as to authorize wider discovery than *Harris*. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 19.4(d) n.27 (2022).

the discovery will lead to evidence helpful to proving claims in your petition.[330] Further, in your discovery motion, you should describe any documents you seek to obtain through discovery. You may also submit any proposed interrogatories (written questions) that you want a state or government official to answer,[331] or facts that you are asking the state or government to admit are true.[332] If you are financially unable to get counsel yourself and if the court finds that a lawyer is necessary for effective discovery, the court *must* appoint you a counsel.[333]

5. Expanding the Record

Expanding the record is another way for you to include new evidence that is not in the existing record and that supports your claim into the existing record.[334] If, for example, the state produces records during the discovery process described above that support your claims, you can make a motion to expand the record to include those records. You also can ask to expand the record to include sworn statements (called "affidavits") from witnesses or experts who know of facts that support your claims. Your motion to expand the record should include a brief memorandum explaining the Habeas Rule and any court decisions that support your motion. You should attach to the motion a copy of the materials you seek to add to the record. In your memorandum, you should also cite to Rule 7 and federal cases supporting the court's authority to expand the record.

If you are a state incarcerated person, the habeas law may limit you to expanding the record to include only evidence or facts that you can show you could not have previously discovered and included in the prior record with reasonable effort.[335] In other words, you will have to show that the failure to

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[330] *See* Payne v. Bell, 89 F. Supp. 2d 967, 970 (W.D. Tenn. 2000) ("Petitioner need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence regarding his petition.").

[331] Interrogatory is a list of question that one party sends to another party as part of the discovery process. Generally, each party can only ask the other party 25 questions unless the court gives permission to ask more. Once a party serves another with an interrogatory, the other party should answer the questions under oath. *See* FED. R. CIV. P. 33 ("Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts."). The procedure for serving and answering interrogatories are governed by Federal Rules of Civil Procedure Rule 33.

[332] Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 6(b) ("The request [for discovery] must . . . include any proposed interrogatories and requests for admission, and must specify any requested documents.").

[333] Rule 6(b) also provides that "[i]f necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A." Under Section 3006A, the court may provide you with a lawyer if you are financially unable to obtain one yourself, and when the "interests of justice" require the court to do so.

[334] Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 7(a) ("If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition.").

[335] The habeas statute severely limits the availability of evidentiary hearings. Under § 2254(e), the district court may grant an evidentiary hearing only when the petitioner shows that the new facts that could not be discovered earlier during the state proceedings through his reasonable effort. *See* 28 U.S.C. § 2254(e)(2) ("If the [petitioner] has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that the claim relies on . . .a factual predicate that could not have been previously discovered through the exercise of due diligence. . ."). The Supreme Court has indicated, and several federal courts of appeals (6th, 8th, 9th) have held that a habeas corpus petitioner's use of Rule 7 to expand the record may be subject to the restrictions under § 2254(e)(2). However, whether this restriction applies to Rule 7 is still an open question. *See* Holland v. Jackson, 542 U.S. 649, 653, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004) (*per curiam*) (stating that § 2254(e)(2)'s restrictions upon granting of a federal evidentiary hearing "apply *a fortiori* when a prisoner seeks relief based on new evidence without an evidentiary hearing" but omitting reference to Rule 7); Mark v. Ault, 498 F.3d 775 (8th Cir. 2007); Landrum v. Mitchell, 625 F.3d 905, 924 (6th Cir. 2010) ("district court did not abuse its discretion in denying Landrum's motion to expand the record because he has not shown [under § 2254(e)(2)] that the factual predicate of Hill's affidavit could not have been discovered previously through the exercise of due diligence"); Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005) (interpreting *Holland v. Jackson* as requiring that habeas corpus petitioners "comply with § 2254(e)(2) in order to expand the record under Rule 7"); *but see* Ruine v. Walsh, 2005 U.S. Dist. LEXIS 14297, at *19 n.4 (S.D.N.Y. 2005) (explaining that applicability of section 2254(e)(2)'s restrictions to Rule 7 "remains an open question in this circuit" and "declin[ing] to adopt [such] restrictions on . . . Rule 7 applications"); Ashworth v. Bagley, 2002 U.S.

include the evidence or facts in the prior record in the case is not your fault, for example, because state officials, a state court, or other circumstances beyond your control kept you from finding the evidence or from including it in the prior record. If instead you were to blame for not discovering or presenting the evidence in prior proceedings in your case, then the federal court likely will not let you expand the record to include that new evidence.

Sometimes, the federal habeas court will use the "expansion of the record" procedure against you by denying your request for an evidentiary hearing at which you can present witnesses and by instead requiring you to present all your new evidence in written form (for example, in affidavits from witnesses you would like to call at a hearing). This procedure then may allow the federal court to dismiss your petition without holding an evidentiary hearing.[336]

At other times, the state or government may ask to expand the record to include evidence that it wants the court to use as a basis for dismissing your petition. If that happens, you should argue that the court should grant you an evidentiary hearing to determine the correctness of the offered evidence,[337] because Habeas Rule 7 requires the court to give the opposing party a chance to dispute the correctness of materials being offered for expansion of the record.[338] Doing this may keep the court from dismissing your petition being without first holding an evidentiary hearing.

6. Evidentiary Hearing

(a) The Importance of Evidentiary Hearing

District courts rarely grant evidentiary hearings in habeas corpus petitions. However, evidentiary hearings are important because they give you the chance to more fully develop the facts supporting your claims and they increase the likelihood that the federal court will grant habeas relief. Therefore, you should strongly consider filing a motion for an evidentiary hearing.[339]

(b) Evidentiary Hearings in Support of Claims by State Incarcerated People

For people incarcerated as a result of state convictions, the court reviewing your habeas petition is required to assume the facts as found by the state courts.[340] This means that the habeas court generally must base its ruling on your habeas petition on the version of the facts that the trial court, state appellate courts, or state post-conviction courts found to be true. However, after receiving your petition and the state's answer, the habeas court may choose to hold an evidentiary hearing on facts

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Dist. LEXIS 27219, at *37 (S.D. Ohio March 28, 2002) ("Expansion of the record pursuant to [Rule 7] . . . is not governed by the restrictions on evidentiary hearing . . ."); McNair v. Haley, 97 F. Supp. 2d 1270, 1284, 1286 (M.D. Ala. 2000) ("It is Rule 8(a) . . . not Rule 7, that provides for evidentiary hearings in federal habeas proceedings.").

[336] *See* Murray v. Carrier, 477 U.S. 478, 487, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (finding that Rule 7's purpose is to enable the judge to dispose of some habeas petitions not dismissed on the pleading, without the time and expense required for an evidentiary hearing.); *see also* United States ex rel. Simmons v. Gramley, 915 F.2d 1128, 1139 (7th Cir. 1990) (finding that Habeas Rule 7 is designed to avoid evidentiary hearings).

[337] If the court has a reason to question the proffered evidence's credibility, the court must conduct an evidentiary hearing. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 19.5 n.14 and accompanying text (2022); Dugas v. Warden, 2006 U.S. Dist. LEXIS 60191, at *9 (D. N.H. Aug. 24, 2006), *aff'd*, 506 F.3d 1 (1st Cir. 2007) ("in cases such as this one where both sides have presented new evidence through affidavits, an evidentiary hearing is necessary to allow the court to assess the credibility of the witnesses.").

[338] Rule 7(c) requires the party seeking to expand the record to supply the opposing party with copies of the materials you seek to include. Rule 7 also requires the court to give the opposing party the chance to dispute the correctness of the materials you wish to include. See Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, Rule 7(c) ("The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.").

[339] An evidentiary hearing is another way to prove that you satisfy the various elements of a habeas petition, including the harmless error rule, state-exhaustion requirement, or to counter the state's defenses such as procedural defaults. *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 20.1 (2022) (discussing the right to a hearing).

[340] 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct.").

that were not fully developed in state court and thus remain in dispute.[341] The habeas court's decision whether to hold an evidentiary hearing may depend on why the facts were not previously developed in the state courts. In particular, whether a federal court will hold an evidentiary hearing may be affected by (1) whether some failure or error for which you or your lawyer was responsible prevented the facts from being developed more fully in prior state court proceedings, or instead (2) whether actions by the police, prosecutors, or state courts kept the facts from being more fully developed during state court proceedings.

(i) *Petitioner's Error*

For state incarcerated people, if you or your lawyer failed to develop the facts fully in state court, this "petitioner's error" will severely limit your ability to obtain evidentiary hearings in support of your habeas claims. Under section 2254(e), you can get an evidentiary hearing in this situation only if you demonstrate two things that are very difficult to demonstrate: "*cause*" and "*innocence*."[342] You can show "cause" in one of two ways:

(1) By showing you are now relying on a right that the Supreme Court has only recently recognized and has held is to apply retroactively,[343] or
(2) By showing you are now relying on newly discovered facts that you could not have discovered earlier during state proceedings in your case through the exercise of "due diligence" (that is, with reasonable effort).[344]

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[341] *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 Oct. 2, 2023).

Regardless of whether you are a state or federal incarcerated person, 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 Section 2254 Cases in the United States District Courts, and to the Rules Governing Section 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 Oct. 2, 2023).

[342] 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(e)(2); *see also* McQuiggin v. Perkins, 569 U.S. 383, 396, 133 S. Ct. 1924, 1934, 185 L. Ed. 2d 1019, 1033 (2013) ("Under [§ 2254(e)(2)], a petitioner seeking an evidentiary hearing must show diligence and, in addition, establish her actual innocence by clear and convincing evidence.").

[343] *See* 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.

[344] 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) (Michael Williams). 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) (Michael Williams). 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) (Michael Williams). 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) (Michael Williams); *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).

In addition to showing cause, you also must 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."[345] In other words, you must prove that, if the constitutional error you are alleging had never happened, a "reasonable" juror would necessarily have found you innocent of the crime of which you were convicted.

In the rare circumstances in which you can show both cause and innocence, you will be granted an evidentiary hearing to further develop your facts. However, if you cannot show cause and innocence, the court will proceed based on the facts as found by the state courts and based on the evidence that is already included in the prior state court record. If the lack of factual development was caused by your error, the court will probably not grant you an evidentiary hearing.[346] 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 at trial and in other state court proceedings. It is also why you must ask the state trial court, state appellate courts, or state post-conviction courts to appoint an investigator and all the experts you need to help you discover and identify facts supporting your constitutional claims. In state proceedings, you also should request discovery of documents and 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 or an evidentiary hearing in state court, the very narrow cause and innocence standard means that you may not be able to request discovery of documents or be given an evidentiary hearing in support of your habeas petition.

(ii) *State's Error*

If, however, the reason the facts were not fully developed in your case during state court proceedings is because of actions by police, prosecutors, state courts, or other state officials involved in your case, then the federal court must hold an evidentiary hearing to develop any facts that remain in dispute. The Supreme Court has listed six situations in which state errors or obstructive actions require the federal court to hold an evidentiary hearing:[347]

(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,[348] or

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[345] 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).

[346] *See, e.g.*, Shinn v. Ramirez, 142 S. Ct. 1718, 212 L. Ed. 2d 713, 2022 U.S. LEXIS 2557 (2022) (holding that a petitioner was "at fault" when their postconviction counsel provided ineffective assistance by failing to raise a meritorious claim of ineffective assistance of trial counsel at the initial state proceedings, and thus "a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of postconviction counsel").

[347] Townsend v. Sain, 372 U.S. 293, 313, 83 S. Ct. 745, 757, 9 L. Ed. 2d 770, 786 (1963), *partially overruled* by Keeney v. Tamayo-Reyes, 504 U.S. 1, 5–6, 112 S. Ct. 1715, 1717–1718, 118 L. Ed. 2d 318, 326–327 (1992). AEDPA revised the habeas statute in 1996 to greatly limit petitioners' ability to obtain an evidentiary hearing. If you or your attorney are responsible for the failure to fully develop the facts in state court, the strict standards of 28 U.S.C. § 2254(e)(2) described in Subsection E(6)(b)(i) ("Petitioner's Error") of this Chapter apply. Otherwise, these standards from *Townsend* and *Keeney* still generally apply. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 20.1[b] ("Even after AEDPA, that is, *Townsend*'s mandatory-hearing standards—and its delegation to district courts of broad discretion to hold evidentiary hearings that are not mandated—continues to govern all situations save those in which the petitioner's procedural default accounts for the state courts' failure to develop the material facts."); *see also* Shinn v. Ramirez, 596 U.S. 366, 142 S. Ct. 1718, 1734, 212 L.Ed.2d 713, 733–734 (2022) ("Even though AEDPA largely displaced *Keeney*, §2254(e)(2) retained 'one aspect of *Keeney*'s holding.' Namely, §2254(e)(2) applies only when a prisoner "has failed to develop the factual basis of a claim." (citation omitted)).

[348] If you or your attorney were responsible for the material facts not being adequately developed, AEDPA (enacted in 1996) requires you to meet the difficult standards described in Subsection E(6)(b)(i) ("Petitioner's

(6) The state judge did not afford the applicant a full and fair hearing for any reason.

Remember that, under AEDPA, these six situations require the federal court to hold an evidentiary hearing *only* if state actors or courts were at fault for not fully developing the facts during the state proceedings.[349]

(c) Preparing for the Hearing

If the district court orders an evidentiary hearing, the court *must* provide you with a lawyer to prepare for and conduct the hearing if you are unable to afford a lawyer yourself.[350] Habeas Rule 8(c) provides that the court must give your lawyer enough time to investigate and prepare for the hearing.[351] Rule 8(c) also allows your lawyer to require witnesses to appear and testify in the hearing through a subpoena.[352]

Prehearing conferences are permitted but not required prior to an evidentiary hearing. However, a prehearing conference is useful because it can help find a time for the hearing, narrow the issues to be addressed in the hearing, enable the court to understand the issues better, and permit a faster decision of motions during the hearing.[353] Therefore, it is often a good idea for your lawyer to ask the court to hold a pretrial conference before an evidentiary hearing.

F. Defense to a Habeas Corpus Claim: Procedural Default

1. Overview

When you raise claims in your federal habeas petition, the court may deny relief on the claim if the state or government shows that you "procedurally defaulted" that claim. A procedural default occurs when you or your lawyer failed to raise the claim in a timely or proper manner as required by law in a prior court proceeding when the claim first became known and available to you.[354]

Error") of this Chapter. If the pre-AEDPA standards apply to your case, federal courts will not provide an evidentiary hearing if you had an adequate opportunity to develop the relevant facts in state court proceedings unless you can show (1) cause for failure to develop the facts and that that failure resulted in actual prejudice to you; or (2) 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 (1992). *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). The "cause and prejudice" and "fundamental miscarriage of justice" standards are described in more detail in Section F(3) of this Chapter.

[349] *See* 28 U.S.C. § 2254(e)(2).

[350] *See* Rules Governing Section 2254 Cases in the United States District Courts, Rule 8(c) ("If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A."); Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984) ("[A]ppointment of counsel [for impoverished petitioner] becomes mandatory when an evidentiary hearing is required").

[351] *See* Rules Governing Section 2254 Cases in the United States District Courts, Rule 8(c) ("The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare."). The purpose of Rule 8(c) is to ensure the counsel has sufficient time to prepare adequately for the evidentiary hearing. *See* Advisory Committee Notes to Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts (noting that the purpose of Rule 8(c) is to assure that counsel has "the time required to prepare adequately for an evidentiary hearing.").

[352] *See* Advisory Committee Notes to Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts (noting that Rule 8 relies upon "local practice" regarding obtaining and processing subpoenas). But because habeas corpus proceedings often take place in the district of incarceration instead of the district of conviction, the lawyer may have to go through a time-consuming inter-district filing requirement and service of subpoenas. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 21.1(c) (2022).

[353] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 21.1(d) (2022).

[354] "Procedural default" is a concept that denies federal habeas relief to a state incarcerated person who failed to present his habeas corpus claim to a state court in compliance with state procedural rules and denies Section 2255 relief to a federally incarcerated person who failed to present his Section 2255 claims at trial or on direct appeal in compliance with federal procedural rules. *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

If you are a state incarcerated person, the state also must show that there no longer is a state post-conviction or other state proceeding in which you would now be permitted to raise the claim. A procedural default can occur if the highest state court to rule on your federal constitutional claim rejected the claim based on a failure by you or your lawyer to raise the claim in a timely or proper fashion.[355] Importantly, however, if you violated a state procedural rule by raising a federal claim in state court too late or in an improper manner, but the state court ignores that rule and reviews the merits of your claim anyway, a federal court cannot then refuse to review your claim based on a procedural default.[356] A procedural default also may occur if you failed to raise the claim in the state courts within the time frame or in the manner required by state law before including it in a federal habeas petition, and the federal court finds that the state courts would reject the claim based on that failure if you tried to raise the claim in the state courts at this late date.[357]

If you are a federally incarcerated person, a procedural default occurs if the claim was available to you at trial or on direct appeal and you failed to raise the claim in a timely and proper fashion as required by federal law when the claim became available to you. A procedural default may occur if the trial or direct appeal court denied your claim because you failed to raise it in a timely or proper manner, or if you simply failed to raise the claim at all at trial and on direct appeal as required by federal procedural law and instead raised it for the first time in a Section 2255 motion.

If you may be or have been convicted of a state criminal offense, you can avoid procedural default by raising every federal constitutional claim in state court as soon as you become aware of the claim and at the time and in the way that state law requires such claims to be raised. In many cases, state law requires you to raise the claim at trial through motions or objections,[358] or at least on direct review

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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.").

[355] *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).

[356] *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 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))).

[357] *See* O'Sullivan v. Boerckel, 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) *partly repealed by* Martinez v. Ryan, 566 U.S. 1, 9, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) (finding that ineffective assistance in an initial-review collateral proceeding may potentially serve as "cause" to excuse a procedural default).

[358] In general, before your trial ends and at a time when the court still can correct the error, you must object to any errors that occurred at trial 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 2023). For more information about Article 440, see Chapter 20 of the JLM, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction of Illegal Sentence." 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, "Appealing Your Conviction or Sentence," and Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel," for more information on ineffective assistance of counsel claims.

or in state post-conviction proceedings.[359] If you may be or have been convicted of a federal criminal offense, you can avoid procedural default by raising every constitutional claim at trial and again on direct appeal.[360]

2. Requirements the State Must Meet to Establish Procedural Default

The procedural default rule prevents a state incarcerated person from bringing a habeas claim in federal court if a state court refused to review the claim "on the merits"—or if a state court never had the chance to review the claim on the merits—because the person did not raise the claim in the state court in a timely or proper manner as required by state law.[361] "On the merits" means that the court evaluated whether or not the claimed constitutional violation actually occurred. If the state court denied your claim because you failed to follow a state procedural rule, then the federal court may not hear your claim because your claim was not reviewed by the state courts "on the merits." The same is true if the state court never got a chance to review the claim "on the merits" because you never raised the claim in state court in the time or manner required by the state court.

Procedural default is a "defense," meaning that the state must assert this objection before a federal habeas court may rely on it as a basis for denying relief on a federal claim.[362] If the state fails to argue, or to prove, that your claim was in procedural default, the federal court must hear your claim (assuming you satisfied other requirements). There are five requirements[363] that the state must meet in order to establish a procedural default that bars relief on a federal habeas claim. First, the state must raise the procedural default defense in a timely manner in the federal habeas court. Second, the state must show that a state procedural rule clearly applied in your case to say when and how you were required to raise a federal constitutional claim. Third, the state must prove that you actually violated that rule by failing to raise the claim at a time or in a manner required by state law. Fourth, the state must prove that the state procedural law was "adequate" and was "independent" of federal law (requirements that are explained below). Fifth, if you are a state incarcerated person and you raised the federal claim in state court, the state must show that the state court unambiguously relied

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[359] In New York, you cannot raise claims in a post-conviction proceeding that you could have but did not raise on direct appeal. *See* N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 2023). *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* Chapter 9, "Appealing Your Conviction or Sentence," and Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel,", for more information on ineffective assistance of counsel claims.

[360] However, 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.").

[361] Procedural defaults can occur at any stage of the state court proceedings. For example, at the trial-court level, your failure to comply with state procedural requirements for the form, content, or timing of pretrial motions, trial objections to inadmissible evidence, prosecutorial misconduct, trial court rulings, jury instructions, or other errors, post-trial motions or the notice of appeal may be a basis for procedural default. On appeal to the state appellate courts, or in state post-conviction proceedings, the petitioner may have failed to raise an issue at all or may have failed to plead it in the appropriate documents or with adequate specificity. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.1 n.2 and accompanying text (2022).

[362] Trest v. Cain, 522 U.S. 87, 89, 118 S. Ct. 478, 480, 139 L. Ed. 2d 444, 448 (1997) ("[P]rocedural default is normally a 'defense' that the [s]tate is 'obligated to raise' and 'preserv[e], if it is not to 'lose the right to assert the defense thereafter.'" (quoting Gray v. Netherland, 518 U.S. 152, 165–166, 116 S. Ct. 2074, 2082, 135 L. Ed. 2d 457, 472 (1996))).

[363] *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.1, § 26.2(a)-26.2 (e) (2022) (discussing the procedural default doctrine and the requirements).

on the state procedural rule as its basis for denying the relief you sought.[364] Each of these requirements is explained below.

(a) Timely Assertion by the State

First, the state must raise the procedural default defense in a timely manner, by raising the default in the state's answer to your habeas corpus petition.[365] The state must raise the procedural default defense in the federal district court and may not raise it for the first time in a federal appellate court.[366] If the state fails to raise the default in a timely fashion, the default is waived, and the federal court may not deny your claim based on procedural default.[367]

(b) Clearly Applicable State Procedural Rule

Second, the state must establish that a state procedural rule clearly applied in your case to specify when and/or how you were required to raise a federal claim in state court. Procedural default does not apply if no clearly applicable state procedural law applied to your case. The state must show that the state procedural rule is clearly part of the law of the relevant state[368] and has been "firmly established and regularly followed" by state courts.[369] Furthermore, the state procedural rule must clearly have been in effect as of the time the state court reviewed your claim.[370] The state must also show that the procedural rule is mandatory rather than discretionary, meaning that the state court was clearly required to apply the rule and had no discretion to decide whether or not to apply it.[371]

(c) Actual Violation of State Procedural Rule

Next, the state must show that you actually violated the state procedural rule. If you made a reasonable or a good faith effort to follow the rule, courts usually will not find a default.[372] A merely

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[364] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.2(e) (2022) (discussing the unambiguous state court reliance requirement); *See* Harris v. Reed, 489 U.S. 255, 265 n.12, 109 S. Ct. 1038, 1045 n.12, 103 L. Ed. 2d 308, 319 n.12 (1989) ("[I]f the state court under state law chooses not to rely on a procedural bar . . . , then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim.").

[365] *See* Lee v. Kemna, 534 U.S. 362, 376 n.8, 122 S. Ct. 877, 885 n.8, 151 L. Ed. 2d 820, 836 n.8 (2002) (state's assertion of procedural default is "deem[ed] . . .waived" because state "did not advance its current contention in the [s]tate's Eighth Circuit brief or in its brief in opposition to the petition for certiorari"); Foster v. United States, 996 F.3d 1100, 1106 (11th Cir. 2021) ("[G]overnment has waived the affirmative defense of procedural default. The government had ample opportunity to assert the defense of procedural default in Foster's case, yet it said nothing about the issue aside from making an indirect reference to an argument made in a separate case."); Kon v. Sherman, 802 Fed. Appx. 240, 242 n.1 (9th Cir. 2020) ("The Warden did not raise a procedural default defense before either the district court or this court. As a result, any procedural default defense has been waived.").

[366] *See* Jones v. Secretary, 778 Fed. Appx. 626, 634 (11th Cir. 2019) ("[W]e decline to consider this additional procedural bar because the state raises it for the first time on appeal. Critically, Florida 'failed to raise th[at] defense . . . in the district court, and the court did not bring it up either.'") (quoting Howard v. United States, 374 F.3d 1068, 1073 (11th Cir. 2004).

[367] In other words, the state's waiver of the procedural default defense does not need to be explicit. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.2(a) (2022).

[368] *See* Thomas v. Davis, 192 F.3d 445, 450–453 (4th Cir. 1999) (concluding there is no procedural default because the state rule was not articulated and consistently or regularly applied in the past).

[369] James v. Kentucky, 466 U.S. 341, 348–349. 104 S. Ct. 1830, 1835-1836, 80 L. Ed. 2d 346, 353-354 (1984) ("[State's] distinction between admonitions and instructions is not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights.").

[370] *See* Ford v. Georgia, 498 U.S. 411, 423–424, 111 S. Ct. 850, 857-858 112 L. Ed. 2d 935, 948-949 (1991) (holding that a state procedural rule that was announced after the petitioner's trial was over cannot constitutes a basis for procedural default).

[371] *See* Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1993) (finding no default because the alleged state rule was "rooted in discretion and not jurisdiction.").

[372] *See* Ashby v. Wyrick, 693 F.2d 789, 793–794 (8th Cir. 1982) (petitioner twice tried to comply with "arguably confusing" procedural rule); Pedrero v. Wainwright, 590 F.2d 1383, 1390 (5th Cir. 1979) (petitioner "did all that he could to comply" but compliance was impossible); Rolan v. Coleman, 680 F.3d 311, 318 (3d Cir. 2012) (petitioner

technical, formalistic mistake should not count as an actual violation.[373] For instance, a mere failure to comply with the state rule on how to organize or structure your brief may be insufficient to find a procedural default. As long as you followed the state rule for the claims you seek to raise in your federal habeas petition, there is no procedural default, even if there was a procedural default on other claims.[374] For instance, if you had two claims in your state post-conviction proceeding but failed to follow the state procedural rule on only one of the claims, you may still get relief for the claim that complied with the state procedure rule in your habeas petition.

(d) Adequate and Independent State Grounds

Next the state must show that the state rule you failed to follow was an "independent and adequate state ground" for denying your federal claim.[375] You cannot be denied relief based on a procedural default unless the state shows that the procedural rule the state court used to deny you review of your federal claim on the merits (1) was "independent" of federal law and (2) was "adequate" (in other words, good enough) to bar federal review of the claim. These standards are further described below.

(i) *The State Procedural Rule Is Not "Independent" of Federal Law*

A state procedural rule is not "independent" of federal law if the rule is in any (even minor) way connected to or dependent on federal law and thus is not entirely separate from federal law.[376] State law is connected with federal law if judges may have to answer questions about federal law in order to decide whether the state procedural rule was violated.[377] For example, if a state procedural rule applies only to claims of violations that are not "fundamental" or "constitutional," the rule is not independent of federal law because the state court had to decide that any violation that may have occurred was not "fundamental" or "constitutional" under federal law. In this situation, no procedural default can occur that bars federal habeas review.[378]

"substantially, if imperfectly, complied with the requirements of" state rule requiring "concise statement of the matters complained of on appeal" by filing "statement [that] was sufficient to allow the court to identify his claims." (internal quotation omitted)).

[373] *See* Rolan v. Coleman, 680 F.3d at 318–319 (finding that procedural default is not appropriate when there was substantial compliance with the state rule's technical requirements for organization and format of appellate brief); *see also* Beavers v. Saffle, 216 F.3d 918, 923–924 (10th Cir. 2000) (petitioner adequately complied with state rule by raising ineffective assistance claim in "application to appeal out of time" even though he failed to reiterate claim in subsequent application for post-conviction relief); Clemmons v. Delo, 124 F.3d 944, 948-949 (8th Cir. 1997) (although the claim was omitted from the petitioner's counsel's brief on appeal of denial of state post-conviction relief, petitioner himself "fairly presented" claim to state supreme court by filing *pro se* motion containing the claim and stating that counsel omitted it against client's wishes); Hutchins v. Wainwright, 715 F.2d 512, 519 (11th Cir. 1983) (finding no procedural default because although the issue was "obliquely stated," the petitioner nonetheless presented the substance of the claim and therefore sufficiently gave notice to the state court).

[374] *See* Cramp v. Bd. of Pub. Instr., 368 U.S. 278, 281–282, 82 S. Ct. 275, 278-279, 7 L. Ed. 2d 285, 289–290 (1961) (state procedural ground did not bar the Supreme Court's review on direct appeal because procedural ground applied only to two of petitioner's four federal constitutional grounds for attacking validity of statute).

[375] *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) ("[S]o 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.").

[376] *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").

[377] *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).

[378] *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

(ii) *The State Procedural Rule Was Not "Adequate"*

A state procedural rule is not an adequate reason to deny review of your federal habeas petition if the state rule is unfair, is designed to or does interfere with enforcement of your federal rights, or is not applied consistently by the state courts.[379] The question whether a state procedural rule is "adequate" is itself a question of federal law.[380] Below are some common ways to argue that a state procedural rule is not adequate to bar review of your federal claims:[381]

- The state's rule is not "firmly established," "consistently applied," or "strictly or regularly followed;"[382]

(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,'" so the state court had to first decide the federal issue of whether the petitioner received the constitutionally-required fair trial (citation omitted)).

379 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).

380 *See, e.g.,* Johnson v. Lee, 578 U.S. 605, 608, 136 S. Ct. 1802, 1805, 195 L. Ed. 2d 92, 96 (2016) (*per curiam*); Beard v. Kindler, 558 U.S. 53, 60, 130 S. Ct. 612, 617, 175 L. Ed. 2d 417, 423 (2009).

381 This is a non-exhaustive list. For more instances, please refer to RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.2d(i) (2022).

382 *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* Walker v. Martin, 562 U.S. 307, 312, 131 S. Ct. 1120, 1123, 179 L. Ed. 2d 62, 67 (2011) (holding that federal courts "must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights"); 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 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

- 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;[383]
- The procedural rule required you to object to the error before you could have realized that the error occurred, or the rule was applied in your case in a way that you could not have anticipated;[384] or
- 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 purpose of the state rule.[385]

(e) Unambiguous State Court Reliance

Finally, the state must show that the state court unambiguously (clearly) relied on a state procedural rule to deny you relief on your federal claim.[386] If the state court decided the claim based on substantive grounds (meaning grounds related to whether or not a violation of your rights occurred) rather than on procedural grounds (meaning your failure to raise the federal claim at the proper time

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1459, 1463 (8th Cir. 1991) ("If a state applies its rule inconsistently, we are not barred from reaching the federal law claim.").

[383] *See* Lawrence v. Sec'y, 700 F.3d 464, 481 (11th Cir. 2012) (holding that substantive competency claims, such as the defendant's claim of incompetency to stand trial, cannot be procedurally defaulted); 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).

[384] *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. Dir., Dept. of Corr., State of Ill., 817 F.2d 448, 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).

[385] *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).

[386] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.2(e) (2022); Harris v. Reed, 489 U.S. 255, 265 n.12, 109 S. Ct. 1038, 1045 n.12, 103 L. Ed. 2d 308, 319 n.12 (1989) ("[I]f the state court under state law chooses not to rely on a procedural bar . . . , then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim."); Ylst v. Nunnemaker, 501 U.S. 797, 801, 111 S. Ct. 2590, 2593, 115 L. Ed. 2d 706, 715 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise be available").

or in the proper way), then there is no procedural default.[387] To decide if the state court relied on the state procedural rule in denying you relief, you should look at how the state court arrived at its decision, focusing on the court's language and the court decisions and other law it cited. For instance, if the state appellate court expressly states that it is dismissing your claim on appeal because you failed to file the appeal within the time period provided by state law, then the state court is primarily relying on state procedural law. Likewise, if the state court's decision only cites to state procedural law rather than federal constitutional law, the state court will be found to have denied relief based on the state procedural rule.[388]

Sometimes, however, the state court decision will discuss both a failure to follow state procedural law and the petitioner's failure to prove that a violation of federal constitutional law occurred. If in this situation the federal habeas court concludes that the state court decision "fairly appears to rest primarily on federal law,"[389] there is no procedural default, and the federal court must review your federal claim and grant you relief if a federal violation occurred. Only when the state court "clearly and expressly" states that it relied on a state procedural rule will the federal courts find a procedural default.[390] Federal courts often *assume* that state court decisions based both on state procedural and federal constitutional law are based on federal law and thus do not establish a procedural default that bars federal habeas review. This is a petitioner-friendly presumption that will help you avoid a procedural default bar.

Sometimes, a higher state court[391] may affirm (agree with) a lower state court decision without any explanation of why it denied you relief on your federal claim. In this case, the district court will look at the lower court's opinion, decide whether the lower court relied on a state procedural rule or

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[387] Manning v. Huffman, 269 F.3d 720, 724 (6th Cir. 2001) (case is "ripe for federal habeas review" because state court "directly addressed" merits rather than "dispos[ing] of [issue] on procedural grounds"); Gall v. Parker, 231 F.3d 265, 310, 321 (6th Cir. 2000) (federal review of procedurally defaulted claims is available because state supreme court "addressed and rejected . . . allegations . . . on their merits"); Tillman v. Cook, 215 F.3d 1116, 1128–1129 (10th Cir. 2000) (no procedural default despite lack of contemporaneous objection at trial because state supreme court "addressed the merits of the issue on direct appeal" pursuant to state courts' "'death penalty exception' to the contemporaneous objection rule"); Jones v. Gibson, 206 F.3d 946, 956 (10th Cir. 2000) (no procedural default because state court addressed merits in context of rejecting separate claim of ineffective assistance with respect to cross-examination); Smith v. Gibson, 197 F.3d 454, 460 (10th Cir. 1999) (no procedural default barring federal review because state appellate court "reviewed the merits of this claim under a fundamental error analysis").

[388] *See, e.g.*, James v. Brigano, 470 F.3d 636, 641–642 (6th Cir. 2006) (claims "are not procedurally defaulted for habeas purposes" because state court's "lengthy opinion . . . does not frame its rejection of James's underlying claims as a failure to find prejudice or on procedural grounds, but instead rejects those claims on their merits").

[389] Harris v. Reed, 489 U.S. 255, 274, 109 S. Ct. 1038, 1049, 103 L. Ed. 2d 308, 324 (1989) ("[W]e adopted a presumption in favor of federal review when . . . a state court decision fairly appears to rest primarily on federal law…" (internal quotation marks omitted)); *see also* Coleman v. Thompson, 501 U.S. 722, 733. 111 S. Ct. 2546, 2556, 115 L. Ed. 2d 640, 658 (1991) ("When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." (quoting Michigan v. Long, 463 U.S. 1032 (1983))); Arizona v. Evans, 514 U.S. 1, 7–10, 7 n.2, 115 S. Ct. 1185, 1189-1192, 1189 n.2, 131 L. Ed. 2d 34, 42-45, 42 n.2 (1995) (citing *Harris v. Reed* line of precedents in support of the "standard for determining whether a state-court decision rested upon an adequate and independent state ground").

[390] Harris v. Reed, 489 U.S. 255, 263, 109 S. Ct. 1038, 1043, 103 L. Ed. 2d 308, 317 (1989) ("A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar."); *see also* Coleman v. Thompson, 501 U.S. 733, 735, 111 S. Ct. 2546, 2557, 115 L. Ed. 2d 640, 659 (1991) (state court opinion must "clearly and expressly rely on an independent and adequate state ground"); Arizona v. Evans, 514 U.S. 1, 10, 115 S. Ct. 1185, 1190, 131 L. Ed. 2d 34, 4 (1995) (no adequate and independent state ground because state court did not "offer a plain statement that its references to federal law were 'being used only for the purpose of guidance, and d[id] not themselves compel the result that [it] reached'" (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983))); Frazier v. Huffman, 343 F.3d 780, 791, 799–800 (6th Cir. 2003) (noting that there is no procedural default because the court found "no clear and express statement in the [state court's] opinion that the state procedural doctrine of *res judicata* was the basis for the decision"), *supplemented on other grounds*, 348 F.3d 174 (6th Cir.).

[391] That is, a state appellate court or state supreme court reviewing a decision.

addressed the federal constitutional merits, and assume the higher court followed the same reasoning as the lower court.[392] Therefore, if the lower state court does not clearly and expressly state that it relied on a state procedural rule, then the federal habeas court will assume that the state appellate court also did not rely on a procedural rule, and will not find a procedural default.

3. Exceptions to Procedural Default

The best way to avoid having a federal habeas court deny you relief on a claim because of a procedural default is to show that one or more of the five requirements described in Section F(2) above ("Requirements the State Must Meet to Establish Procedural Default") is not satisfied in your case. If all five requirements are met, the federal habeas court will conclude that a procedural default occurred, which usually will require that court to deny your claim without actually deciding whether a constitutional violation occurred. However, there are two limited circumstances in which the federal court must ignore a procedural default and review your constitutional claim. These circumstances apply to people in both state and federal prisons. You have the burden to show that one or both of these circumstances are present. You can require the federal court to review your claim by showing either that (1) there is "cause and prejudice" for and from the procedural default, or that (2) you are "actually innocent" such that failing to review your claim would be a "fundamental miscarriage of justice".[393]

The courts rarely find either of these exceptional circumstances, so *you should not depend on either of these exceptions as a reason to commit a procedural default.*[394] You should work hard to avoid procedural default, first, by raising all of your federal claims in state court if you are a state incarcerated person or on direct federal appeal if you are a federal incarcerated person, and, second, by showing that one or more of the requirements for a default is not present. Both exceptions to the procedural default rule are discussed below.

(a) Exception #1: Cause and Prejudice

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 still must review your claim if you can prove (1) that you had "cause" for not following the state procedural rule and (2) that you will be "prejudiced" if your claim is not resolved by the federal habeas court. To show "cause," you must provide 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. To show "prejudice," you must demonstrate that your case would have come out differently if the constitutional violation you allege had not occurred.[395]

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[392] *See* Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 2594, 115 L. Ed. 2d 706, 716 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.").

[393] 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 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."). *See* Subsection D(5)(d) for further discussion on the "Actual Innocence" standard.

[394] *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). *See generally,* Dretke v. Haley, 451 U.S. 386, 393, 124 S. Ct. 1847, 1852, 158 L. Ed. 2d 659, 669 (2004) (noting that "the cause and prejudice standard is not a perfect safeguard against fundamental miscarriages of justice").

[395] *See* Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640, 669 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate

Showing cause and prejudice is difficult.[396] Since the Supreme Court announced the standard in 1977,[397] 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 the "cause and prejudice" standard.

(i) *First Step: Showing Cause*

To show "cause" for not following a state procedural rule, you typically must identify some outside force or factor—meaning actions by someone other than yourself or your lawyer—that kept you from following the state procedural rule.[398] Some of the situations that courts have identified as constituting "cause" are listed below:

- State officials prevented you from following the state procedural rule.[399] 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.[400]
- State officials purposely lied about material information.[401] 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

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cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."); 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 Subsection D(9)(c), "New Laws: The *Teague* Rule," would still apply and may bar relief, even if procedural default were overcome in this situation.

[396] 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).

[397] 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).

[398] *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))).

[399] 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))).

[400] *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).

[401] 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).

evidence—because you did not know about it.[402] The fact that the state lied to you establishes a cause for failure to investigate that the court may consider.

- The legal basis of your constitutional claim was not reasonably knowable or discoverable by you (or by your lawyer) at the time you failed to follow the state procedural rule.[403] For example, 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.[404] For instance, "cause" is not present simply because (i) your attorney did not happen to know of the relevant law;[405] (ii) your attorney incorrectly believed it would be useless to raise the claim because the state court had rejected the claim before; [406] or (iii) your attorney was negligent in not identifying the facts or law that established the claim.[407]
- 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" [408] in violation of the Supreme Court's decision in *Strickland v. Washington*.[409] 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.[410]

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[402] *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").

[403] *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).

[404] *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 D(9)(c), "New Laws: The *Teague* Rule," of this Chapter for more information.

[405] *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.").

[406] *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.").

[407] *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.").

[408] *See* 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).

[409] *See* 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).

[410] *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*).

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."[411] By "Shepardizing" both the Supreme Court's decisions in *Wainwright v. Sykes*[412] and *Coleman v. Thompson*[413] and researching this issue, you will discover other reasons that courts have found "cause."[414]

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

- Ineffective assistance of counsel in a state post-conviction or other proceeding in which there is not a federal constitutional right to counsel.[415]
- A failure to discover the existence of the violation, if that failure was a result of your own or your attorney's neglect.[416]
- A failure to discover evidence of a violation that was reasonably available to you, if that failure was a result of your own or your attorney's neglect.[417] 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.[418]

(ii) *Second Step: Showing Prejudice*

The Supreme Court has not explained the meaning of "prejudice" as thoroughly as the meaning of "cause." In *United States v. Frady*, the Court said "prejudice" requires that you show errors at your trial that "worked to [your] actual and substantial disadvantage, infecting [your] entire trial with error of constitutional dimensions."[419] Prejudice is a high standard for you to meet because the federal court

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411 *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.3b (2022) (providing a non-exhaustive list of examples where courts have found cause).

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

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

414 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.

415 *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.") However, if postconviction counsel fails to include a claim of ineffective assistance of counsel in an initial postconviction petition and later raises it in a successive state postconviction petition, "a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on the ineffective assistance of state postconviction counsel." Shinn v. Ramirez, 142 S. Ct. 1718, 1734 (2022). For further discussion on finding "cause" for exceptions to the procedural default doctrine under *Martinez* and *Shinn*, refer to § 26.3(b), note 36 of RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE.

416 *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").

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

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

419 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); *see also* United States v. Pettigrew, 293 F. Supp. 3d 1139, 1144 (D.C. Cir. 2003) (noting that the "required showing for prejudice prong of [the] procedural default doctrine has not been precisely delineated").

will measure the effect of any violation you raise in the context of your whole trial.[420] 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*[421] that it would find prejudice if a New York trial court accepted a petitioner's guilty plea without holding a hearing on the petitioner'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.[422]

(b) Exception #2: "Actual Innocence"

The second exception to the procedural default rule is even narrower than the "cause and prejudice" exception. This exception requires you to show that "failure to consider the claims [that are procedurally defaulted] will result in a fundamental miscarriage of justice."[423] Although the Supreme Court has not clearly defined a fundamental miscarriage of justice, the Court in *Schlup v. Delo*, suggested that this exception requires a petitioner to persuade the court of his "actual innocence."[424] If you use this exception, you are claiming that you are innocent, and that ignoring the procedural default and addressing your constitutional claim is necessary to avoid the especially serious injustice of leaving a person in prison for a crime they did not commit.[425]

To demonstrate this kind of miscarriage of justice, you must present new evidence showing you are innocent. This evidence must go beyond the evidence presented at trial, and the new evidence must be admissible under the Federal Rules of Evidence. [426] You must show that no reasonable juror, if

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[420] *See* 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).

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

[422] *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). For more examples where courts have found "prejudice to exist," see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.3c (2022).

[423] *See* 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).

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

[425] 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 the habeas statute 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.

[426] *See* Schlup v. Delo, 513 U.S. 298, 327–328, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836–837 (1995). However, persuasive evidence of actual innocence that may not have been admissible under state law at your trial *may* be considered by the court in considering this claim. *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).

presented with this new evidence, would likely have convicted you.[427] If you can convince the federal habeas court that you are innocent as defined by this standard, that court then will address your claims, even if they are procedurally defaulted, in order to avoid a "manifest miscarriage of justice."

The fundamental miscarriage of justice exception also 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*.[428] 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.[429] Keep in mind that this especially narrow 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. 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.[430]

G. Defense to a Federal Habeas Claim: Harmless Error

1. General

If a federal habeas court reaches the merits of your constitutional claims, and if the court finds that a claim you raise is valid and that a constitutional violation occurred, the court still may deny relief on the claim if the state or government claims and the court concludes that you were not *actually* harmed by the violation. This is called the "harmless error" rule. If the court finds that the violation did not cause you "actual prejudice," it will conclude that the error was harmless and will not grant habeas relief. [431] The requirements for establishing that a constitutional violation is harmless are discussed below.

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[427] 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 § 2254(d)'s higher standard of review does *not* apply in cases where there is a claim of actual innocence.

[428] *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).

[429] *See* 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* Atwood v. David Shinn, 36 F.4th 834, 837 (9th Cir. 2023) (citing Thompson v. Calderon, 151 F.3d 918, 923–924 (9th Cir. 1998) that Sawyer was subsumed by the habeas statute); *In re Richardson*, 802 Fed. Appx. 750, 758 (4th Cir. 2020) (citing that the "judge-fashioned" actual innocence exception of *Sawyer* did not survive in the habeas statute); 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 habeas statute was revised, 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*).

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

[431] 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 involving people convicted of federal crimes to determine whether a *non-constitutional* error was harmless. In *Brecht*, the court applied the *Kotteakos* test to all, including *constitutional*, violations. *See* Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

(a) The State Must Clearly and Timely State that an Error Was Harmless

A federal habeas court will not automatically consider whether a constitutional violation it has found is harmless. Because harmless error is a "defense" to habeas relief, the federal habeas court will not consider that question unless the state or government has affirmatively come forward and said that the violation was "harmless error."[432] If the state or government does not raise the harmless error issue in a *clear* and *timely* manner, that defense is "waived" (lost), and the court will grant your relief based on the violation. Generally, the state or government is required to raise the "harmless error" defense in its response to your habeas petition.[433] Because, however, it is very likely that the state or government will raise this defense, you usually should explain in your own petition how the error harmed you, for example, by showing how it affected the jury's or a judge's decision-making process in your case.

2. Standard for Determining Whether an Error was "Harmless"

To determine whether a constitutional error was harmless, courts generally ask whether the error "had a substantial and injurious effect or influence in determining the jury's verdict" (or the judge's verdict, if your case guilt was found by a judge instead of a jury).[434] In other words, the court will ask whether the error substantially influenced the decision that you were guilty, either by keeping you from defending yourself or by convincing them of your guilt. If the court finds that the violation did have that effect, it will likely grant habeas relief. If, on the other hand, the court finds that the error had only a "slight effect" on the guilty verdict in your case, no relief will be granted.[435] (If your claim is that the sentence imposed in your case, not the guilt determination, was unconstitutional, this same standard applies to the determination that you deserved the sentence imposed in your case.)

The state or government "bears the burden" of demonstrating that the error was harmless.[436] This means that, if the state or government cannot convince the judge that the error was harmless, federal habeas relief must be granted if a violation is found. The key question is how certain the federal habeas judge must 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 a "possibility" that the error did not affect the outcome of your case (which would be a very easy standard for the state to meet) to a requirement of proof "beyond a reasonable doubt" that the error was harmless (a very difficult standard for the state to meet). In *Davis v. Ayala*, the Supreme Court notes that it is *not* enough for the state to show that there was a "reasonable possibility" that the error made no difference (was harmful).[437] On the other hand, it is *not* necessary for the state to prove that the error was harmful beyond a reasonable doubt.[438]

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[432] *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).

[433] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 31.2 (2022) (citing Miller v. Stovall, 608 F.3d 913, 926–27 (6th Cir. 2010)) ("Joining other courts that have considered the question, we now hold that a [s]tate waives harmless error when it fails to raise the issue in its response to the habeas petition in federal district court.").

[434] Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 1711 (1993); *See also* Reiner v. Woods, 955 F.3d 549, 561–562 (6th Cir. 2020) ("[I]t's important to reiterate what *Brecht* and *O'Neal* require, and what they do not. 'The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.', *citing O'Neal*, 513 U.S. at 438).

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

[436] *See* 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.")

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

[438] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 31.2 (2022).

Instead, the Court has ruled that an error is not harmless if it had a "substantial and injurious effect" on the outcome of the case, and any "grave doubt" on the court's part about its being harmless requires the court to find that the error was not harmless and grant relief.[439] In other words, if the judge is unsure whether the error changed the outcome but believes there is a serious chance that it did, the state has not met its burden of proof of proving that the error was harmless, and the court must grant relief.[440] 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 "possibility" that the error was harmful) will not be sufficient.

(a) Factors To Be Considered

Judges may consider various factors when making a harmless error determination, including the following:[441]

(1) The nature and seriousness of the right you claim has been violated;
(2) How likely it is that violations of the right you are claiming affected the jury's decision;
(3) How serious a crime and potential penalty were involved;
(4) The phase of the trial that was affected by the error;
(5) The seriousness of the legal violation in your case;
(6) The centrality of the legal error to the case (how big of a role the erogenous action 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, and whether the absence of that evidence misled the jury about the facts;
(9) Whether there were multiple errors and, if so, the total effect of the errors; and
(10) Whether the court failed to give "curative instructions" or to take other remedial measures to prevent the error from substantially affecting the jury's deliberations.[442]

If the violation resulted in the jury hearing evidence that should not have been admitted, the court will also consider:

(1) Whether and how forcefully the prosecutor emphasized the improper evidence in closing argument or the judge emphasized it in jury instructions;
(2) Whether the issue on which the evidence was admitted was central to the prosecutor's case; and
(3) What other, proper evidence was admitted on the same point and how strongly that evidence supported the prosecutor's case or your defense.

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[439] *See* 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).

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

[441] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 31.4 (2022).

[442] 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 2023, however, no court has found for a defendant based on these details.

3. Examples of Errors Found NOT to Be "Harmless"

Below are examples of errors that courts have found to be harmful (that is, cases where petitioners won relief because the court concluded that the errors harmed them). Keep in mind that courts may not rule that all errors like those listed below are harmful; the facts of your case (including the factors listed above) are different. Courts have found errors to be *not harmless* (that is, have allowed the petitioner to win relief) when:

(1) The defense attorney represented two defendants charged with possession of the same drugs even though the two defendants had conflicting interests: each defendant was able to argue that the other defendant possessed the drugs, and a single attorney could not credibly make both conflicting claims at once.[443]

(2) A juror lied about his background in order to be selected to serve on the jury and made numerous comments that called into doubt the juror's objectivity.[444]

(3) The trial court erroneously allowed testimony from a co-petitioner about his understanding of the petitioner's knowledge of fraudulent behavior even though (1) the witness did not have personal knowledge of the fact to which he testified, (2) the testimony was "vitally important" to the "central disputed issue" in the case, and (3) the government's overall case was weak."[445]

(4) The district court erroneously admitted a child's out-of-court statements to a doctor when there was no evidence that (1) the child was told the need for truthful revelations, (2) that the child knew she had been brought to the doctor for a medical diagnosis, or (3) that the child understood the doctor's role as a doctor. [446]

(5) When testimony admitted in violation of the Confrontation Clause was an essential basis for the jury's decision.[447]

(a) Examples of Structural Errors Found Not To Be "Harmless"

A small set of constitutional violations affect such important aspects of the trial process that courts assume that those errors *always* harm the petitioner. These violations are said to be "structural errors" that are "*per se* [that is automatically or always] prejudicial."[448] If this kind of violation occurred in your case, the state or government is not allowed to show that the error was harmless as a way to avoid a grant of habeas relief.[449] Structural errors include:[450]

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[443] 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").

[444] 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).

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

[446] United States v. Sumner, 204 F.3d 11821186–1187 (8th Cir. 2000).

[447] Orlando v. Nassau County District Attorney's Office, 915 F.3d 113, 130 (2d Cir. 2019), *cert. denied*, 2020 U.S. LEXIS 2814 (U.S. 2020).

[448] 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: that when ineffective assistance of counsel is so bad aso to deprive them of the right to appeal, it is a *per se* prejudicial.); 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).

[449] *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[s] the framework within which the trial proceeds, rather than simply…error[s] in the trial process.").

[450] 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.

(1) total denial of the right to counsel;[451]
(2) denial of the right to an impartial judge;[452]
(3) unlawful discrimination in the grand jury selection process;[453]
(4) denial of the right to self-representation at trial;[454]
(5) denial of the right to a public trial;[455]
(6) flawed jury instructions on the requirement that they find the defendant guilty beyond a reasonable doubt;[456] and possibly
(7) the prosecution's knowing presentation of or failure to correct perjured testimony.[457]

Although the courts do occasionally find that a structural error has occurred, these cases are fairly rare. Therefore, you should always state in your petition how you suffered actual harm, even if you believe that a structural error occurred.[458]

H. Successive Petitions

1. Overview

If you already have filed a first federal habeas corpus petition, and if the court rejected the claims in that petition and "denied" your petition or "dismissed" your petition "with prejudice," then you very likely will not be permitted to file a second federal habeas corpus petition. More specifically, you almost never can raise the *same* claim in a second federal habeas corpus petition as one you raised in a first

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[451] 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).

[452] *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).

[453] 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 Black people were systematically excluded from the grand jury that indicted him).

[454] 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.").

[455] Waller v. Georgia, 467 U.S. 39, 48–49, 104 S. Ct. 2210, 2216–2217, 81 L. Ed. 2d 31, 39–40 (1984) (holding that the closure of an entire suppression hearing to the public violated the defendant's right to a public trial).

[456] 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, 1833, 144 L. Ed. 2d 35, 46 (1999) (listing structural errors subject to automatic reversal: (1) 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).

[457] Some courts have added one other type of structural error as to which prejudice need not be provided: when the prosecution knowingly presented or failed to correct perjured testimony in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). *See, e.g.*, Rosencrantz v. Lafler, 568 F.3d 577, 589 (6th Cir. 2009) (leaving open the question whether the admission of perjured testimony qualifies as structural in the sense that it "affect[ed]affected the framework within which the trial proceeds.")") (citation omitted) (internal citations omitted), *cert. denied* 130 S. Ct. 2401. Other courts, however, have refused to treat this kind of violation as "structural" or "*per se* prejudicial" and do require the petitioner to prove prejudice. *See, e.g.*, Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005) (requiring proof of prejudice as a result of the admission of perjured testimony and issuing the writ after concluding that the perjured testimony in the case prejudiced the petitioner); United States v. Spivack, 376 Fed. App'x 144, 145 (2d Cir. 2010) (finding that a reversal is only warranted if the prosecutorial misconduct makes the trial so unfair that it raises due process questions).

[458] 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.").

federal habeas petition and that the first habeas court rejected "on the merits" (which means that the court considered the claim and decided that it was not valid).[459] There are a few—very few—instances when you may bring *new* claims in a second habeas petition that you did not include in a first federal habeas petition that was "denied" or "dismissed with prejudice," But these instances are very limited. Overall, the rule is that you get only *one full chance* at federal habeas corpus review and relief. It is very difficult to convince a court that your case is within an exception to that rule and to allow you to bring a "second" or (what is often called) a "successive" federal petition. For that reason, it is very important that your first habeas petition contain every claim for relief against your conviction and sentence that may possibly apply in your case and that your petition refer to every legal argument you can think of and all of the facts and evidence you can possibly come up with to support those claims. The statute barring successive petitions except in rare circumstances was meant to be harsh, and it is.[460]

Everything that was just said applies, however, only if your first federal habeas petition was considered by the court and rejected "on the merits," after which that court "denied" your petition or "dismissed" it "with prejudice." Sometimes, however, a court instead will "dismiss" your habeas corpus "*without prejudice*"—that is, without actually considering and deciding your claims against you. This may happen, for example, because you filed the federal habeas petition too soon, or your petition was inadequate for some procedural reason and has to be done over and refiled. In that case, you may later refile what will count as your *first* petition. The following are situations in which federal habeas corpus courts will allow you to refile a petition and count it as your "first" petition and will not reject it as an improper "second" or "successive" petition:

(1) If you file a federal habeas corpus petition that is "dismissed" or "dismissed without prejudice" because you have not yet exhausted your state remedies, you will be allowed to refile the petition in federal court after you have exhausted your state remedies. In that case, your refiled petition is treated as your "first" petition and is not considered improperly "successive."[461]

(2) If you file a federal habeas corpus petition that the court rejects at the start because you failed to pay the filing fee, or you failed to file a statement saying you are unable to pay the fee, or because your petition was written using the wrong form, you will be allowed to refile the petition once you have corrected that problem. Your refiled petition will be treated as your "first" petition and will not be considered "successive."[462]

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[459] 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. It is a good idea to read the text of 28 U.S.C. § 2244 in full to understand better 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 because that person had not made a motion in the court of appeals for an order authorizing the district court to consider a "second or successive" habeas application). *See also* Banister v. Davis, 140 S. Ct. 1698, 1702 (2020) (holding that a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) in a § 2254 case is not a second or successive habeas petition).

[460] *See* Felker v. Turpin, 518 U.S. 651, 654, 116 S. Ct. 2333, 2335, 135 L. Ed. 2d 827, 834 (1996) (finding new restrictions on successive habeas corpus petitions to be constitutional).

[461] *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 corpus 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(6), "Exhaustion of State Remedies for Persons Incarcerated for State Convictions," of this Chapter for more information on exhaustion.

[462] *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").

(3) If you are a federally incarcerated person and you file a petition calling it a "Section 2255" motion when it actually is a "Section 2241" motion that challenges the execution, not the validity, of your sentence, the court will allow you to refile another motion with the correct label. Your refiled motion will be treated as your "first" petition and will not be considered "successive."[463]

(4) If you file a federal habeas corpus petition and win relief against your conviction or your sentence, and if you then go back for a new trial and you are convicted and sentenced again, you may challenge your *new* judgment of conviction and sentence in a new federal habeas petition. This is because you get one chance to bring a federal habeas corpus petition challenging every "judgment" of conviction and sentence. In this case, because you got a new judgment of conviction and sentence from the trial court after your first judgment was overturned, you are allowed to bring a new federal habeas corpus petition challenging that new judgment.[464] (In this case, however, if you are convicted in state court, you will have to exhaust your state remedies on the second judgment of conviction and sentence before filing a federal habeas corpus petition.) Note, however, that if you brought a habeas petition challenging both your conviction and sentence, and if you won habeas relief only on your sentence, but not on your conviction, then after you are resentenced, you may file a new habeas petition challenging your new sentence, but any claims included in that petition that challenge your conviction will be treated as "successive' (because your initial conviction remains intact), and the court almost surely will refuse to address additional claims challenging your conviction.

2. Procedure for Filing Successive Petitions

Before filing a successive petition, you must make a motion in the federal court of appeals for an order authorizing the district court to consider the successive petition.[465] The successive petition must also be filed within the statute of limitations.[466] You should take the following steps:

(1) First, prepare the motion and the petition. You should prepare the habeas corpus petition itself, the "Petition for Habeas Corpus Relief," and the "Motion for Leave to File Petition."

(2) Then, the applicant must "file in the court of appeals a motion for leave to file a second or successive habeas application in the district court."[467] If you accidentally file it in district

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[463] *See* Chambers v. United States, 106 F.3d 472, 474–475 (2d Cir. 1997). See Section 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.

[464] *See, e.g.*, Magwood v. Patterson, 561 U.S. 320, 338–339, 130 S. Ct. 2788, 2800–2801, 177 L. Ed. 2d. 592, 607 (2010) (holding that a new petition was not successive, because it was challenging a new judgment, imposed after retrial following a successful habeas corpus petition; the petition was not successive even though the petitioner could have made, but did not make, the same claim in his first petition); *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);). *See also* Panetti v. Quartermann, 551 U.S. 930, 947, 127 S. Ct. 2842, 2854, 168 L. Ed. 2d 662, 678 (2007) (holding that a claim of incompetency to be executed can be raised in a subsequent petition without triggering the habeas statute's successive petition rules, even if the claim was not raised in the first petition and dismissed at that time as premature), *following* Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S. Ct. 618, 140 L. Ed. 2d 849 (1998).

[465] 28 U.S.C. §§ 2244(b)(3)(A).

[466] This may be 180 days (for states that opt-in to certain habeas provisions) or one year (the general statute of limitations applied to federal post-conviction review. 28 U.S.C. §§ 2255, 2263. *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 28.3(d) (2022).

[467] In 2004, the Rules Governing Section 2254 Cases in the United States District Courts and the Rules Governing Section 2255 Proceedings for the United States District Courts were amended to "reflect provisions in the Antiterrorism and Effective Death Penalty Act of 1996, . . . which now require a petitioner [or Section 2255 movant] to obtain approval from the appropriate court of appeals before filing a second or successive petition [or Section 2255 motion]." Advisory Committee Notes to Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts ("2004 Amendments"). *Accord* Advisory Committee Notes to Rule 9 of the Rules Governing Section 2255 Proceedings for the United States District Courts ("2004 Amendments"). *See* Rule 9 of

court, ask the district court to transfer the motion to the court of appeals. In that event, you should not withdraw the petition, and you should try to convince the district court not to dismiss it and instead to transfer it to the court of appeals.

(3) Next, the court of appeals will refer the motion for leave to file to a three-judge panel. The panel has 30 days to decide whether the application makes a *prima facie* [i.e., a reasonable] showing that the application satisfies the habeas statute's substantive standard for filing a "second or successive petition."[468]
   (a) If the judges authorize the filing of the petition, the district court will then examine each of the application's claims to see if they satisfy the statute's substantive standards for successive petitions.
   (b) If the judges do not authorize filing of the petition, then there are not many options left. The habeas statute prohibits the filing of a "petition for rehearing."[469] You may be able to file an original habeas corpus petition in the Supreme Court,[470] but you will have to meet the very high standard of "exceptional circumstances' justifying the issuance of the [original] writ." In addressing an "original petition," the Supreme Court will also apply the statutes' very narrow standard for allowing successive petitions.

3. Standards for Filing "New Claim" Successive Petitions

The habeas statute bars second and successive petitions raising the *same* claim as a prior habeas petition that was denied on the merits. There are no exceptions.

In very rare instances, federal courts will allow a petitioner to file a second or "successive" petition that raises a *new* claim that was not raised in the first petition for federal habeas relief. In these rare instances, as described above, you must first file a motion in the proper federal court of appeals asking for authorization to file a second petition and establishing that your case falls within the very limited exceptions in which second petitions are allowed.[471] The situations in which "new claim" successive petitions are different for people convicted in state court from those available to people convicted in federal court.

If you were convicted by a *state* court, the following are the two exceptions to the general prohibition on successive petitions:

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the Rules Governing Section 2254 Cases in the United States District Courts (as amended, effective December 1, 2004) ("Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. §§ 2244(b)(3) and (4).")

[468] 28 U.S.C. § 2244(b)(3)(D).

[469] *See, e.g.*, In re Baptiste, 828 F.3d 1337, 1339–1340 (11th Cir. 2016) (noting that while the statute bars petitions for rehearing, the court can decide sua sponte to rehearing a decision). A petitioner may also be able to "suggest" to the court a rehearing is necessary. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 28.3(d) nn. 126–127 (2022).

[470] Felkin v. Turner, 518 U.S. 651, 659–660 (1996) (holding that the habeas statute did not strip from the Supreme Court the power to entertain original habeas corpus petitions). However, the habeas statute does not allow for Supreme Court review court of appeals decisions about successive or second petitions by "a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

[471] 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). When a court of appeals is deciding on a motion for authorization to file a second or successive petition, it may decide only whether there is *prima facie* evidence that the petition satisfies the habeas statute's substantive standard for filing a successive petition; the court may not consider the constitutional merits of the claims in the petition, possible exhaustion of state remedies problems, procedural defaults, and other bases for denying the petition. *See* Turner v. Baker, 912 F.3d 1236, 1240–1241 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 306 (2019) (holding that in reviewing an application for a second or successive habeas petition, "we do not assess the cognizability of that petition.") (citations omitted).

(1) Your new claim rests on a "new" and previously unavailable rule of constitutional law that the Supreme Court has deemed to apply retroactively "to cases on collateral appeal."[472] This exception applies only if the Supreme Court has recently clarified or made a rule of constitutional law on which your successive petition relies, and the Court has stated that the new decision applies even to cases that the state courts finally decided before the Court announced its new rule. See Part D(i)(c) of this Chapter, "New Laws: The *Teague* Rules." Because the Supreme Court rarely declares new decisions to be retroactive, this exception almost never applies.

(2) Your new claim relies on facts that you could not have discovered earlier, even with "due diligence."[473] Additionally, these facts combined with the other facts already on the record establish by "clear and convincing"[474] evidence that "but for"[475] the constitutional error that you are challenging, no reasonable juror would have found you guilty of the offense with which you were charged.[476] See Part F(B)of this Chapter, "Exception 2: Fundamental Miscarriage of Justice." This exception also is exceptionally narrow and rarely applies.

If you were convicted by a *federal* court, the following are the two exceptions to the general prohibition on successive petitions:

(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.[477] 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.[478] Again, however, the Supreme Court only rarely declares new decisions to be retroactive.

(2) The combination of the "newly discovered evidence" with other facts on the record provides "clear and convincing" evidence that, in the absence of a trial court's error, the jury would have found you not guilty.[479] This, too, is a very narrow exception.

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

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[472] 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.").");

[473] 28 U.S.C. § 2254(e)(2)(A)(ii). "Due diligence" means "good effort." *See, e.g.*, In re Wogenstahl, 902 F.3d 621, 626, 628–629 (6th Cir. 2018) (holding that petitioner made a *prima facie* showing of meeting the "new evidence" standards through repeated efforts shown over the years on record, and because of *Brady* violations).

[474] "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. *See, e.g.*,. In re Wogenstahl, 902 F.3d 621, 626, 628–629 (6th Cir. 2018).

[475] "But for," in this context, means "without."

[476] 28 U.S.C. § 2254(e)(2)(B).

[477] 28 U.S.C. § 2255(h)(2).

[478] 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 B(1) "Which Laws Apply to Federal Habeas Corpus," of this Chapter for more information on when people in federal prison should bring § 2241 petitions.

[479] 28 U.S.C. § 2255(h)(1).

get something wrong or if you do not follow a procedural rule correctly, that may be the end of the road for your petition.

I. Post Trials and Appeals

1. Post-judgment, Pre-appeal Proceedings in the District Court

(a) Overview[480]

This Section outlines what to do if the federal district court in which you filed your habeas denies relief on some or all its claims. Once that court's judgment is entered announcing its final decision, you have two choices: (1) You can seek rehearing or a new trial from the district court, or (2) you can appeal to a federal court of appeals. You are not required to seek rehearing or a new trial before appealing the judgment, so you should make this decision based on your personal circumstances.[481] You should weigh the likelihood of convincing the district court to grant you a rehearing or new trial and to change its mind about why it denied your relief ("given the courts' decision" and its accuracy[482]) against the importance of obtaining appellate review sooner. Any motion for a rehearing or a new trial will delay your appellate proceedings.

These posttrial motions that you are permitted to file in the district court arise under Rules 59 and Rule 52(b) of the Federal Rules of Civil Procedure and are called a "Motion for a New Trial"[483] (under Rule 59(b), a "Motion to Alter or Amend" the district court's judgment under Rule 59(e),[484] or a "Motion to Amend (or Make Additional) Findings"[485] (under Rule 52(b)). You can choose to file more than one of these three motions at once.[486]

The next three Subsections discuss these post-judgment, pre-appeal options. All Rule 59 and 52(b) motions will toll (i.e., pause) the time limit you have to appeal the district court's judgment against

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480 *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 34.1 (2022).

481 *See* FED. R. CIV. P. 59(a) ("The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court . . . .").

482 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 34.1 (2022).

483 FED. R. CIV. P. 59(b).

484 FED. R. CIV. P. 59(e); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 34.2 (2022). *See, e.g.*, Banister v. Davis, 140 S. Ct. 1698, 1702–1703, 207 L. Ed. 2d 58, 64–6503 (2020) ("Rule 59(e) applies in federal civil litigation generally. (Habeas proceedings, for those new to the area, are civil in nature.). . . . The Rule enables a party to request that a district court reconsider a just-issued judgment. . . . Rule 59(e) allows a litigant to file a 'motion to alter or amend a judgment.' . . . The Rule gives a district court the chance 'to rectify its own mistakes in the period immediately following' its decision. . . . In keeping with that corrective function, 'federal courts generally have [used] Rule 59(e) only' to 'reconsider[ ] matters properly encompassed in a decision on the merits.' . . . In particular, courts will not address new arguments or evidence that the moving party could have raised before the decision issued. . . . The motion is therefore tightly tied to the underlying judgment."); Barnett v. Roper, 904 F.3d 623, 628–630, 633 (8th Cir. 2018) (court of appeals (1) rejects, as unpreserved, state's challenge to district court's partial grant of prisoner's Rule 59(e) motion, which requested that district court "amend its judgment on the rule 60(b) motion and grant a hearing on the claims presented."" . . . and (3) affirms district court's denial of state's subsequent Rule 59(e) motion to alter or amend judgment granting habeas corpus relief); *See also, e.g.*, In re Franklin, 832 Fed. Appx. 340, 340–341 (5th Cir. 2020) (*per curiam*) (relying on *Banister v. Davis*, *supra*, to hold that district court erred in treating Section 2255 movant's Rule 60(b) motion—which actually was Rule 59(e) motion because "motion was filed within the 28-day period following the entry of judgment during which a Rule 59(e) motion may be filed"—as "successive § 2255 motion, and transferring it to this court for authorization [for filing of successive motion]": "Accordingly, the district court's transfer order is VACATED, and the case is TRANSFERRED back to the district court for further proceedings consistent with this opinion. Franklin's motion for authorization to file a successive § 2255 motion is DENIED as moot, and his motion for a COA is DENIED as unnecessary.").

485 FED. R. CIV. P. 52(b).

486 For example, you can file both a Rule 52(b) motion and a Rule 59 motion for a new trial at the same time. FED. R. CIV. P. 52(b).

you to the court of appeals.[487] Once the court decides on your Rule 59 or 52(b) motion, the time to appeal the district court's judgment begins running again. You must, however, file one of these motions within 28 days after the district court issues its final ruling and judgment. If you file a motion more than 28 days later, it will *not* toll the time for appeal, and you likely will have to file your appeal before the district court issues a ruling on your motion.[488]

(b) Motion for a New Trial (Rule 59(b))

If you decide that you want to move for a new trial, the procedure is described in Rule 59(b) of the Federal Rules of Civil Procedure.[489] The motion must be filed no later than 28 days after the entry of the judgment.[490] This timeline cannot be altered.

(c) Motion to Amend (Rule 52(b))

If you decide you would like to move for the court to amend or make additional findings, you can find the procedure described in Rule 52(b).[491] The motion must be filed no later than 28 days after the entry of judgment.[492]

If you decide you would like to move to alter or amend your judgment, the procedure is described in Rule 59(e). This is called a "Motion to Alter or Amend."[493] The motion must be filed no later than

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[487] *See* FED. R. APP. P. 4(a)(4)(A).

[488] *See, e.g.*, Browder v. Director, 434 U.S. 257, 264–265, 267, 268–272, 98 S. Ct. 556, 561–565, 54 L. Ed. 2d 521, 531, 533–536 (1978) (*untimely* rehearing motion does not toll time for appeal).

[489] FED. R. CIV. P. 52(a)–(b), 59. *See* Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts (Civil Rules "may be applied" in habeas corpus proceedings, "to the extent that they are no inconsistent with any statutory provisions or . . . [Habeas] rules"). The court *sua sponte* "may order a new trial for any reason that would justify granting one on a party's motion" as long as the court acts no later than 28 days after entering judgment. FED. R. CIV. P. 59(d). Once any party files a timely Civil Rule 59 motion, the court, "[a]fter giving the parties notice and an opportunity to be heard . . . may grant a timely motion for a new trial for a reason not stated in the motion." *Id. See* Advisory Committee Note to 1966 Amendment to *id. See also* FED. R. CIV. P. 52(b) ("On a party's motion filed no later than 28 days after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly."); *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 34.2 (2022).

[490] FED. R. CIV. P. 59(b); *see also* FED. R. CIV. P. 6(a) (outlining the method of counting days to determine whether the strict 28-day limit has passed).

[491] FED. R. CIV. P. 52(b). ("On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.").

[492] FED. R. CIV. P. 52(b).

[493] FED. R. CIV. P. 59(e); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 34.2 (2022) (discussing the motion to alter or amend). *See, e.g.*, Banister v. Davis, 140 S. Ct. 1698, 1702–1703, 207 L. Ed. 2d 58, 64–65 03(2020) ("Rule 59(e) applies in federal civil litigation generally. (Habeas proceedings, for those new to the area, are civil in nature.). . . . The Rule enables a party to request that a district court reconsider a just-issued judgment. . . .... Rule 59(e) allows a litigant to file a 'motion to alter or amend a judgment.' . . . The Rule gives a district court the chance 'to rectify its own mistakes in the period immediately following' its decision. . . . In keeping with that corrective function, 'federal courts generally have [used] Rule 59(e) only' to 'reconsider[ ] matters properly encompassed in a decision on the merits.' . . . In particular, courts will not address new arguments or evidence that the moving party could have raised before the decision issued. . . . The motion is therefore tightly tied to the underlying judgment."); Barnett v. Roper, 904 F.3d 623, 628–63030, 633 (8th Cir. 2018) (court of appeals (1) rejects, as unpreserved, state's challenge to district court's partial grant of prisoner's Rule 59(e) motion, which requested that district court "amend its judgment on the rule 60(b) motion and grant a hearing on the claims presented."" . . . and (3) affirms district court's denial of state's subsequent Rule 59(e) motion to alter or amend judgment granting habeas corpus relief); *See also, e.g.*, In re Franklin, 832 Fed. Appx. 340, 340–341 (5th Cir. 2020) (*per curiam*) (relying on *Banister v. Davis*, *supra*, to hold that district court erred in treating Section 2255 movant's Rule 60(b) motion—which actually was Rule 59(e) motion because "motion was filed within the 28-day period following the entry of judgment during which a Rule 59(e) motion may be filed"—as "successive § 2255 motion, and transferring it to this court for authorization [for filing of successive motion]": "Accordingly, the district court's transfer order is VACATED, and the case is TRANSFERRED back to the district court for further proceedings consistent with this opinion. Franklin's motion for authorization to file a successive § 2255 motion is DENIED as moot, and his motion for a COA is DENIED as unnecessary.").

28 days after the entry of judgment.[494] A motion to amend can be filed for almost any reason, but here are a few grounds:

- Errors in law or fact of the court's decision[495]
- Errors of procedure or evidence[496]
- Clerical mistakes (a mistake in the preparation, assembly, or submission of documents)[497]
- Mistake, "inadvertence" (accident), surprise, or excusable neglect on the part of the moving party[498]
- Newly discovered evidence
- Fraud, misrepresentation, and other misconduct by the opposing party [here, the state or government][499]
- Any factor rendering the judgment void[500]
- Any other reason that justifies relief[501]
- Any reason for which a rehearing has been granted in a suit in equity in federal court[502]

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[494] FED. R. CIV. P. 59(e).

[495] *See* McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (*en banc*) (*per curiam*), *cert. denied*, 529 U.S. 1082 (2000) (in habeas corpus, as in other, proceedings, Rule 59(e) motion may be used to "'correct manifest errors of law or fact upon which the judgment is based'" (quoting 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2810.1 (2d ed. 1995))). As to errors of fact, see also FED. R. CIV. P. 52(b). *But cf.* FED. R. CIV. P. 61 ("No error in either the admission or the exclusion of evidence and no error or defect in . . . anything done or omitted by the court or by any of the parties is ground for [reconsideration of any kind] . . . unless refusal to take such action appears . . . inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

[496] *See Browder v. Director*, 434 U.S. 257, 266, 98 S. Ct. 556, 561–562, 54 L. Ed. 2d 521, 532 & n.10 (1978) (denial of hearing is proper basis for reconsideration).

[497] *See* FED. R. CIV. P. 60(a); Advisory Committee Note to Fed. R. Civ. P. 60 (any Rule 60 ground for relief may also be brought under 59(e)).

[498] *See* FED. R. CIV. P. 60(b); Advisory Committee Note to FED. R. CIV. P. 60 (any Rule 60 ground for relief may also be brought under 59(e)). *See also* Pioneer Inves. Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 394–395, 113 S. Ct. 1489, 1497–1498, 123 L. Ed. 2d 74, 88–89 (1993) (describing limitations on "excusable neglect" as basis for reconsideration).

[499] *See* FED. R. CIV. P. 60(b); Advisory Committee Note to FED. R. CIV. P. 60 (any Rule 60 ground for relief may also be brought under 59(e)). Motions on the ground of fraud, misrepresentation, or other misconduct by the opposing party are allowed under Rule 60(b) within a reasonable time not more than one year after judgment entered. However, the motion will not toll time for appeal unless filed within 28-day time limit. FED. R. CIV. P. 60(c)(1).

[500] *See* FED. R. CIV. P. 60(b)(4), 60(b)(6) (motions on last two grounds in text allowed within reasonable time after judgment entered; motion will not toll time for appeal, however, unless filed within 28-day time limit); Advisory Committee Note to FED. R. CIV. P. 60 (any Civil Rule 60 ground for relief also may be raised in Civil Rule 59 motion filed within 28-day time limit).

[501] *See* FED. R. CIV. P. 60(b); Advisory Committee Note to FED. R. CIV. P. 60 (any Rule 60 ground for relief may also be brought under 59(e)). *See also* Pioneer Inves. Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 393–395, 113 S. Ct. 1489, 1497–1498, 123 L. Ed. 2d 74, 88–89 (limitations on reconsideration for "any other reason justifying relief from the operation of the judgment"); McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 ("'Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion.'" (quoting 11 CHARLES ALAN WRIGHT ET AL., Federal Practice and Procedure § 2810.1 (2d ed. 1995))).

[502] *See* FED. R. CIV. P. (59)(a).

Keep in mind, however, that this motion is not realistically available to you in some federal circuits (as of 2022, those circuits are the Fifth Circuit[503] and Ninth Circuit[504]), which have ruled Rule 59(e) motions must meet the nearly impossible-to-meet requirements for successive petitions. Other circuit courts (as of 2022, these are the Third Circuit,[505] Sixth Circuit,[506] and Seventh Circuit[507]) have held that Rule 59(e) motions are exempt from the successive petition limitations, permitting you to file Rule 59(3) motions in those circuits. (The rule that applies in the other circuits is unclear.)

(d) Motion for Relief from a Judgment (Rule 60)[508]

There is one other post-judgment, pre-appeal motion you might consider, which is a Rule 60 Motion for Relief from a Judgment or Order. In limited circumstances, this motion may be filed *after* the 28-day limit, but no more than a year after the entry of the district court's judgment.[509] A Rule 60 motion for relief from judgment is a request made to the court for correcting a mistake in the judgment and can be based on grounds similar to those for a Rule 59(e) motion. If the motion is based on a clerical error, you should make the motion under Rule 60(a).[510] If the motion is based on the mistake, inadvertence, surprise, or excusable neglect on the part of the moving party,[511] newly discovered

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[503] *See, e.g.*, Uranga v. Davis, 893 F.3d 282, 284 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1179, 203 L. Ed. 2d 216 (2019) (holding that the habeas corpus petitioner's postjudgment Rule 59(e) motion was not "unauthorized successive § 2254 application" "under *Gonzales* [*v. Crosby*]" because the petitioner "did not seek to add a new ground for relief" or attack the merits of the judgment, but "asserted that a previous ruling (the denial of his motion for leave to amend) which precluded a merits determination was in error," which is "an attack of an alleged defect" in his § 2254 proceeding); Williams v. Thaler, 602 F.3d 291, 303–304 (5th Cir. 2010),.), *cert. denied*, 562 U.S. 1006, 131 S. Ct. 506, 178 L. Ed. 2d 376 (2010) (notwithstanding "differences [that] exist between Rule 59(e) and Rule 60(b)," court concludes that "Rule 59(e) gives rise to concerns similar to those the Supreme Court addressed in *Gonzalez* [*v. Crosby*]," and holds that "[w]e will therefore apply the *Gonzalez* framework to determine whether we should construe [Rule 59(e) motion] . . . as a second or successive habeas petition, and thus subject to the habeas statute's additional jurisdictional requirements."). In sum, the Fifth Circuit asks the question of whether the Rule 59(e) motion is attacking the substance of the federal court's judgment, and if the answer is yes, applies the requirements of the habeas statute's successive petition. *See, e.g.*, Bernard v. United States, 820 Fed. App'x 309, 311 (5th Cir. 2020), *cert. denied*, 141151 S. Ct. 504, 208 L. Ed. 2d 484 (2020) (construing appellant's Fed. R. Civ. P. 60(b)(6) motion for relief from judgment as a successive § 2255 motion and dismissing it without prejudice). The Fifth Circuit includes Louisiana, Texas, and Mississippi.

[504] *See* Rishor v. Ferguson, 822 F.3d 482, 492–493 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2213, 198 L. Ed. 2d 661 (2017) ("Rule 59(e) motion that raises entirely *new* claims should be construed as a second or successive habeas petition subject to the habeas statute's restrictions. A Rule 59(e) motion raises a 'new claim' when the motion seeks to add a ground for relief not articulated in the original federal habeas petition, presents newly discovered evidence, or seeks relief based on a subsequent change in the law. In contrast, a timely Rule 59(e) motion that asks the district court to 'correct manifest errors of law or fact upon which the judgment rests' should not be construed as a second or successive habeas petition."). Therefore, if your 59(e) motion raises entirely new claims, then it will be subject to the successive petition requirements. The Ninth Circuit includes Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Hawaii.

[505] Blystone v. Horn, 664 F.3d 397, 415 (3d Cir. 2011) (holding "that a timely Rule 59(e) motion to amend or alter a judgment is not a second or successive petition, whether or not it advances a claim, and therefore such a motion lies outside the reach of the jurisdictional limitations that the habeas statute imposes upon multiple collateral attacks."). The Third Circuit includes Delaware, New Jersey, Pennsylvania, and the Virgin Islands.

[506] Howard v. United States, 533 F.3d 472, 475 (6th Cir. 2008) (stating that "Because a Rule 59(e) motion only 'operates to suspend the finality of the [district] court's judgment,' . . . it is not a collateral action . . . . [E]xtending the holding of *Gonzalez* to Rule 59(e) motions would attribute to Congress the unlikely intent to preclude broadly the reconsideration of just-entered judgments."). The Sixth Circuit includes Kentucky, Michigan, Ohio, and Tennessee.

[507] Curry v. United States, 307 F.3d 664, 665 (7th Cir. 2002), *cert. denied*, 538 U.S. 989 (2003) (holding that a Rule 59(e) motion is not "affected by the statutory limitations on successive collateral attacks on criminal judgments" because "such a motion does not seek collateral relief"; "filed as it must be within 10 days of the judgment, it suspends the time for appealing"). The Seventh Circuit includes Illinois, Indiana, and Wisconsin.

[508] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 34.3 (2022).

[509] FED. R. CIV. P. 60(C).

[510] FED. R. CIV. P. 60(a).

[511] FED. R. CIV. P. 60(b)(1).

evidence,[512] fraud, misrepresentation, other misconduct by the opposing party,[513] a void judgment,[514] or any other reason that justifies relief,[515] it should be made under Rule 60(b).

It is important to note that a Rule 60 motion will *only* toll the time for appeal if it is filed within 28 days of the district court's entry of final judgment. This 28-day provision is similar to the one that applies to Rules 52(b) and 59. Because a Rule 60 motion is about the same as a Rule 59(e) motion, what it gives you that you cannot get from a Rule 59 or Rule 52(a) motion is the ability to file a post-judgment motion *after* you have appealed to the court of appeals, in circumstances in which you find a new basis for relief from the district court judgment after more than 28 days have passed since the district court's judgment.

Except in that situation, however, it is preferable to file a Rule 59(e) motion within 28 days of the district court's judgment, rather than relying on Rule 60. This is true for several reasons. First, although Rule 60 applies in habeas corpus cases, a Rule 60 Motion may qualify as a successive petition, in which case you will have to show that the very narrow circumstances in which successive petitions are allowed are present.[516] Second, a Rule 60 motion does *not* toll the time for appealing the original judgment, which means it is essentially the same as a Rule 59 motion.[517] Third, the denial of a Rule 60 motion[518] is reviewed by the court of appeal for "abuse of discretion."[519] Review for abuse of discretion is a very deferential standard of review, which means the district court's decision is unlikely to be overturned. The last reason Rule 59 motions are preferable to Rule 60 motions is that some courts have held that a "district court temporarily loses jurisdiction to consider a [] Rule 60 motion" while waiting for an appeal to be decided, "when jurisdiction over the case lies with the court of appeals."[520] This means the court will no longer consider your Rule 60 motion once you file your appeal.

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[512] FED. R. CIV. P. 60(b)(2) (". . . the court may relieve a party or its legal representative from a final judgment . . . for . . . newly discovered evidence, that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).").

[513] FED. R. CIV. P. 60(b)(3).

[514] FED. R. CIV. P. 60(b)(4).

[515] FED. R. CIV. P. 60(6).

[516] *See* Gonzalez v. Crosby, 545 U.S. 524, 538, 125 S. Ct. 2641, 2651, 162 L. Ed. 480, 496 (2005) (holding that a "Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction. . . . [If the motion] attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings, . . . [the motion] is not to be treated as a successive habeas petition. ").

[517] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 34.3 (2022) ("Civil Rule 60 motions").

[518] Appealing a Rule 60 motion has several obstacles. The motion has to be appealed within 30 days from when the court's acts upon your motion. You must also secure a certificate of leave to appeal, which is called a "certificate of appealability". *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 34.3 (2022) ("Civil Rule 60 motions"). *See, e.g.*, Bracey v. Superintendent, 986 F.3d 274, 282 (3d Cir. 2021) (noting that a "COA is required when a petitioner appeals the denial of a Rule 60(b) motion seeking reconsideration of a dismissal of a habeas petition, even if that dismissal was on procedural grounds"); Torres v. United States, 833 F.3d 164, 164–165 (2d Cir. 2016) (*per curiam*) (finding that a "COA is required to appeal a district court's denial of a Rule 60(d) motion when the underlying order denied § 2255 relief"; "Our conclusion comports with the practice of the other Circuits that have addressed the issue.").

[519] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 34.3 nn. 24–27 (2022).

[520] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 34.3 (2022) (discussing the reasons why Civil Rule 59 motions are preferable to Rule 60 motions). *See, e.g.*, Williams v. Woodford, 306 F.3d 665, 683 (9th Cir. 2002) (stating that "Once Williams filed his notice of appeal of the district court's judgment denying his habeas corpus petition, the district court lost jurisdiction over the petition . . . . To seek Rule 60(b) relief during the pendency of an appeal, ' "the proper procedure is to ask the district court whether it wishes to entertain the motion, or to grant it, and then move this court, if appropriate, for remand of the case." ' "); Burdine v. Johnson, 87 F. Supp. 2d 711, 716–717 (S.D. Tex. 2000) (finding that state's Rule 60(b) motion to stay conditional relief order is denied because order is already on appeal).

2. Appeals

(a) Overview

If you filed a petition for habeas corpus in federal district court and your petition is denied, you may appeal to the appropriate United States Court of Appeals (also called the circuit court).[521] Because the habeas statute severely restricts the opportunity to file a second or successive petition for habeas relief, this appeal is by far your best remaining chance to secure habeas relief, so it is important that you follow the appeal rules correctly. You must file a notice of appeal in the district court within 30 days of the district court judgment.[522]

(b) Notice of Appeal (Timing and Form)

To start an appeal, you must file a notice of appeal in the district court within 30 days of the district court judgment.[523] You must be sure to file on time because it is unlikely the circuit court will grant an extension.[524]

(c) Certificate of Appealability

You do not, however, assure yourself of an appeal simply by filing a notice of appeal. In other words, you do not have an automatic right to appeal a denial of your habeas petition. In order to appeal, you also (in addition to filing a notice of appeal) must ask for permission to appeal by obtaining a "certificate of appealability."[525] You do this by filing an application for a certificate of appealability with your notice of appeal in district court.[526] If the district court denies your request for a certificate of appealability entirely, you may request one from the appeals court by filing an application for a certificate of appealability with the appeals court's clerk.[527] If the district court grants a certificate for only some of your claims, you may ask the court of appeals to extend the certificate of appealability to apply to additional claims that the district court did not include.[528] In order to obtain a certificate of appealability as to any particular claim you would like to raise on appeal, you must convince the district court or the court of appeals that you have made a "substantial showing of the denial of a

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[521] 28 U.S.C. § 2253(a).

[522] 28 U.S.C. § 2107(a); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35 (2022) ("Initiating the Appeal").

[523] 28 U.S.C. § 2107(a); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.2 (2022) (discussing how to select the issues to include in your brief to the appellate court).

[524] 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, 764–767 (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.

[525] 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).

[526] 28 U.S.C. § 2253.

[527] 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). *See also* Gonzalez v. Thaler, 565 U.S. 134, 135, 132 S. Ct. 641, 644, 181 L. Ed. 2d 619, 626 (2012) (construing § 2253 as permitting appellate review of a denial of habeas corpus relief even if the certificate-of-appealability-issuing judge fails to specify on which issues the certificate is granted).

[528] *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).

constitutional right" as to that claim.[529] To meet this standard and obtain certificate of appealability, you do not have to show that your appeal will surely succeed. Nor does this inquiry require full consideration of the factual or legal bases presented in support of the claim.[530] What you must show, however, in order to get a certificate of appealability on a particular claim is that reasonable judges could *debate* whether the district court should have resolved the claim in question differently—or, put another way, that reasonable judges could disagree with the district court's ruling.[531] The inquiry does not which makes getting a certificate of appealability a bit easier.

(d) How to Select Claims/Issues for Appeals[532]

In your application for a certificate of appealability, you must specify the issue or issues on which you wish to appeal, and make a "substantial showing of the denial of a constitutional right" in regard to each such claim.[533] Be sure to ask for a certificate of appealability on every issue that you want to appeal. Your appeal will be limited to those issues on which the certificate is granted.

Some of the issues that federal courts have concluded in the past are "appealable" issues" are listed below. Keep in mind, however, that the court will rule on your application for a certificate of appealability based not only on the type of legal claim involved but also on the strength of the evidence supporting each such type of claim. So, you cannot be sure that you will be granted a certificate as to legal claims you raise that are similar to those listed below.

(1) Did the trial court deny you the right to confront witnesses?[534]
(2) Did the prosecutor commit a *Brady* violation by withholding information about blood-testing evidence that might have exonerated the petitioner?[535]
(3) Did the prosecutor commit a *Brady* violation by withholding witness statements at trial that were favorable to your case?[536]
(4) Was your confession coerced by police beatings?[537]
(5) Was your trial counsel constitutionally ineffective?[538]

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[529] 28 U.S.C. § 2253(c)(2).

[530] *See* Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039, 154 L. Ed. 931, 950 (2003) (explaining that "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.").

[531] *See* Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034, 154 L. Ed. 2d 931, 944 (2003) (stating that "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.").

[532] *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.2 (2022).

[533] 28 U.S.C. § 2253(c)(3).

[534] *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.").

[535] *See* 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).

[536] *See* 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).

[537] *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).

[538] *See* Part D(9)(b) ("Standards and Tests for Claims of Violations") of this Chapter for more information on ineffective assistance of counsel.

If your petition was denied or dismissed for procedural reasons, for example, a procedural default[539] or a failure to exhaust state remedies.[540] A certificate of appealability will be granted only if reasonable judges could debate or disagree about (1) whether you have demonstrated that a constitutional violation occurred in regard to the claim affected by the district court's procedural ruling, and (2) whether the district court correctly dismissed your petition on that procedural ground.[541]

(e) Ancillary Appellate Proceedings: How to Be Appointed Counsel on Appeal

If the district court appointed a lawyer to represent you either under 18 U.S.C. § 3599 in a capital case[542] or under the Criminal Justice Act in a noncapital case,[543] that lawyer is required to represent you throughout your federal habeas appeals.

If you do not yet have counsel, the court of appeals may appoint counsel to represent you on appeal.[544] The court of appeals will follow the same standards as the district court when appointing counsel. In general, a court of appeal might agree to provide you with counsel if you show (1) that you are financially unable to obtain one yourself and (2) that the "interests of justice" require the court to do so.[545] See Part C ("Obtaining Counsel") above for a discussion of those standards.

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[539] *See* Part F(1) ("Defense to a Habeas Corpus Claim: Procedural Default") for a discussion of procedural default.

[540] *See* Part H(1) ("Successive Petitions") of this Chapter for more information on failure to exhaust.

[541] *See* 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).

[542] 18 U.S.C. § 3599(a)(2) (formerly 21 U.S.C. § 848(q) (2000)) ("In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)").

[543] Criminal Justice Act, 18 U.S.C. § 3006A(c) ("A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court though appeal, including ancillary matters appropriate to the proceedings.").

[544] *See* Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts ("These rules do not limit the appointment of counsel under [18 U.S.C.] § 3006A at any stage of the proceeding."); Rule 8(c) of the Rules Governing Section 2255 Proceedings in the United States District Courts (same).

[545] *See, e.g.*, Criminal Justice Act, 18 U.S.C. § 3006A(c) ("If at any stage of the proceedings, including an appeal, the United States magistrate judge or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate."). Rule 48 of the Federal Rules of Appellate Procedure permits the court of appeals to appoint a special master when necessary to resolve factual questions on ancillary matters such as eligibility for appointment of appellate counsel or the level of compensation of such counsel. *See* Advisory Committee Note to FED. R. APP. P. 48 (rule permits appointment of special master when a "question before a court of appeals requires a factual determination," including in regard to "application for fees or eligibility for Criminal Justice Act status"; "when factual issues arise in the first instance in the court of appeals, such as fees for representation on appeal, it would be useful to have authority to refer such determinations to a master for a recommendation"). *See, e.g.*, Houston v. Lack, 487 U.S. 266, 268–271, 108 S. Ct. 2379, 2381–2382, 101 L. Ed. 2d 245, 250–252 (1988) (discussing circuit court's appointment of counsel to brief and argue difficult jurisdictional issues); Hawkins v. Lynaugh, 844 F.2d 1132, 1134 (5th Cir. 1988), *cert. denied*, 488 U.S. 900 (1988) (requiring a competency hearing to assure defendant could proceed without a lawyer on appeal); Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986) (appellate court appoints counsel in remand order, because the petitioner faced death sentence and the appellate court's holdings placed the case in "different posture" and increased the complexity and difficulty that the petitioner would be facing); Heath v. United States Parole Comm'n, 788 F.2d 85, 88 (2d Cir. 1986) (appointment of counsel in post-conviction proceedings in noncapital cases is a "matter that rests within the discretion of the appeals court").

(f) The Record on Appeal[546]

In order for the court of appeals to review the district court's decision, it must have access to the record of prior proceedings. On appeal, "the record" shall consist of "the original papers and exhibits filed in the district court," "the transcript of proceedings, if any" in the district court, and "a certified copy of the docket entries prepared by the district clerk."[547] Your local appeals courts rules may impose more detailed requirements.[548] The governing district court rules may also tell you what to do in the event that (for some reason) the relevant records are unavailable, incomplete, or in error.[549] The parties may agree to limit the record on appeal to only particularly important materials in the district court record.[550]

The "original papers and exhibits filed in the district court" will include all or parts of the record of the prior state court proceedings in the case, including the trial record and transcript, briefs and opinions on direct appeal, and the trial and appellate record of any state post-conviction proceedings (such as the post-judgment, pre-appellate motions discussed in Part H(a)(i) ("Post-judgment Pre-appeal Proceedings in the District Court).[551] The district court record may also include "deposition transcripts, the products of other discovery devices, or other documentary or physical evidence the parties submitted [to the district court] at an evidentiary hearing or upon motion to expand the state court record."[552] A habeas corpus appeal requires that the district court clerk forward to the appellate court: (1) the record; (2) a certificate of appealability (or a statement of the district court's reasons for denying a certificate);[553] (3) an order granting the petitioner leave to proceed *in forma pauperis*[554] on appeal (or a statement of the district court's reasons for denying such an order);[555] and (4) a record of

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[546] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.1(a) (2022) (discussing in summary the record on appeal). This treatise provides a very thorough and clear explanation of the process for creating the record on appeal and how to enlarge it when necessary, so the majority of language was pulled from this section.

[547] FED. R. APP. P. 10(a) ("Composition of the Record on Appeal."); *see also* FED. R. APP. P. 30, 32. The record may also be part of the of the appendix to the appellate briefs, if permitted by local rules. FED. R. APP. P. 30 ("Appendix to the Briefs"); FED. R. APP. P. 32 ("Forms of Briefs, Appendices, and Other Papers"); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.2 n.10 (2022) (discussing case law in which part of the record was included in the appendix to the brief).

[548] *See, e.g.*, 7TH CIR. R. 10(a) (specifying items that "will not be included in a record unless specifically requested by a party by item and date of filing within fourteen days after the notice of appeal is filed or unless specifically ordered by th[e] court").

[549] *See, e.g.*, FED. R. APP. P. 10(c) ("Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript is Unavailable"); FED. R. APP. P. 10(d) ("Agreed Statement as the Record on Appeal"); FED. R. APP. P. 10(e) ("Correction or Modification of the Record").

[550] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.1(a) (2022). (explaining that the parties could agree not to include the portion on jury selection if it is not relevant).

[551] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 19.4, 19.5 (2022) (discussing discovery and expansion of the records in habeas corpus cases).

[552] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.1(a) (2022) (discussing in summary the record on appeal). *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 19.5 (discussing expansion of the record and prehearing fact-development procedures).

[553] FED. R. APP. P. 22(b); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.4 (2022) (discussing the certificate of appealability).

[554] This is a Latin term that refers to the ability of an in indigent person to proceed in court without payment of the usual fees associated with a lawsuit or appeal. *In forma pauperis*, BLACK'S LAW DICTIONARY (9th ed.). See Chapter 22 of the JLM for a discussion of the *in forma pauperis* process.

[555] FED. R. APP. P. 24(a)(2); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.3 (2022) (discussing filing fees for indigent appellants).

any action by the district court on its own or the petitioner's motion for appointment of counsel and bail pending appeal.[556]

If an evidentiary hearing was held in your case, you may want the record on appeal to contain all or parts of the transcript of that hearing. If so, you must ask *the court reporter* to prepare the transcript within 14 after filing your notice of appeal or the court's decision on a post-judgment, pre-appeal motion that you filed under FED. R. CIV. P. 52(b), 59 or 60(b). It is often easier to request the entire copy of a transcript, as opposed to an excerpt.[557] A copy of your written request for a transcript must be filed with the clerk of the district court (as well as with the court reporter) within the same 14-day period.[558] Although failing to file the within 14 days rule will not cause automatic dismissal of your appeal, it may still subject you to a range of sanctions (penalties imposed by the court). This could include exclusion of materials from the appellate record (which would limit the arguments you may make on appeal) or dismissal of your appeal.[559] You also *must* serve the state with a copy of the written request for a transcription of the district court proceedings. If you ordered the entire transcript, you do not need to do anything else.

Requesting transcripts costs money to pay the court reporter for the time and effort needed to prepare the transcript. When you request transcription, you must "make satisfactory arrangements with the reporter for paying the cost of the transcript." If you cannot pay the fee, you may ask the court to pay this cost under the Criminal Justice Act.[560] To do so, you must (1) secure permission from the court to proceed *in forma pauperis* (literally, "as a poor person") on appeal, and (2) state in the transcript request that "the cost of the transcript is to be paid by the United States under the Criminal Justice Act." If you do not satisfy these requirements, you will receive a costly bill covering the cost of the transcript.[561]

The Federal Rules of Appellate Procedure require[562] the district court clerk to transmit the following materials "promptly"[563] to the clerk of the court of appeals:

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[556] FED. R. APP. P. 23(b), 23(d); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 36.4 (2022) (discussing release on recognizance or surety, particularly pending post judgment adjudication, including appeal of habeas corpus relief).

[557] FED. R. APP. P. 10(b)(1)(A). "Within 14 days after filing the notice of appeal or [after] entry of an order disposing of the last timely remaining motion [under FED. R. CIV. P. 50(b), 52(b), or 59 or under FED. R. CIV. P. 60(b) if the motion was filed no later than 28 days after entry of judgment] . . . , whichever is later, the appellant must . . . order from the [court] reporter a transcript of such parts of the [district court] proceedings not already on file as the appellant considers necessary." *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 34.2, 34.3 (2022) (discussing motions under FED. R. CIV. P. 50(b), 52(b), 59, 60(b)). Appellate Rule 10(b)(1)(A) makes this requirement "subject to . . . local rule[s] of the court[s] of appeals." FED. R. APP. P. 10(b)(1)(A). *See, e.g.*, 11TH CIR. R. 10-1 & Internal Operating Procedure (setting forth local requirements for ordering transcripts).

[558] FED. R. APP. P. 10(b)(1)(A)(iii). Note that even if you don't plan to order a transcript for your appeal, you must still "file a certificate stating that no transcript will be ordered." FED. R. APP. P. 10(b)(1)(B). This certificate must also be served to the appellee (in criminal cases, usually the state) within 14 days. FED. R. APP. P. 10(b)(3)(A).

[559] FED. R. APP. P. 3(a)(2) ("An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.").

[560] In noncapital cases (cases that don't have the death penalty), requests for financial assistance should be made under the Criminal Justice Act by showing three things. You must show that you need help paying for the transcript, you are financially unable to pay the cost of transcript, and "the interests of justice so require." 18 U.S.C. §§ 3006A(a) & (e).

[561] For example, in the Southern District of New York, an ordinary transcript of 100 pages (delivered within thirty (30) days), will cost $402 ($4.02 per page), and an additional copy to each party will cost $90.00 ($ .90 per page). *Court Reporting and Transcripts*, U.S DISTRICT COURT: SOUTHERN DIST. OF N.Y., *available at* https://www.nysd.uscourts.gov/court-reporters (last visited Sep. 29, 2023).

[562] The Federal Rules of Appellate Procedure may be modified by local appeals courts rules or by action of the parties. FED. R. APP. P. 11(c) ("Retaining the Record Temporarily in the District Court for Use in Preparing the Appeal"); FED. R. APP. P. 11(e) ("Retaining the Record by Court Order"); FED. R. APP. P. 11(f) ("Retaining Parts of the Record in the District Court by Stipulation of the Parties").

[563] FED. R. APP. P. 11(b)(2). *But cf.* FED. R. APP. P. 11(g) (if, before the record is sent, you or the state desires to ask the appeals court for dismissal, stay pending appeal, or other intermediate order, the district court clerk

- The notice of appeal you filed,[564]
- Your docket fee, or in cases in which you have asked to proceed *in forma pauperis* (status granted by the court to people with low incomes who cannot afford to pay court fees), the *in forma pauperis* application and the court's order either granting *in forma pauperis* status or denying it on the ground that "the appeal is not taken in good faith or that the appellant is not indigent,"[565]
- A certificate of appealability, or in cases which the district court denied the application for a certificate of appealability, a written statement of the court's reasons for denial,[566]
- The district court record of the case,[567]
- The transcript of the proceedings (assuming one is requested from the reporter and the reporter prepares it, unless the transcript already is part of the court record),[568]
- A copy of the docket sheet,[569] and
- Any other parts of the "record on appeal."[570]

If any party to the appeal discovers a document or other physical item that is "material to full and fair adjudication of the appeal and has been omitted from or not previously made part of the record,"[571] that party can follow procedures to enlarge the record to include the omitted item.[572] This refers to something that was originally part of the district court record but did not make it into the record on appeal.[573]

If, however, a party discovers that the materials that should have been but *never were included* in the district court record, the proper procedure will depend upon the stage at which the party learns of the omission. If you learn of the omission before notice of appeal is filed, you should make a motion in the district court to expand the record to include the missing material.[574] If you wait until after filing

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"must send the court of appeals any parts of the record designated by any party"). Note that in capital cases, you may seek expedited appellate procedures through use of Federal Rule of Appellate Procedure 11(g) ("Record for a Preliminary Motion in the Court of Appeals" which includes "any other intermediate order"). *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 36.2 (2022) (discussing stays of execution pending appeal, and using Appellate Rule of Procedure 11(g) to expedite transfer of the district court record to the court of appeals).

564 FED. R. APP. P. 3, 4; *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.2 (2022) (discussing the timing and form of the Notice of Appeal).

565 FED. R. APP. P. 3(e), 24(a); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.3 (2022) (discussing the filing fee of appeal and what happens in the case of low-income appellants).

566 28 U.S.C. § 2253; FED. R. APP. P. 22(b)(1). *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.4 (2022) (discussing the certificate of appealability).

567 FED. R. APP. P. 10(a)(1).

568 FED. R. APP. P. 10(a)(2).

569 FED. R. APP. P. 10(a)(3).

570 FED. R. APP. P. 10(a).

571 FED. R. APP. P. 10(e)(1) ("If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.").

572 "Enlargement" of the record is not the same as "expansion" of the record. Enlargement is the procedure for adding to the record at the appellate level that is used in both habeas and non-habeas appeals. Expansion is a particular procedure for habeas corpus petitions to add to the record at the district court level. FED. R. APP. P. 10(e) ("Correction or Modification of the Record"); *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.1b (2022) ("Enlargement"). *See also* FED. R. APP. P. 27 (motions practice).

573 This situation is where something "material to either party is omitted from or misstated in the record by *error or accident*, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded . . . on stipulation by the parties; . . . by the district court before or after the record has been forwarded; or . . . by the court of appeals." FED. R. APP. P. 10(e)(2) (emphasis added).

574 U.S.C.S. Sec. 2254 Cases R. 7. *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 19.5 (2022) (discussing the expansion of the record for habeas corpus cases and noting that "courts may abuse their discretion by failing to utilize [Habeas Rule 7, the rule governing expansion of the record] in compelling circumstances").

the notice of appeal to act, Appellate Rule 10(e) requires that a motion seeking enlargement of the record on appeal be made to the court of appeals (instead of the district court).[575] Appeals courts do not routinely permit enlargement of the appellate record,[576] particularly when there is reason to believe that a party is making the same factual case in the appellate court that it already did or could have made in the district court.[577] But appellate courts will allow enlargement of the record in some circumstances.[578]

To justify enlarging the appellate court, you must demonstrate that: (1) the information you want to be included is "material"[579] to (meaning that it has an important bearing on) an issue on appeal; (2)

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[575] FED. R. APP. P. 10(e)(3) ("All other questions as to the form and content of the record must be presented to the court of appeals.").

[576] *See, e.g.*, Abdullah v. Norris, 18 F.3d 571, 573 n.3 (8th Cir. 1994) (denying motion to supplement record with state crime lab report because report is irrelevant to petitioner's claims); Knox v. Butler, 884 F.2d 849, 852 n.7 (5th Cir. 1989) (refusing to take judicial notice of census data because petitioner offered no reason for failing to present evidence to district court); Berry v. Lockhart, 873 F.2d 1168, 1171 n.6 (8th Cir. 1989) (expressing "misgivings about the propriety of [the state's] attempt to inject new evidence into the record on appeal" but finding it unnecessary to rule on the issue because new evidence did not affect decision). *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.1(b) n.35 (2022) (citing the aforementioned cases and more cases from the Ninth and Seventh Circuits).

[577] *See* Baker v. Estelle, 711 F.2d 44, 46 (5th Cir. 1983) (finding that despite significant effort by the state, the record of the district court was unable to be reproduced, and the appellant made no effort to produce the portion of his record pertinent to his habeas claim [that was based on insufficiency of evidence], nor explained why he could not produce it; furthermore, at the Federal Rule of Appellate Procedure 10(c) hearing to reconstruct the evidence, the appellant "neither objected nor offered any proposed amendments for the statement of evidence;" therefore appellant's assertion that his habeas corpus petition had insufficient evidence is not persuasive).

[578] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.1(b) n. 37 (2022); *See, e.g.*, Dobbs v. Zant, 506 U.S. 357, 358 (1993) (*per curiam*) (holding that the court of appeals erred in rejecting habeas corpus petitioner's motion to supplement record on appeal with sentencing transcript; "[w]e have emphasized before the importance of reviewing *capital* sentences on a complete record") (emphasis added); Abdulrafi v. Lockyer, 121 Fed. Appx. 226, 228 (9th Cir. 2005) (granting appellant's motion to supplement record on appeal with state post-conviction petition, "which was erroneously omitted from the state court record before the district court . . . [and which] shows that a request for an evidentiary hearing was made in state court" and thus, shows that the appellant "diligently sought to develop the factual record in state court"); United States v. Kennedy, 225 F.3d 1187, 1192 (10th Cir. 2000) (agreeing "with the Eleventh Circuit [of *Ross v. Kemp*] that, under some circumstances, we [the appellate court] have an inherent equitable power to supplement the record on appeal"); Reid v. Oklahoma, 101 F.3d 628, 630–631 (10th Cir. 1996) (granting motion to supplement record with additional documents from district court file; court will not, however, enlarge record to include materials unavailable to district court nor will it compel opposing party to produce documents); Jones v. White, 992 F.2d 1548, 1566–1568 (11th Cir. 1993) (granting petitioner's motion to supplement the record on appeal with transcript of evidentiary hearing in another case in which experts testified in district court about statewide administration of Alabama's habitual felony offender act, due to the appellate court's "inherent equitable powers . . . to supplement the record with information not reviewed by the district [court]" and "unique appellate powers [available] in the context of habeas corpus actions under 28 U.S.C. § 2254(a)"); Lesko v. Lehman, 925 F.2d 1527, 1538 n.8 (3d Cir. 1991) (appellant ordered to submit affidavit from trial counsel regarding plea negotiations and advice to appellant in order "[t]o clarify the record"); Fiumara v. O'Brien, 889 F.2d 254, 258 n.3 (10th Cir. 1989) (granting appellant's rehearing petition and ordering "record enlarged to include evidentiary documents relied on by the Parole Commission, and then the district court, [which] were not designated in the record and therefore could not be reviewed"); Byrne v. Butler, 845 F.2d 501, 513 n.10 (5th Cir. 1988) (deciding to consider a new affidavit because it did not affect the ultimate decision and doing so would forestall need for successive habeas corpus action seeking to introduce affidavit); Ross v. Kemp, 785 F.2d 1467, 1477 (11th Cir. 1986) (remanding a motion to supplement the record with instructions to the district court to conduct a hearing on the threshold issue of inexcusable neglect); Gibson v. Blackburn, 744 F.2d 403, 405 n.3 (5th Cir. 1984) (enlarging the record on appeal to avoid prolonging case in district court, because to do so would be "contrary to both the interests of justice and the efficient use of judicial resources"); Dickerson v. Alabama, 667 F.2d 1364, 1367 n.5 (11th Cir. 1982) (noting that the "appellate court's inherent equitable powers [include the ability] to supplement the record as justice requires"); Grigsby v. Mabry, 637 F.2d 525, 527–528 (8th Cir. 1980) (holding that supplementation of the record was allowed, because the petitioner did not receive full and fair state or district court hearing, and therefore remanded for hearing on new materials). *See also* Vicks v. Bunnell, 875 F.2d 258, 259–260 (9th Cir. 1989) (holding that reversal of the denial of habeas corpus relief and remand was required when the district court could not properly have resolved the habeas corpus claim without reviewing state court transcripts that were not before district court).

[579] "Material" means the missing information is essential and important to proving your case, or to the state's defenses.

the you were not "inexcusably neglectful" in failing to introduce the items into the record at the district court level; and (3) the "interests of justice and efficient use of judicial resources" support supplementation.[580] Occasionally, motions to enlarge the record will be followed by remands of the case back to the district court. On remand, the district court will then consider whether and how to admit the missing information from the record.[581]

(g) Standard of Review in Appeals (Law and Fact)

(i) *Review of the Law*

The standard of review on appeal refers to the deference or respect that an appellate court gives to a lower court's decision. In habeas corpus appeals, appellate courts review district court rulings on questions of law[582] and "mixed" legal-factual questions[583] "*de novo*," meaning that the court of appeals makes its own independent judgment of the issue without giving any special weight to the district court rulings. This level of review applies to the merits of your constitutional claims and to the district court's treatment of the legal and mixed factual/legal aspects of the state's procedural defenses (such as non-exhaustion, non-retroactivity, procedural default, *Stone v. Powell*, and harmless error).[584]

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[580] Ross v. Kemp, 785 F.2d 1467, 1475–1478 (11th Cir. 1986) (outlining the test for supporting enlargement of the record that a party must show). *Accord* United States v. Kennedy, 225 F.3d 1187, 1191–1192 (10th Cir. 2000) (quoting and agreeing with the approach of the 11th Circuit in *Ross v. Kemp*); Jones v. White, 992 F.2d 1549, 1567 (11th Cir. 1993). *See* Dobbs v. Zant, 506 U.S. 357, 358–359, 113 S. Ct. 835, 835–836, 122 L. Ed. 2d 103, 106–109 (1993) (holding that the court of appeals erred in rejecting the habeas corpus petitioner's motion to supplement the record on appeal with the sentencing transcript, because the sentencing transcript was obviously relevant to the issue on appeal and the transcript was omitted largely because of state's erroneous representation that sentencing phase closing arguments were not available); Gibson v. Blackburn, 744 F.2d 403, 405 n.3 (5th Cir. 1984) (finding that the court of appeals has the authority to supplement the record, even for materials not originally available to the district court). *Cf.* Howard v. Lewis, 905 F.2d 1318, 1325 (9th Cir. 1990) (denying a motion to supplement the record because the documents were not relevant to issues on appeal).

[581] *See, e.g.*, Vicks v. Bunnell, 875 F.2d 258, 259–260 (9th Cir. 1989); Ross v. Kemp, 785 F.2d 1467, 1477 (11th Cir. 1986) (remanding motion back to district court to supplement the record with instructions to conduct a hearing on the issue of inexcusable neglect); Grigsby v. Mabry, 637 F.2d 525, 529 (8th Cir. 1980) (supplementation allowed because petitioner did not receive full and fair state or district court hearing, and therefore remanding for hearing on new materials).

[582] *See, e.g.*, Elder v. Holloway, 510 U.S. 510, 516, 114 S. Ct. 1019, 1023, 127 L. Ed. 2d 344, 351 (1994) (direct review decision) ("question[s] of law … must be resolved *de novo* on appeal"); Ellsworth v. Levenhagen, 248 F.3d 634, 638 (7th Cir. 2001); Mincey v. Head, 206 F.3d 1106, 1131 (11th Cir. 2000), *cert. denied*, 532 U.S. 926 (2001); Barrett v. Acevedo, 169 F.3d 1155, 1165 (8th Cir.) (*en banc*), *cert. denied*, 528 U.S. 846 (1999) ("We review the district court's legal conclusions *de novo*."); Kurzawa v. Jordan, 146 F.3d 435, 439 (7th Cir. 1998); Williams v. Singletary, 78 F.3d 1510, 1512 (11th Cir.), *cert. denied*, 519 U.S. 887 (1996) ("case involves an issue of law, which we review *de novo*"); McGeshick v. Fiedler, 3 F.3d 1083, 1087 (7th Cir. 1993) ("question of whether testimony given at two different times was consistent" is question of law, not fact, that is reviewed *de novo* by court of appeals). For more case examples, *see* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.3(a) n.4 (2022).

[583] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 686, 698, 104 S. Ct. 2052, 2063, 2070, 80 L. Ed. 2d 674, 692, 700 (1984); Guidry v. Dretke, 397 F.3d 306, 327 (5th Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006) ("The district court's … conclusions of law and rulings on mixed issues of law and fact … [are reviewed] *de novo*."); Robertson v. Cain, 324 F.3d 297, 301 (5th Cir. 2003) ("Mixed questions of law and fact, such as the district court's assessment of harmless error, are … reviewed *de novo*."); Ellsworth v. Levenhagen, 248 F.3d 634, 638 (7th Cir. 2001); Mincey v. Head, 206 F.3d 1106, 1131 (11th Cir. 2000) ("We review *de novo* . . . the district court's resolution of … mixed questions of law and fact.").

[584] *See, e.g.*, Elder v. Holloway, 510 U.S. 510, 516, 114 S. Ct. 1019, 1023, 127 L. Ed. 2d 344, 351 (1994) (holding that in section 1983 context, the question of "[w]hether an asserted federal right was clearly established at a particular time . . . presents a question of law, not one of 'legal facts.' . . . . [and] must be resolved de novo on appeal."); Belot v. Burge, 490 F.3d 201, 206–207 (2d Cir. 2007), *cert. denied*, 552 U.S. 1190 (2008) (explaining that, in a court of appeals' review of district court's ruling on whether to grant equitable tolling of statute of limitations, "[t]he operative review standard in the end will depend on what aspect of the lower court's decision is challenged. If a district court denies equitable tolling on the belief that the decision was compelled by law, that the governing legal standards would not permit equitable tolling in the circumstances—that aspect of the decision should be reviewed *de novo*. . . [I]f the decision to deny tolling was premised on a factual finding, the factual finding should be reviewed for clear error. Finally, if the court has understood the governing law correctly, and has based its decision on findings of fact which were supported by the evidence, but the challenge is addressed to

(ii) *Review of the Facts*

When reviewing factual judgments, the courts of appeals give substantial deference to the district court's findings of fact, and will not overturn the district court's findings unless those findings are "clearly erroneous."[585] A finding is clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[586] The appellate court may conclude that a finding is clearly erroneous even if there is "there is some evidence to support it,"[587] The "clearly erroneous" standard gives considerable deference or respect to the district court's findings of fact.

There are three exceptions to the "clearly erroneous" rule of deference for factual findings: (1) when the legal issues at stake are so new, unformed, or otherwise in need of appellate elaboration that a greater than usual appellate role in the application of fact to law is required;[588] (2) when the district

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whether the court's decision is one of those within the range of possible permissible decisions, then appellate review will be . . . for abuse of discretion."); Kittelson v. Dretke, 426 F.3d 306, 315 (5th Cir. 2005) (*per curiam*) ("We review whether a habeas petitioner's claims have been procedurally defaulted *de novo*."); Morris v. Dretke, 413 F.3d 484, 491 (5th Cir. 2005) ("This Court reviews *de novo* the legal question of whether a federal habeas petitioner has exhausted state court remedies."); Insyxiengmay v. Morgan, 403 F.3d 657, 665 (9th Cir. 2005) (holding that a " 'district court's application of the habeas statute, as well as its conclusion that the standards set forth in the habeas statute are satisfied, is a mixed question of law and fact which we review *de novo*' "); Manning v. Foster, 224 F.3d 1129, 1132 (9th Cir. 2000) ("We review the district court's decision to dismiss the habeas petition for procedural default *de novo*."); Mincey v. Head, 206 F.3d at 1135 ("We review *de novo* the district court's conclusion . . . that Mincey procedurally defaulted his . . . claim."); Smallwood v. Gibson, 191 F.3d 1257, 1265 (10th Cir. 1999), *cert. denied*, 531 U.S. 833 (2000) ("We review *de novo* [*Stone v. Powell* issue] whether a petitioner had an opportunity for full and fair litigation of his or her Fourth Amendment claim in state court."); Lucas v. O'Dea, 179 F.3d 412, 416 (6th Cir. 1999) ("[W]e review the district court's decision applying the 'cause and prejudice' rules to the 'procedural bar' issues *de novo.*");"); Carson v. Burke, 178 F.3d 434, 436 (6th Cir. 1999) ("Whether the district court erred in dismissing this case based on the doctrine of laches involves mixed questions of law and fact, which are generally reviewed *de novo*."); Magirl v. Dorsey, 1999 U.S. App. LEXIS 8542, at *4 (10th Cir. May 5, 1999) ("The [*Stone v. Powell*] issue of whether a petitioner had a full and fair opportunity to litigate the [4th Amendment] claims in state court is a question this court reviews *de novo*."); Stokes v. Anderson, 123 F.3d 858, 859 (5th Cir. 1997), *cert. denied*, 522 U.S. 1134 (1998) ("We review *de novo* a district court's denial of federal habeas review based on a state procedural ground."); Cochran v. Herring, 43 F.3d 1404, 1408 (11th Cir. 1995),.), *modified*, 61 F.3d 20 (11th Cir. 1995), *cert. denied*, 516 U.S. 1073 (1996) ("The district court's holding that, under the facts of this case, the *Batson* claim is not procedurally barred is a mixed question of law and fact subject to de novo review by this court."); Macklin v. Singletary, 24 F.3d 1307, 1313 (11th Cir. 1994), *cert. denied*, 513 U.S. 1160 (1995) ("abuse of the writ doctrine presents objective, threshold questions involving the application of law to facts," which court of appeals "review[s] . . . *de novo.*").."). *See also* Teleguz v. Pearson, 689 F.3d 322, 329 (4th Cir. 2012) (vacating dismissal of habeas corpus petition and remanding to district court for further proceedings on petitioner's *Schlup v. Delo* claim of "actual innocence" because district court's "conclusory" rejection of claim "do[es] not provide sufficient analysis to enable us to review the reasons for, or scope of, the district court's denial of Teleguz's *Schlup* gateway innocence claim.");"); Dunlap v. United States, 250 F.3d 1001, 1007 n.2 (6th Cir. 2001),.), *cert. denied*, 534 U.S. 1057 (2001) ("[W]("here the facts are undisputed or the district court rules as a matter of law that equitable tolling [of the habeas statute's statute of limitations] is unavailable, we apply the de novo standard of review to a district court's refusal to apply the doctrine of equitable tolling; in all other cases, we apply the abuse of discretion standard.").").

[585] FED. R. CIV. P. 52(a) (federal courts' "[f]indings of fact . . . must not be set aside unless clearly erroneous.").). This "clearly erroneous" standard may also be called "clearly and convincingly erroneous. *See* Martha S. Davis, *A Basic Guide to Standards of Review*, 33 S.D. L. REV. 469, 476 (1988) (writing that this standard gives lower courts "substantial, but not total, deference"); United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948) (holding that the appellate court reverse only if they are left with "the definite and firm conviction that a mistake has been committed"). *See, e.g.*, Rust v. Zent, 17 F.3d 155, 161 (6th Cir. 1994) ("We review the district court's findings of fact supporting its determination of cause and prejudice for clear error."). *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 20.3d nn.72 & 73, § 31.4f (2022).

[586] United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948).

[587] United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948).

[588] *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 113–118, 106 S. Ct. 445, 451–454, 88 L. Ed. 2d 405, 412–416 (1985) (noting that in instances where an issue falls between a "pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."). *See also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 237 (1985) (discussing the difficult of classifying issues as questions of law, facts, or both).

court's "finding of fact . . . is predicated on a misunderstanding of the governing rule of law";[589] or (3) when, in arriving at the factfinding, the district court considered improper evidence, ignored or erroneously excluded material evidence, or otherwise tried the facts in an incomplete or unfair manner.[590] When one of these exception is present, the court of appeals must either remand the case to the district court for more fact-finding or make its own findings of fact on the issue. A case is more likely to be remanded for more district court findings if exception (2) or (3) is present. The appellate court is more likely to make its own fact findings if exception (1) is present in the case, the record is complete, and most of the critical historical fact questions have otherwise been properly addressed.[591]

Complications arise in cases involving people convicted by a state court when the federal district court makes findings on factual questions that previously were presented to the state courts at your trial, on your direct appeal, or during your state post-conviction proceedings (if any occurred in your case).[592] If the federal district court concludes that the state courts did not make any findings on a factual question important to your case, the district court must make its own findings on those factual questions. On appeal, the federal court of appeals will first decide whether it agrees with the federal district court that there are no state court findings of fact on the matter.[593] If the appeals court agrees

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[589] Bose Corp. v. Consumers Union, 466 U.S 485, 501, 104 S. Ct. 1949, 1959, 80 L. Ed. 2d 502, 517 (1984).

[590] *See, e.g.*, Magouirk v. Phillips, 144 F.3d 348, 363 (5th Cir. 1998) (reversing the district court's dismissal of claim of insufficiency of evidence, which was based "solely upon the rendition of the facts reported in the Louisiana Court of Appeal decision denying [the appellant]'s sufficiency claim on direct appeal," and noting that "[w]e [the court of appeals] are at a loss to understand how a federal habeas court can conduct a meaningful sufficiency review without a transcript of trial.").

[591] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.3(b) (2022). The following cases were all cited in the Hertz and Liebman's book in § 37.3(b), note 19. *See, e.g.*, Taylor v. Maddox, 366 F.3d 992, 1008–1009 (9th Cir.), *cert. denied*, 543 U.S. 1038 (2004) (holding that the court of appeals, after concluding that district court erred in applying presumption of correctness to state court factfindings that should have been found "unreasonable" under Section 2254(d)(2), makes new findings itself rather than remanding to district court because "petitioner is not seeking to introduce new evidence . . . [and] merely asks us to make findings . . . based on evidence presented to the state courts" and "[i]n such circumstances, we are no in no worse a position than the district court to make the findings" and "[g]iven that petitioner has already served over ten years of his sentence, we see no reason for further delay"); Lewis v. Dretke, 355 F.3d 364, 367–368 (5th Cir. 2003) (*per curiam*) (rejecting district court's finding that counsel had attempted to speak with family members about petitioner's background of abuse and that they were " 'not forthcoming' " and instead crediting family members' testimony that "counsel never spoke with any of them": "We are always reluctant to question a district court's factual finding when it is grounded in the credibility (or lack thereof) of a witness whom court hears and views in person but of whom we see nothing more than a cold record. Nevertheless, reversing such a call under review for clear error (much less *de novo*) is certainly not unheard of . . . . A careful reading of their testimony and supporting portions of the record leaves us with the clear belief that a mistake has been made."); Clark v. Crosby, 335 F.3d 1303, 1310–1312 (11th Cir. 2003), *cert. denied*, 540 U.S. 1155 (2004) (remanding the case to district court for an evidentiary hearing, because the district court erroneously predicated ruling on state court evidentiary hearing that did not adequately address pertinent facts); Griffin v. Camp, 40 F.3d 170, 174 (7th Cir. 1994) (remanding a case back to district court for "a more searching examination of the record consistent with this opinion" and for "clarification as to its factual findings and an explanation as to whether this affects its conclusions of law," because of "apparent inconsistencies" between district court's factual findings and the record); Zilich v. Reid, 36 F.3d 317, 321–323 (3d Cir. 1994) (remanding the case back to district court for an evidentiary hearing on missing facts, because district court improperly denied a hearing in the mistaken belief that facts never found by state courts could be gleaned from record).

[592] In the review of habeas corpus claims, federal district courts are essentially acting in an appellate role. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.1(b) (2022). *See, e.g.*, Self v. Collins, 973 F.2d 1198, 1204 (5th Cir. 1992), *cert. denied*, 507 U.S. 996 (1993) ("[I]f the district court has made factual findings that are based on an incorrect application of the [since superseded] § 2254(d) governing standard, those findings are not subject to the clearly erroneous standard of review. Thus, in reviewing the district court's factual findings for clear error, we must first determine whether it properly applied § 2254(d) in making them."); Lesko v. Lehman, 925 F.2d 1527, 1536 (3d Cir. 1991), *cert. denied*, 502 U.S. 898 (1991) (" 'Where, as here, a district court has denied a petition for habeas corpus without holding an evidentiary hearing, our review consists of . . . determin[ing] whether the petitioner has alleged facts that, if proved, would entitle him to relief[,] [and] . . . [i]f so, . . . whether an evidentiary hearing is necessary to establish the truth of the allegations' " (citation omitted)).

[593] If the appellate court "agrees with the district court that the state courts either did not make findings at all on a fact question material to the appeal or did not make findings of the sort or in a manner requiring deference from the federal courts, then the appellate court simply reviews the district court's substituted factfindings on

that no state court findings of fact were made on the relevant point, it will review the federal district court's factual findings by applying the "clearly erroneous" standard and will defer to the district court findings unless the appellate judges have a "definite and firm conviction that a mistake has been" made or unless one of the three exceptions to the "clearly erroneous" standard that are listed above is present.[594]

The rules are different if, instead, there *are* state court rulings on the matter. In that situation, federal district courts generally are required to follow the state court findings of fact, unless they are unreasonable. If the district court accepted a state court finding of fact without making its own findings, the federal court of appeals must first decide whether that was the proper way to handle that factual issue. If the federal court of appeals finds that the federal district court properly accepted a state court fact finding, the court of appeals must accept that factfinding itself unless it is "unreasonable."[595] If the federal court of appeals finds that the federal district court should *not* have accepted a state court factfinding, the court of appeals will either remand the case to the district court to decide the factual question itself or will make its own findings of fact.[596] If the federal court of appeals concludes that the federal district court modified or rejected state court findings that it should have accepted, the court of appeals will accept and apply the state court's fact findings unless those findings are "unreasonable."[597]

(h) Post-judgment Proceedings After Adverse Decision in Appeal

(i) *Rehearing*

If your habeas appeal failed, you may petition the panel that originally heard the case to reconsider its decision.[598] This petition for rehearing is "designed to bring to the panel's attention points of law or fact that it may have overlooked."[599] Subject to modifications by the local circuit rules, Rule 40 of the Federal Rules of Appellate Procedure requires you to file the rehearing petition "within 14 days

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those questions under Rule 52(a) of the Federal Rules of Civil Procedure." RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 37.3(b) nn. 13–14 and accompanying text (2022).

[594] FED. R. CIV. P. 52(a) (The court of appeals generally must accept the district court's findings "unless [the] appellate court is left with the definite and firm conviction that a mistake has been committed."). *See also* Inwood Lab. Inc. v. Ives Lab. Inc., 456 U.S. 844, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982).

[595] *See, e.g.*, Rolan v. Vaughn, 445 F.3d 671, 681 (3d Cir. 2006) (holding that the district court erred in concluding that "there were no legitimate state court findings of fact" on the relevant issue, and therefore the court of appeals engages in "review that the District Court should . . . have undertaken . . . to ascertain whether or not the[] ["state court findings of fact"] were reasonable" under Section 2254(d)(2)).

[596] *See, e.g.*, Burden v. Zant, 510 U.S. 132, 132–134, 114 S. Ct. 654, 654–655, 126 L. Ed. 2d 611, 613–614 (1994) (*per curiam*) (after concluding that court of appeals erroneously "failed to accord the presumption of correctness . . . due a state court determination" bearing on petitioner's "claim of ineffective assistance of counsel due to conflict of interest," Supreme Court "[r]eview[s] the record," finds that "record of evidence strongly support[s] [appellant]'s contention" that his lawyer represented key prosecution witness and negotiated immunity deal on witness's behalf, and accordingly reverses and remands for determination whether counsel's " 'conflict of interest adversely affect[ed] [his] performance' ").

[597] *See, e.g.*, Rolan v. Vaughn, 445 F.3d 671, 681 (3d Cir. 2006) (holding that the district court erred in concluding that "there were no legitimate state court findings of fact" on the relevant issue, and therefore the court of appeals engages in "review that the District Court should . . . have undertaken . . . to ascertain whether or not the[] ["state court findings of fact"] were reasonable" under Section 2254(d)(2)).

[598] FED. R. APP. P. 40.

[599] Missouri v. Jenkins, 495 U.S. 33, 46 n.14, 110 S. Ct. 1651, 16601659 n.14, 109 L. Ed. 2d 31, 51 n.14 (1990). (1990). *See* FED. R. APP. P. 40(a)(2) ("The petition must state with particularity each point of law or fact that the [rehearing] petitioner believes the court has overlooked or misapprehended and must argue in support of the petition."). *Compare* Coe v. Thurman, 922 F.2d 528, 533 n.1 (9th Cir. 1991) (*per curiam*) (invoking circuit rule allowing court in "appropriate circumstances" to "address an issue raised for the first time in a petition for rehearing" "[e]ven though the Attorney General offers no excuse for his failure to raise the issue in a timely manner, [and] one can assume that the failure was due either to incompetence or the recognition that the argument completely lacks merit," because claim could "have profound implications for the conduct of numerous cases in the Ninth Circuit") *with* Costo v. United States, 922 F.2d 302, 302–303 (6th Cir. 1990) ("[A]("n argument not raised in an appellate brief or at oral argument may not be raised for the first time in a petition for rehearing.").").

after entry of judgment" by the court of appeals panel, unless "the time is shortened or extended by order or local rule."[600] If your petition for panel rehearing is granted, the court may: (A) make a final disposition of the case without re-argument; (B) restore the case to the calendar for re-argument or resubmission; or (C) issue any other appropriate order.[601] If you file within those mandated 14 days, then issuance of the appellate court's mandate is automatically stayed [paused].[602] Your timely submission also tolls [pauses] the start of the period in which a petition for certiorari to the Supreme Court must be sought.[603]

(ii) *Rehearing* en banc

Federal appeals are usually heard by a panel of three judges.[604] The appeals court, however, on its own motion or on a party's petition, may decide by majority vote that the court of appeals will hear an appeal *en banc* [meaning altogether] either in the first instance or on rehearing (after an initial decision by a three-judge panel).[605] This means that *en banc* hearings involve more judges than the normal panel of three. "An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."[606] If you decide to file a written petition asking the court of appeals to rehear the case *en banc*, this written petition also must be made within the 14-day period specified in Rule 40 of the Federal Rules of Appellate Procedure.[607]

A hearing *en banc* is more likely to be granted if the three-judge panel decision differs from other panel decisions of the same court, contradicts a Supreme Court decision, or there is no set precedent on the matter in your circuit. In addition, you should refer to the rules of your circuit court of appeals on motions for rehearing *en banc*, because those rules will outline the grounds upon which an *en banc* hearing may be granted.[608] Lastly, you will need an attorney at this stage. A rehearing *en banc* will almost never happen without an attorney being appointed to represent you.

Petitions for a rehearing *en banc* should be framed in terms of the two criteria listed above—*i.e.*, a need for uniformity of decisions within the circuit, and/or the exceptional importance of the issues presented.[609] If possible, your petition should emphasize the following: any conflicts between the federal circuits or conflicts between district courts within your federal circuit; dissenting opinions in

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[600] FED. R. APP. P. 40(a)(1).

[601] FED. R. APP. P. 40(a)(4).

[602] FED. R. APP. P. 41(d)(1).

[603] S. CT. R. 13.3; *See also* Missouri v. Jenkins, 495 U.S. 33, 45 & n.13 110 S. Ct. 1651, 1660 109 L. Ed. 2d 31 (1990) (tolling provision applies to all timely petitions for rehearing except those "seeking only to correct a formal defect in the judgment or opinion of the lower court"). The tolling continues "until rehearing is denied or a new judgment is entered on the rehearing." Missouri v. Jenkins, 495 U.S. 33, 45 110 S. Ct. 1651, 1660 109 L. Ed. 2d 31 (1990).

[604] 28 U.S.C. § 46(c).

[605] 28 U.S.C. § 46(c); FED. R. APP. P. 45.

[606] FED. R. APP. P. 35(a). *See* Missouri v. Jenkins, 495 U.S. 33, 46 n.14, 110 S. Ct. 1651, 1660, 109 L. Ed. 2d 31, 51 (1990) ("Rehearing in banc is a discretionary procedure employed only to address questions of exceptional importance or to maintain uniformity among Circuit decisions"). The circuits' practices vary a lot, in regard to both the number of *en banc* cases heard each year and the likelihood that habeas corpus appeals will be among those reheard; RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.1(b) (2022).

[607] FED. R. APP. P. 35(c) (citing FED. R. APP. P. 40).

[608] *See, e.g.*, 9TH CIR. R. 22-4(d) ("Appeals From Authorized Second or Successive 2254 Petitions or 2255 Motions in Capital Cases [. . .] Any active or senior judge of the Court may request that the *en banc* court review the panel's order."); 3D CIR. INTERNAL OPERATING PROCEDURES R. 9.5 (preferring a single petition for rehearing and rehearing *en banc*); 3D CIR. INTERNAL OPERATING PROCEDURES R. 9.3.1 (noting that "rehearing *en banc* is not favored and will not be ordered unless consideration by the full court is necessary to secure or maintain uniformity of its decisions or the proceeding involves a question of exceptional importance.").

[609] FED. R. APP. P. 35(b).

the panel or in other decisions by this circuit; "conflicts with Supreme Court opinions; implications for the legality of either a state statute or a widespread practice; or the severity of the penalty at stake."[610]

Your petition for rehearing *en banc* will circulate to all "judges of the circuit who are in regular active service."[611] If the court grants a rehearing *en banc*, the panel decision is automatically vacated and has no effect on you or the other parties (unless the *en banc* court decides to reinstate it).[612]

(i) How to Seek Stay of Mandate Pending Rehearing or Certiorari

(i) *Timing of Mandate and Reasons for Seeking a Stay*

Especially if you are under sentence of death, you may want to seek a stay of a court of appeals' decision against you as you pursue further proceedings in your case. For example, you may wish to delay issuance of the mandate in a case in which an execution date has been or soon may be set and in which any previous stay of execution expires upon issuance of the mandate.[613] However, once the court of appeals issues its mandate, it may lose jurisdiction (or even just the willingness) to order a stay of its own, the district court's, or the state courts' judgments or proceedings.[614] In addition, neither the filing nor the granting of a petition for a writ of *certiorari* to the Supreme Court will automatically stay the issuance of the appellate court's mandate. The federal district court or state courts may act upon the issuance of the appellate court's mandate.[615]

The Federal Rules of Appellate Procedure provide that the mandate "must issue 7 days after the time to file a petition for rehearing expires"[616] (which is ordinarily 14 days following the entry of judgment),[617] although the court may issue an order to "shorten or extend the time" for issuing the mandate.[618] The filing of a petition for rehearing does not necessarily automatically stay the issuance of the mandate until the court of appeals acts on the petition; to confirm such a stay, a court order is likely still required.[619]

If the petition for rehearing is denied, the mandate will issue "7 days after entry of [the] order" denying the petition, unless that time is "short[ened] or extend[ed]" by the court.[620]

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[610] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.1(b) (2022).

[611] FED. R. APP. P. 35(a).

[612] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.1(b) (2022). *See, e.g.*, Cooey v. Bradshaw, 338 F.3d 615, 616 (6th Cir. 2003) (*en banc*) (Clay, J., concurring in grant of initial hearing *en banc* and denial of state's motion to vacate stay of execution) ("The granting of initial en banc review eliminated the panel's jurisdiction over this matter. The three judge panel had not filed . . . [an] opinion when the en banc Court assumed jurisdiction. Had the panel already filed an opinion, the decision to hear the case en banc would have automatically vacated the panel's opinion").

[613] *See, e.g.*, Streetman v. Lynaugh, 835 F.2d 1521, 1523–1524 (5th Cir. 1988) (finding that defendant's stay of execution pending appeal dissolved upon disposal of the appeal).

[614] The stay provision in the habeas corpus statute permits "[a] justice or judge of the United States *before whom a habeas corpus proceeding is pending*" to "stay any proceeding against the person detained … under the authority of any State for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251(a)(1) (emphasis added). If a petitioner simultaneously seeks post-judgment rehearing *en banc* in the court of appeals and *certiorari* in the Supreme Court, the court of appeals apparently retains jurisdiction not only to grant rehearing *en banc* on the merits, but also to grant ancillary relief such as a stay. *See* Messer v. Kemp, 831 F.2d 946, 957 (11th Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 1029 (1988) ("[T]he Supreme Court's stay did not divest this court of jurisdiction to consider petitioner's appeal en banc").

[615] See FED. R. APP. P. 41(d) for asking appeals court to stay mandate pending *certiorari*. *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.2 (2022).

[616] FED. R. APP. P. 41(b) (as amended in 2002).

[617] FED. R. APP. P. 40(a)(1).

[618] FED. R. APP. P. 41(b) (as amended, effective Dec. 1, 2018).

[619] FED. R. APP. P. 41(b) (as amended, effective Dec. 1, 2018); FED. R. APP. P. 41(b) advisory committee's note to 2018 amendment.

[620] FED. R. APP. P. 41(b). *See* FED. R. APP. P. 36 (defining entry of judgment).

(ii) *From Whom to Seek Stay of Mandate Pending Certiorari*

In some death penalty cases, but not all, the court of appeals specifically says in its opinion that the mandate will be stayed pending the filing of a timely *certiorari* petition.[621] When this happens, the court of appeals' stay generally remains in effect until either (1) the appeals court clerk receives a copy of an order of the Supreme Court denying the *certiorari* petition (at which point the mandate must be issued, absent "extraordinary circumstances")[622] or (2) the appeals court clerk receives notice that some other "final disposition" by the Supreme Court has occurred.[623] If the court of appeals does not decide on its own to stay issuance of the mandate pending certiorari, you must make a motion seeking a stay of mandate from the court of appeal. If that fails, you must file a motion in the Supreme Court seeking a stay of the court of appeals' mandate.[624]

(iii) *Procedures for Seeking a Stay*

Section 2101(f) of the Judicial Code and Appellate Rule 41(d)(1) authorize motions to stay the mandate pending a petition for a writ of *certiorari*.[625] Although not stated explicitly in those provisions, there is an implied time limit for filing to stay a mandate pending a petition for writ of *certiorari*.[626] This is due both to Appellate Rule 41(b), which requires the court of appeals to issue its decision within 7 days after the time to file rehearing expires or after denial of a petition, and to the requirement of Appellate Rule 41(d)(1) that a party seeking to stay the mandate provide adequate notice to all parties.[627] Therefore, you should try to file your motion to stay the mandate as soon as possible in order to allow the other parties to respond to the motion and to give the court time to rule on the motion.[628]

(iv) *Standards of Your Motion to Stay the Mandate*

When you are seeking a stay of the appellate court mandate, Appellate Rule 41 requires you to "show that the [*certiorari*] petition would present a substantial question and that there is good cause for a stay [of the mandate]."[629] The Supreme Court has limited such stays to cases presenting issues

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[621] *See, e.g.*, Stafford v. Ward, 60 F.3d 668, 670 (10th Cir.), *cert. denied*, 515 U.S. 1173 (1995) (holding that the "'[I]ssuance of the mandate is stayed until January 11, 1995, and . . . if, on or before that date, there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that appellant has filed a timely petition for writ of certiorari in that court, the stay shall continue until final disposition in the Supreme Court'") (citation omitted). *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.2(c) (2022).

[622] FED. R. APP. P. 41(d)(4) (as amended, effective Dec. 1, 2018) ("The court of appeals must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist.").

[623] If the Supreme Court grants a writ of certiorari, Appellate Rule 41(d) automatically extends the mandate stay until the Supreme Court issues *its* mandate. FED. R. APP. P. 41(d)(2)(B)(ii) (once petition for *certiorari* has been filed, "stay [of mandate] continues until the Supreme Court's final disposition").

[624] S. CT. R. 23.3 ("An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.").

[625] 28 U.S.C. § 2101(f) (when final judgment of any court is subject to review by Supreme Court on writ of *certiorari,* enforcement of judgment may be stayed for "reasonable time to enable the party aggrieved to obtain a writ of certiorari"; "stay may be granted by a judge of the court rendering the judgment … or by a justice of the Supreme Court"); FED. R. APP. P. 41(d)(1).

[626] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.2(c)(i) (2022).

[627] FED. R. APP. P. 41(d)(1) (as amended, effective Dec. 1, 2018) ("The motion must be served on all parties . . . ."); *see also* FED. R. APP. P. 25(d) (requiring that "[a] paper presented for filing . . . contain either . . . (A) an acknowledgment of service by the person served; or (B) proof of service," and specifying manner by which proof of service is to be shown).

[628] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.2(c)(i) (2022).

[629] FED. R. APP. P. 41(d)(1) (as amended, effective Dec. 1, 2018).

as to which there is a reasonable probability that four Justices will vote to grant *certiorari*.[630] In addition, in capital cases, the Supreme Court often requires that the "balance [of] 'stay equities' " and an analysis of "the likely outcome of th[e] Court's consideration of the case on the merits" must support a stay.[631] The Court has held that stays of execution "are not automatic pending the filing and consideration of a petition for a writ of certiorari . . . to the court of appeals that has denied a writ of habeas corpus"[632] and that a stay will issue only if [633] there is (1) a "reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the *grant of certiorari*"; (2) "a significant possibility of reversal of the lower court's decision"; and (3) "a likelihood that irreparable harm will result if that decision is not stayed."[634]

In order to meet this standard for stays of mandate and stays of execution, there are two arguments that you should make in your motion for a stay pending *certiorari* in capital cases if they apply in your case. First, as a corollary to the Supreme Court's "rule of four,"[635] you should ask the Court to treat a vote of four justices to grant a stay of execution pending *certiorari* as a sufficient indication of the likelihood that *certiorari* will be granted to require a stay. You then should argue that you believe at least four justices will agree with your argument that *certiorari* review should be granted.

Second, if relevant to your situation, you should keep in mind that stays of execution routinely are granted pending the timely filing and disposition of a petition for *certiorari* raising a claim similar to one on which the Supreme Court has granted *certiorari* and that is at present awaiting final decision by that Court.[636] Therefore, when appropriate in your situation, your motion for a stay of the mandate and of execution pending *certiorari* review should point out that the Supreme Court has granted *certiorari* on claims similar to yours, and that the court of appeals or Supreme Court should grant a stay of the mandate and of execution pending the Supreme Court's final decision in that similar case.

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630 *See, e.g.,* Maggio v. Williams, 464 U.S. 46, 48, 104 S. Ct. 311, 312–313, 78 L. Ed. 2d 43, 46 (1983) (citing authority).

631 Tate v. Rose, 466 U.S. 1301, 1302, 104 S. Ct. 2186, 2186, 80 L. Ed. 2d 805, 806 (1984) (O'Connor, Circuit Justice, in chambers). *Accord, e.g.*, Planned Parenthood v. Casey, 510 U.S. 1309, 1310–1311, 114 S. Ct. 909, 910, 127 L. Ed. 2d 352, 355 (1994) (Souter, J., Circuit Justice, in chambers). *See also* Rubin v. United States, 524 U.S. 1301, 1301–1302, 119 S. Ct. 1, 1–2, 141 L. Ed. 2d 761, 763 (1998) (Rehnquist, J., Circuit Justice) (application for stay of subpoenas pending decision on *certiorari* on claim of Presidential Privilege is denied because "equities do not favor granting a stay" and because, even "assum[ing], without deciding, that four members of this Court . . . would grant certiorari," applicant for stay has failed to "show that there is a likelihood that this Court, having granted certiorari and heard the case, would reverse the judgment of the Court of Appeals"). *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.2(c)(ii) n. 43 (2022).

632 Barefoot v. Estelle, 463 U.S. 880, 895, 103 S. Ct. 3383, 3396, 77 L. Ed. 2d 1090, 1105 (1983).

633 *See, e.g.*, Demosthenes v. Baal, 495 U.S. 731, 110 S. Ct. 2223, 109 L. Ed. 2d 762 (1990); Delo v. Stokes, 495 U.S. 320, 110 S. Ct. 1880, 109 L. Ed. 2d 325 (1990); Maggio v. Williams, 464 U.S. 46, 46, 104 S. Ct. 311, 312, 78 L. Ed. 2d 43, 45 (1983).

634 Barefoot v. Estelle, 463 U.S. 880, 895, 103 S. Ct. 3383, 3396, 77 L. Ed. 2d 1090, 1105–1106 (1983) (quoting White v. Florida, 458 U.S. 1301, 1302, 103 S. Ct. 1, 2–3, 73 L. Ed. 2d 1385, 1386 (1982) (Powell, Circuit Justice, in chambers)) (internal quotation marks omitted). *Accord, e.g.,* Maggio v. Williams, 464 U.S. 46, 48, 104 S. Ct. 311, 313, 78 L. Ed. 2d 43, 46 (1983). *See also* Philip Morris USA Inc. v. Scott, 561 U.S 1301, 1304–1305, 131 S. Ct. 1, 4–5, 17 L. Ed. 2d 1040, 1043–1044 (2010) (Scalia, Circuit Justice, in chambers) (granting tobacco companies' "application for a stay of the execution of the judgment" of state court judgment in favor of plaintiff class of smokers, "pending applicants' timely filing, and this Court's disposition, of a petition for a writ of *certiorari*," because "I conclude applicants have satisfied the prerequisites for a stay" under 28 U.S.C. § 2101(f): "I think it reasonably probable that four Justices will vote to grant *certiorari*, and significantly possible that the judgment below will be reversed. . . Refusing a stay may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents. . . Under those circumstances, the equitable balance favors issuance of the stay"). For more examples, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.2(c)(ii) n. 48 (2022).

635 The "rule of four" is an unwritten judicial rule. It refers to four out of nine votes ordinarily being sufficient to grant *certiorari*. *Supreme Court Procedures*, UNITED STATES COURTS, *available at* https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Sept. 29, 2023).

636 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.2(c)(ii) nn. 50–53 and accompanying text (2022).

(v) *Recall of Mandate*

"[T]he courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion."[637] Recalling the mandate means that a mandate previously issued by the court of appeals no longer has any force or effect. You have the right to ask the court of appeals to recall its mandate, which can have the same effect as a stay of the mandate, which in turn can have the effect of staying a pending execution.[638] The standards and procedures for a recall of the mandate are not clear, especially in habeas corpus proceedings. The Supreme Court has stated that an incarcerated person's "motion to recall the mandate on the basis of the merits of the underlying decision *can* be regarded as a second or successive petition," and thus *may* be subjected to the very strong procedural and substantive restrictions that apply to limit the use of successive petitions.[639] Still, the exact circumstances when a request to recall a mandate may be considered a second or successive petition are unclear.[640]

There are several situations in which your case might merit a recall of the mandate. The first situation is if the court of appeals is properly considering your application for permission to file a successive petition.[641] The second situation is if you are asserting actual innocence of the underlying crime and can show that it is likely that "'no reasonable juror would have convicted [you] in light of the new evidence presented in [your] habeas application."[642] A third situation arises if you can show

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[637] Calderon v. Thompson, 523 U.S. 538, 549, 118 S. Ct. 1489, 1498, 140 L. Ed. 2d 728, 743 (1998).

[638] *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 553–554, 118 S. Ct. 1489, 1500, 140 L. Ed. 2d 728, 745–746 (1998) (discussing "prisoner's motion to recall the mandate").

[639] Calderon v. Thompson, 523 U.S. 538, 553–554, 118 S. Ct. 1489, 1500, 140 L. Ed. 2d 728, 745–746 (1998) (emphasis added) ("Otherwise, petitioners could evade the [§ 2244(b)(1)] bar against relitigation of claims presented in a prior application, or the [§ 2244(b)(2)] bar against litigation of claims not presented in a prior application"); Owsley v. Luebbers, 281 F.3d 687, 689 (8th Cir.), *cert. denied*, 534 U.S. 1121, 122 S. Ct. 981, 151 L. Ed. 2d 962 (2002) (employing section 2244(b)(2) criteria to deny motion to recall mandate based on new Supreme Court decision); Thompson v. Nixon, 272 F.3d 1098, 1100–1101 (8th Cir. 2001), *cert. dismissed*, 535 U.S. 1075, 122 S. Ct. 1988, 152 L. Ed. 2d 1019 (2002) (analyzing "motion to recall a mandate . . . as a successive petition" and denying motion because asserted new claim merely reiterates previously rejected claim with addition of new authority). For more cases, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.2(d) n. 57 (2022). For further discussion on second and successive petitions, see Part H of this Chapter.

[640] In its opinion in Calderon v. Thompson, the Court sometimes seems to suggest that a habeas corpus petitioner's motion to recall the mandate *must* be treated as a successive petition. *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 553, 118 S. Ct. 1489, 1500, 140 L. Ed. 2d 728, 746 (1998) ("If the court grants such a motion [to recall the mandate], its action *is* subject to [the habeas statute] . . ." (emphasis added)). At other points, however, the Court suggests that a recall motion should be treated as a successive petition only if the petitioner is trying "to utilize a Rule 60(b) motion [or recall motion] to make an end-run around the requirements' of [the habeas statute]." *Thompson* at 547, 1496, 741. *See also Thompson* at 572, 1508, 757 (Souter, J., dissenting) (understanding majority to be concerned whether court of appeals "was . . . covertly allowing respondent to litigate a second habeas petition"). For further discussion, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.2(d) n. 58 (2022).

[641] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 38.2(d) (2022); Calderon v. Thompson, 523 U.S. 538, 554, 118 S. Ct. 1489, 1500, 140 L. Ed. 2d 728, 746 (1998) ("If in recalling the mandate [*sua sponte*], the court [of appeals] considers new claims or evidence presented in a successive application for habeas relief, it is proper to regard the court's action as based on that [successive] application. In these cases, § 2244(b)(2) [of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), or, in non-AEDPA cases, the pre-AEDPA standard for new-claim successive petitions] applies irrespective of whether the court characterizes the action as sua sponte"). For further discussion on second and successive petitions, see Part H of this Chapter.

[642] Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct. 1489, 1503, 140 L. Ed. 2d 728, 750 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836 (1995)). *See also* Calderon v. Thompson, 523 U.S. 538, 542, 118 S. Ct. 1489, 1494, 140 L. Ed. 2d 728, 738 (1998) ("recall of the mandate was not controlled by the precise terms of [§ 2244(b)]"); Calderon v. Thompson, 523 U.S. 538, 554, 188 S. Ct. 1489, 1500, 140 L. Ed. 2d 728, 746 (1998) ("As a textual matter, § 2244(b) applies only where the court acts pursuant to a prisoner's 'application' "); Calderon v. Thompson, 523 U.S. 538, 558, 188 S. Ct. 1489, 1502, 140 L. Ed. 2d 728, 748 (1998) ("[W]here . . . a court of appeals recalls its mandate to revisit the merits of its earlier decision denying habeas relief," recall is inappropriate "[i]n the absence of a strong showing of 'actual innocence' "). The Court's standard is considerably "more lenient" than § 2244(b)'s totally preclusive standard for relitigation of claims already adjudicated (the situation in *Thompson*). *See* Calderon v. Thompson, 523 U.S. 538, 553, 188 S. Ct. 1489,

"'by clear and convincing evidence' that no reasonable juror would have found [you] eligible for the death penalty in light of the new evidence."[643]

J. Certiorari to the Supreme Court

1. Overview[644]

If the court of appeals denies your appeal or refuses to overturn the district courts' decision, the next and final step is to petition the Supreme Court for a writ of *certiorari*. A writ of *certiorari* is required to allow the Supreme Court to review the federal court of appeals judgment against you in your habeas case. The Supreme Court does not have to review your case,[645] and it rarely grants review in such cases unless you can show that one of the following standards is met:

- The case has national significance.
- The case will resolve differences between how district courts or circuit courts have ruled on similar issues.
- The case will resolve differences between Supreme Court decisions and recent federal court of appeals decisions on the same issue.
- The case has important precedential value for future cases.[646]

Note that the Supreme Court may not review decisions by a court of appeals to deny your application to file a successive habeas corpus petition.[647]

1499–1500, 140 L. Ed. 2d 728, 745–746 (1998) (comparing § 2244(b)'s standards for same-claim and new-claim successive petitions); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 28.3, 28.4 (2022) (discussing pre- and post-§ 2244(b) standards for new-claim and same-claim successive petitions).

643 Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503, 140 L. Ed. 2d 728, 750 (1998) (quoting Sawyer v. Whitley, 505 U.S. 333, 348, 112 S. Ct. 2514, 2523, 120 L. Ed. 2d 269, 285 (1992)). The Court in *Thompson* elaborated on the criterion quoted above in text as follows: "The *Sawyer* standard [on which the Court based the criterion quoted above in text] has a broader application than is at first apparent. As the Court explained in *Schlup*, when a capital petitioner challenges his underlying capital murder conviction on the basis of an element that 'function[s] essentially as a sentence enhancer,' the *Sawyer* 'clear and convincing' standard applies to the claim. Schlup v. Delo, 513 U.S. 298, 326, 115 S. Ct. 851, 866, 130 L. Ed. 2d 808, 836 (1995). Thus, to the extent a capital petitioner claims he did not kill the victim, the *Schlup* 'more likely than not' standard applies. To the extent a capital petitioner contests the special circumstances rendering him eligible for the death penalty, the *Sawyer* 'clear and convincing' standard applies, irrespective of whether the special circumstances are elements of the offense of capital murder or, as here, mere sentencing enhancers." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503, 140 L. Ed. 2d 728, 750 (1998).

644 *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39 (2022).

645 28 U.S.C. § 2241 ("[t]he Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and [to] transfer the application for hearing and determination to the district court having jurisdiction to entertain it").

646 S. CT. R. 10 ("Considerations Governing Review on Writ of Certiorari"); *Supreme Court Procedures*, UNITED STATES COURTS, *available at* https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Oct. 1, 2023).

647 If the judgment you are seeking a writ of *certiorari* for is a ruling on an application for permission to file a successive petition, § 2244(b) prohibits review by the Supreme Court. 28 U.S.C. § 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari"). *See* Felker v. Turpin, 518 U.S. 651, 664, 116 S. Ct. 2333, 2340, 135 L. Ed. 2d 827, 840 (1996) (holding that § 2244(b)'s restriction on the Court's authority to review denials of leave to file a second habeas petition is constitutional, because it does not repeal the Court's authority to entertain original habeas petitions).

2. Filing the Certiorari Petition[648]

Timing: You must file your petition for *certiorari* seeking review of the federal court of appeals judgment "within 90 days after entry of the judgment" of the court of appeals.[649] If you filed a timely petition for rehearing by the court of appeals, you then must file within 90 days after denial of the rehearing petition or entry of the judgment from that rehearing.[650]

Form and Content: Supreme Court Rules 14, 33, and 34 describe the required contents and form the certiorari petition. The petition also must include an appendix reproducing the final judgment and opinion or opinions of the appeals court and usually any federal district court opinions. If you are unable to pay the Supreme Court's fee for seeking certiorari, you also should file a motion to proceed *in forma pauperis* along with your petition.

Where to File: File your petition with the Supreme Court Clerk, along with the docket fee or motion for leave to proceed *in forma pauperis*,[651] proof that you served the certiorari petition on the state or government,[652] adequate documentation of timely filing,[653] and, if applicable, a motion for a stay of execution. Lastly, if you are represented by an attorney, you must "submit documents to the Court's electronic filing system" *in addition to* filing documents in paper form.[654]

Fees: The docketing fee for a petition for a writ of *certiorari*, due upon the filing of the document,[655] is $300.[656] If you cannot afford these fees and any others that may occur, you must make a motion to proceed *in forma pauperis*.[657]

Even if the Supreme Court did issue a writ of *certiorari* to review your case, there are three other potential responses the Supreme Court may have that will have a beneficial effect on your case. These are (1) grant/vacate/remand, (2) a summary reversal, or (3) a "hold" followed by a favorable action once the Court rules on a related case. Under (1), the Court vacates the appeals court judgment and remands for proceedings in the court of appeals consistent with a recent decision by the Supreme Court. Response (2)—a summary reversal—occurs when the Court concludes that the court of appeal decision "has so far departed from the accepted and usual course of judicial proceedings, or [has]

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[648] *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.2 (2022).

[649] S. CT. R. 13.1. *See* 28 U.S.C. § 2101(c) ("Any . . . appeal or any writ of certiorari intended to bring any judgment . . . before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days").

[650] S. CT. R. 13.3 ("The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment").

[651] *See* S. CT. R. 39.

[652] S. CT. R. 12.3, 29.5. Service must follow the rules set forth in S. CT. R. 29.3, though service copies may be required in *in forma pauperis* cases. *See* S. CT. R. 39.

[653] *See* S. CT. R. 29.2 ("If [a document is] submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid").

[654] S. CT. R. 29.7 (adopted on Sept. 27, 2017, effective Nov. 13, 2017). An accompanying Clerk's Comment explains that "[b]ecause paper will continue to be the official filing, just as under current practice, use of the electronic filing system will be 'in addition' to the other filing requirements." Rule 29.7 provides that electronic filing should conform to the "Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System, issued by the Clerk." The Court Clerk's Office in 2017 also issued a "Guide for Prospective Indigent Petitioners for Writs of Certiorari."

[655] S. CT. R. 12.1, 17.4.

[656] S. CT. R. 38(a).

[657] S. CT. R. 39.

sanctioned such a departure" that the Court simply rejects the lower court ruling without further proceedings in the case.[658] Response (3)—a "hold"—occurs when there is another case in which the Court has granted *certiorari* review that is still pending, and the decision of that case will affect your case.[659]

3. Ancillary Proceedings

(a) Indigent

If you are unable to pay the expenses associated with appealing the court's decision, you may file a motion to proceed *in forma pauperis*.[660] This motion is separate from the petition for a writ of *certiorari*. This motion can simply (1) say that the court below appointed your counsel and "cite the provision of law under which counsel was appointed" by the lower court; (2) attach a "copy of the [lower court's] order of appointment"); or (3) ask to be allowed to proceed *in forma pauperis* and attach an affidavit of indigency in the form of, or similar to, the model affidavit attached to the Federal Rules of Appellate Procedure Form 4.[661] As noted above, this motion must be filed along with the petition for writ of *certiorari*.[662]

The motion and its attachments must be served upon the state in the manner described by Supreme Court Rule 29.[663] You must also file proof of service at the time the motion and its attachments are filed with the Clerk of the court.[664] If everything is in order, the clerk will place your motion on the docket without any payment.[665] If the Court allows you to proceed *in forma pauperis*, your case will proceed without you having to pay any fees.

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[658] S. CT. R. 10(a) (the Supreme Court will summarily reverse lower federal court decisions that "ha[ve] so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of [the Supreme] Court's supervisory power."). *See* S. CT. R. 16.1 ("order [disposing of the *certiorari* petition] may be a summary disposition on the merits"); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.2(d) n. 43 (7th ed. 2022). *See, e.g.*, Alaska v. Wright, 141 S. Ct. 1467, 209 L. Ed. 2d 431 (2021) (*per curiam*); Tharpe v. Sellers, 583 U.S. 33, 138 S. Ct. 545, 199 L. Ed. 2d 424 (2018) (*per curiam*); Porter v. McCollum, 558 U.S. 30, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (*per curiam*); Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (*per curiam*); Maryland v. Dyson, 527 U.S. 465, 467 n.1, 119 S. Ct. 2013, 2014 n.1, 144 L. Ed. 2d 442, 445 n. 1 (1999) (*per curiam*) ("summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law"). *See also* Elmore v. Holbrook, 580 U.S. 938, 939, 137 S. Ct. 3, 4, 196 L. Ed. 2d 272, 273 (2016) (*mem.*) (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of *certiorari*) ("This Court has not hesitated to summarily reverse in capital cases tainted by egregious constitutional error, particularly where an attorney has rendered constitutionally deficient performance.").

[659] *See, e.g.*, Haynes v. Thaler, 568 U.S. 970, 133 S. Ct. 498, 184 L. Ed. 2d 311 (2012) (*mem.*) (stay of execution granted pending disposition of *certiorari* petition).

[660] S. CT. R 39. You will petition the Supreme Court under 28 U.S.C. § 1915 and S. CT. R. 39 to proceed *in forma pauperis*. If leave to proceed *in forma pauperis* is granted, you will not have to pay docketing fees, you will only have to file and serve one copy of the required papers, and those papers can be produced in any "legible" manner. If *certiorari* is granted, you will be eligible for appointment of counsel and for printing of briefs by the Court itself.

[661] S. CT. R. 39.1 (as amended, effective January 1, 2023) ("A party seeking to proceed *in forma pauperis* shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U.S.C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion shall state whether leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted. If the court below appointed counsel for an indigent party, no affidavit or declaration is required, but the motion shall cite the provision of law under which counsel was appointed, or a copy of the order of appointment shall be appended to the motion.").

[662] S. CT. R. 39.2.

[663] S. CT. R. 29.3, 29.4.

[664] S. CT. R. 29.3, 29.4, 39.4. Only one copy of the motion needs to be filed. S. CT. R. 39.2.

[665] S. CT. R. 39.4.

(b) Appointment of Counsel

The Supreme Court "rarely, if ever" appoints counsel prior to granting *certiorari*.[666] If, however, the federal district court or court of appeals has appointed counsel to represent you, that appointment will extend through any proceedings in the Supreme Court.[667] If you have not yet been appointed counsel, you can try asking the court of appeals to appoint counsel to assist you in proceedings in the Supreme Court, but such motions are rarely granted.[668]

4. Stays of Execution[669]

If you have been sentenced to death and an execution date has been set in your case or you expect that such a date will be set soon, you will need to seek a stay of execution pending a ruling on your petition for a writ of *certiorari*. A Stay is an action taken by a court to stop a legal proceeding or the actions of a party.[670] Sometimes, a stay of execution granted by a federal district court or by a federal court of appeals will, by the stay's own terms, remain in effect until the Supreme Court has ruled on a *certiorari* petition.[671] Other times, if a date of execution is not set, the state may choose not to set an execution date until a decision is reached on your petition to the Supreme Court for a writ of *certiorari*.[672] You may also seek an administrative stay of execution (for example, from a state governor or from a state parole or clemency board) if you are pursuing executive clemency alongside the writ of *certiorari*,[673] or a state court stay of execution pending a ruling on your request for executive clemency

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666 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(b) (7th ed. 2022) ("Appointment of Counsel" in ancillary proceedings to seek writ of *certiorari*). *See* Maryland v. Dyson, 527 U.S. 465, 467 n.1, 119 S. Ct. 2013, 2014 n. 1, 144 L. Ed. 2d 442, 445 n.1 (1999) (*per curiam*) ("While we have on occasion appointed an attorney to file a brief as *amicus* in a case where we have granted *certiorari*, in order to be sure that the argued case is fully briefed, we have never done so in cases which we have summarily reversed."). *Cf.* S. CT. R. 39.7 (when certiorari is granted, Court "may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964").

667 Criminal Justice Act, 18 U.S.C. §§ 3006A(a)(2)(B), 3006A(c); 18 U.S.C. § 3599(a)(2) (formerly codified at 21 U.S.C. § 848(q)(B)(4)) (appointment of counsel and the provision of other services in post-conviction proceedings seeking to vacate a death sentence); DeOca v. United States, 2004 U.S. Dist. LEXIS 481, at *11 (D. Del. Jan. 16, 2004) ("When a district court appoints counsel, the appointment 'extend[s] throughout any proceedings in the Supreme Court.'")(citing RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(b) (4th ed. 2001)).

668 Requests for an appellate court appointment of counsel at this stage should follow FED. R. APP. P. 25 and 27 and should be filed *before* the appellate court's mandate issues and *before* a *certiorari* petition actually is filed in the Supreme Court. *See* FED. R. APP. P. 41. *See also* FED. R. APP. P. 25, 27, 41.

669 *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(c) (7th ed. 2022) ("Stays of execution" preceding seeking writ of certiorari).

670 A stay most commonly is issued by a court as a stay of proceedings in order to stop litigation from continuing, and they normally are only temporary. *See* Wex Definitions Team, *stay* (2021), available at https://www.law.cornell.edu/wex/stay (last visited Mar. 4, 2024).

671 *See* Stafford v. Ward, 60 F.3d 668, 670–671 (10th Cir. 1995), *cert. denied*, 515 U.S. 1173 (1995) (mandate stay pending "'final disposition [of *certiorari* petition] in the Supreme Court'" remained in effect until Supreme Court's denial of *certiorari*); Blair v. Armontrout, 994 F.2d 532, 532–533 (8th Cir. 1993) (reaffirming federal court's authority to grant stays of execution pending Supreme Court's "final action" on petition for *certiorari* and clarifying that such stays remain in effect until Supreme Court denies timely motion for rehearing or, if no such motion is filed, time for seeking rehearing expires); Thompson v. Cain, 1999 U.S. Dist. LEXIS 329, at *4–5 (E.D. La. Jan. 6, 1999) (reaffirming that previously granted "stay would continue pending any decision on a [w]rit of *certiorari*" and denying state's motion to vacate stay).

672 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(c) (7th ed. 2022). *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 6.3, 13.1, 13.2(a) (7th ed. 2022) (all discussing informal stays of execution).

673 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(c) n.31 (7th ed. 2022) ("Some States permit the agency charged with reviewing clemency petitions to stay executions for relatively short periods of time. Such agencies sometimes refuse to act if the prisoner is simultaneously pursuing judicial remedies.").

and on your petition for a writ of *certiorari*.[674] If there is no other stay of execution available, you must apply to the United States Supreme Court. You can apply for one or both of the following: (1) a stay pending a ruling on your petition for *certiorari*; or (2) a stay or recall of the lower court's mandate, if that would have the effect of staying the execution under the terms of a preexisting stay order.[675]

If you are seeking a stay of execution from the Supreme Court itself, it is advised to attach a copy of your *certiorari* petition with the stay motion.[676] Generally, you should address your stay motion to the Circuit Justice for the court of appeals that issued the decision that you are asking the Supreme Court to review by way of a writ of *certiorari*.[677] Most stay motions, however, will be referred to the Court as a whole.

Timing: If you have an execution date set, do *not* treat it as a deadline for your stay application and *certiorari* petition. File the stay application as soon as you can. The Supreme Court generally dislikes "last-minute" stay applications.[678]

Form and Content:[679] A motion for a stay of execution should include a discussion of:

> "(1) the facts and procedural history relevant to the stay motion and petition, including, in particular, the efforts by the petitioner to secure a stay in the state and lower federal courts,
> (2) the law governing issuance of stays pending *certiorari*, and
> (3) the reasons why the questions presented in the *certiorari* petition justify a stay pending the Court's decision whether to grant plenary review or at least

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[674] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(c) (7th ed. 2022).

[675] *See* 28 U.S.C. § 2101(f) (final judgment of court subject to *certiorari* review by Supreme Court "may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of *certiorari*"; stay may be granted by judge of court rendering judgment or by Justice of Supreme Court); Buchanan v. Angelone, 520 U.S. 1163 (1997) (*mem.*) (granting stay of execution pending ruling on prisoner's *certiorari* petition); Tuggle v. Netherland, 515 U.S. 1188 (1995) (*mem.*) (same); Gerlaugh v. Stewart, 167 F.3d 1222, 1224 (9th Cir. 1999) (notwithstanding court's conclusion that petitioner failed to satisfy criteria for stay, court briefly stays execution to permit petitioner to seek stay from Supreme Court); Teague v. Johnson, 151 F.3d 291, 291 (5th Cir. 1998) (*per curiam*) (holding that petitioner's request of stay pending disposition of *certiorari* petition had to be filed in Supreme Court, because appellate mandate had already issued and therefore the "habeas petition is no longer pending before the court of appeals, and we [the 5th Circuit] have no jurisdiction to stay proceedings under § 2251"); Williams v. Cain, 143 F.3d 949, 950 & n.1 (5th Cir.) (*per curiam*), *cert. denied*, 524 U.S. 934 (1998) (holding that petitioner must seek stay of execution from the Supreme Court, "[o]r, in limited circumstances, from the circuit court", because the district court lacks jurisdiction to issue stays "pending disposition of *certiorari* when the habeas petition has already been ruled on, the appellate mandate has issued, and the case is no longer before the [district] court in any fashion"); Bolender v. Singletary, 60 F.3d 727, 728 (11th Cir. 1995) (*per curiam*) (briefly staying execution to allow petitioner to apply to Supreme Court for stay pending *certiorari*). *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(c) n.32 (7th ed. 2022) (additional case law about seeking stays of execution).

[676] Although the Supreme Court Rules provide that a motion for a stay pending the filing of a *certiorari* petition suffices under section 2251 to bring the habeas corpus action before the Court and thereby permit a member of the Court to grant a stay, the more convincing an argument in favor of *certiorari*, the more likely the Court or one of its members will grant your stay. Simply put, the stronger the argument in your petition for writ of *certiorari*, the more likely it is your execution will be stayed. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(c) nn.35–36 (7th ed. 2022).

[677] S. CT. R. 22.3 (incorporated by reference in S. CT. R. 23.3). Motions directed to the Court as a whole usually are referred to the appropriate Circuit Justice. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(c) n.52 (7th ed. 2022) ("[T]he process of directing stay motions to individual Justices is becoming something of a formality.").

[678] *See, e.g.*, Sawyer v. Whitley, 505 U.S. 333, 341 n.7 (1992); Gomez v. United States Dist. Ct., 503 U.S. 653, 653–54 (1992) (*per curiam*); Woodard v. Hutchins, 464 U.S. 377 (1984) (Powell, J., concurring). *See generally* Anthony G. Amsterdam, *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*, *in* THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 157–265 (Austin Sarat ed., 1999).

[679] *See* S. CT. R. 22, 23 (stays); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(c) (7th ed. 2022) (providing more discussion and case law to argue in your *certiorari* petition and motion for a stay of execution).

> to hold the *certiorari* petition in abeyance pending plenary consideration of similar questions in another case."[680]

A stay motion must identify the federal court of appeals judgment you are asking to be reviewed on *certiorari*, and you must attach both the order and opinion reflecting that judgment. The motion must also have the order of the court or judge below denying a requested stay of execution.[681] The motion, which must be filed in a specific form[682] and must be filed and served in a specified manner,[683] "shall set out specific reasons why a stay is justified"[684] and must be signed by the party or by counsel of record.[685]

5. Response

While not required, it is likely that the respondent will file a brief in opposition[686] of your petition for a writ of *certiorari*,[687] though the Court may deny your petition without a response.[688] Responses are due within 30 days of the state's receipt of your petition.[689] Regardless of whether a response is sent, your petition will be circulated to the Court.[690] If a response is filed, you may file a short reply brief addressing new points raised in the brief in opposition."[691] You should file a reply brief as soon as possible (within a week or less). Otherwise, your reply will likely be too late to be considered by the Supreme Court.[692]

6. Granting or Denying Your Petition

If the Court grants your petition for a writ of *certiorari*, you or your counsel will be notified. The case is then scheduled for briefing and oral argument.[693] Generally, your main brief on the merits

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[680] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3(c) (7th ed. 2022).

[681] S. CT. R. 23.3.

[682] S. CT. R. 23.3.

[683] S. CT. R. 29 (referred to by S. CT. R. 22.2, which is referred to by S. CT. R. 23.3) (manner of filing; list of parties required); S. CT. R. 29.3 (manner of service; one service copy required because motion may be prepared pursuant to S. CT. R. 33.2); S. CT. R. 22.2 (proof of service required via complex procedure in S. CT. R. 29); S. CT. R. 21.4 (responses to motions). The rules do not specify the number of copies to file. Rule 22.2 requires parties to file an original and two copies of applications to individual Justices. The Court, however, requires that a renewed application for a stay directed to another Justice be accompanied by 10 copies of the original application. S. CT. R. 22.4. Accordingly, especially when time is of the essence, it is advisable to file 13 copies of the application in the first instance, so that any renewed motion can be made without delay.

[684] S. CT. R. 23.3.

[685] S. CT. R. 33.2(a).

[686] The Supreme Court sets detailed requirements that the response must follow. *See* S. CT. R. 15.1–15.3, 24.2, 33 (form, content); S. CT. R. 15.1, 15.5, 29.1, 29.2 (filing, method of filing); S. CT. R. 29.3, 29.4, 29.5 (service; proof of service); S. CT. R. 15.2, 33.1(g) (length); S. CT. R. 15.3 (accompanying documents).

[687] S. CT. R. 15.1–15.5.

[688] The Court will, however, always call for a response in capital cases. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.4 n.3 (7th ed. 2022) and accompanying text.

[689] S. CT. R. 15.3, 30.

[690] S. CT. R. 15.5.

[691] S. CT. R. 15.6. *See also* Clerk of the Court, Memorandum Concerning the Deadlines for Cert Stage Pleadings and the Scheduling of Cases for Conference 2–3 (Feb. 2020) (explaining rules and procedures for filing Reply to Brief in Opposition), *available at* https://www.supremecourt.gov/casehand/Guidance-on-Scheduling-Feb-2020.pdf (last visited Feb. 12, 2024).

[692] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.4 (2022).

[693] S. CT. R. 16.2.

must be filed within 45 days,[694] together with a joint appendix.[695] The state's brief generally must be filed "within 30 days after . . . [your] brief . . . is filed."[696] If you wish to file a reply brief, it generally must be filed "within 30 days after the brief for the [state] . . . is filed, but any reply brief must actually be received by the Clerk no later than 2 p.m. 10 days before the date of oral argument."[697]

If your petition for writ of *certiorari* is denied, this is not a decision on the merits of your argument.[698] If you raise another habeas corpus petition later, the denial for writ of *certiorari* will have no effect.[699] You may ask the Court to rehear your petition,[700] but a rehearing, "except by order of the Court or a Justice," will not change the Court's denial of your *certiorari* petition.[701] To apply for rehearing, you must submit two things: (1) the rehearing petition; and (2) a signed certificate, attesting that the petition is "limited to intervening circumstances [meaning new circumstances that were not present when you filed your *certiorari* petition] of a substantial or controlling effect or to other substantial grounds not previously presented" and that the petition "is presented in good faith and not for delay."[702]

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[694] S. CT. R. 25.1, 25.4, 30. *See* S. CT. R. 24.1, 24.5, 24.6 (content, form of brief); S. CT. R. 24.3, 33.1(g), 33.2(b) (length of brief); S. CT. R. 29.1, 29.2 (filing; proof of filing, if by mail); S. CT. R. 25.7, 29.3, 29.4, 29.5 (service; proof of service); S. CT. R. 39 (*in forma pauperis* requirements). The Supreme Court rules requires that "all filers who are represented by counsel . . . submit documents to the Court's electronic filing system." *See* S. CT. R. 29.7 (adopted Dec. 5, 2022; effective Jan. 1, 2023).

[695] S. CT. R. 26. *See also* Guide for Counsel in Cases to be Argued Before the Supreme Court of the United States (prepared by the Clerk of the Court, October Term 2022, updated Oct. 3, 2022), at 15–18 (explaining rules and procedures for preparation and filing of joint appendix and merits briefs), *available at* https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202022.pdf (last visited Feb. 12, 2024).

[696] S. CT. R. 25.2; S. CT. R. 25.4, 30.

[697] S. CT. R. 25.3. *See* S. CT. R. 24.2 (content, form); S. CT. R. 24.3, 33.1(g), 33.2(b) (length); S. CT. R. 29.1, 29.2 (filing, proof of filing, if by mail); S. CT. R. 25.7, 29.3, 29.4, 29.5 (service, proof of service); S. CT. R. 39 (*in forma pauperis* requirements). Oral argument is governed by S. CT. R. 28. *See also* Guide for Counsel in Cases to be Argued Before the Supreme Court of the United States (prepared by the Clerk of the Court, October Term 2022, updated Oct. 3, 2022), at 2–12 (explaining rules and procedures for oral argument), *available at* https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202022.pdf (last visited Feb. 12, 2024); S. CT. R. 32 ("Models, Diagrams, Exhibits, and Lodgings").

[698] *See, e.g.*, Calvert v. Texas, 141 S. Ct. 1605, 1606–1607 (2021) (*mem.*) (Sotomayor, J., respecting the denial of *certiorari*) ("I write separately to emphasize that the denial of Calvert's [*certiorari*] petition should not be construed as a rejection of his claim on the merits . . . The legal question Calvert presents is complex and would benefit from further percolation in the lower courts prior to this Court granting review."); Boumediene v. Bush, 549 U.S. 1328, 1329 (2007) (statement of Stevens and Kennedy, JJ., respecting the denial of *certiorari*) ("as always, denial of *certiorari* does not constitute an expression of any opinion on the merits").

[699] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.5 (2022). It does not matter whether what issues you raised on your first habeas corpus petition—the Supreme Court's denial of your writ will have no bearing on your second petition.

[700] S. CT. R. 16.3, 45.2. *See also* S. CT. R. 44.2 (requiring nonindigent *certiorari* petitioners to accompany petitions for rehearing of denial of *certiorari* with appropriate filing fee).

[701] S. CT. R. 16.3. ("order [denying *certiorari*] … will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice").

[702] S. CT. R. 44.2 (clerk must reject rehearing petition filed without certificate).

K. Original Petitions[703]

Sections 2241 and 2242 of the Judicial Code allow you to file an "original [habeas corpus] petition" with the Supreme Court.[704] However, the Supreme Court only very rarely grants original habeas corpus petitions, even if you meet the Court's incredibly high standard for such petitions.[705]

First, you must "state the reasons for not making application to the district court of the district in" which you are held.[706] Then, you must also "show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."[707] In other words, you must show that only the Supreme Court can grant you relief, because no other court in your area can do so. These exceptional circumstances can be separated into two general categories.[708]

The first category includes original petitions received by the Supreme Court because the appellate chain below was somehow broken. This requirement might be met, for example, if there is a state rule forbidding you from beginning the proceedings necessary to exhaust your state remedies.[709] Or, this requirement might be met if the state court that ordinarily would serve as the first step in your exhaustion proceedings has jurisdiction only because that court took actions against you that were "wholly beyond [its] . . . jurisdiction," or so lawless that requiring you to return to that court would make the illegality worse.[710]

The second category includes cases where the appellate chain is too long, meaning that fulfilling the exhaustion of state and lower federal court remedies would take too long, and therefore the incarcerated individual would be executed or irreparably injured before securing a ruling.[711]

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[703] *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 40 (2022) ("Original Habeas Corpus Proceedings").

[704] 28 U.S.C. §§ 2241, 2242.

[705] S. CT. R. 20.4(a) (original writs are "rarely granted"). *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 40.3 n.2 (2022) (discussion of the rare instances in which original writs were granted).

[706] 28 U.S.C. § 2242.

[707] S. CT. RULE. 20.4(a). *Accord, e.g., In re Davis*, 557 U.S. 952, 953, 130 S. Ct. 1, 1, 174 L. Ed. 2d 614, 614 (2009) (Stevens, J., concurring, joined by Ginsburg and Breyer, JJ.) (concurring in Court's transfer of original habeas corpus petition to district court for "hearing and determination" of claim of actual innocence because "[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently 'exceptional' to warrant utilization of this Court's Rule 20.4(a), 28 U.S.C. § 2241(b), and our original habeas jurisdiction.") For more cases illustrating these exceptional circumstances, *see* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 40.3 n.6 (2022).

[708] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 40.3 (2022).

[709] *See, e.g.*, Ex parte Hull, 312 U.S. 546, 549–551, 61 S. Ct. 640, 641–642, 85 L. Ed. 1034, 1035–1037 (1941) (original petition granted to review, *inter alia*, a state prison rule, apparently respected by state courts, forbidding prisoners from challenging legality of incarceration; prison rule invalidated but relief on merits of underlying claim denied). *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 40.3 n.12 (2022).

[710] Ex parte Yarbrough, 110 U.S. 651, 653, 4 S. Ct. 152, 153, 28 L. Ed. 274, 274 (1884) (it is "not only within the authority of the Supreme Court, but it is its duty" to hear original petitions when court of confinement and, apparently, court to which initial petition would have to be directed under usual rule, previously had incarcerated prisoner "in regard to a matter wholly beyond or without the jurisdiction of that court"). *Accord* Ex parte Grossman, 267 U.S. 87, 122, 45 S. Ct. 332, 337, 69 L. Ed. 527, 536 (1925) (original petition granted after district judge to whom petition would have to be directed in first instance under usual rule defied presidential pardon of petitioner and reincarcerated him); Ex parte Hudgings, 249 U.S. 378, 384, 39 S. Ct. 337, 340, 63 L. Ed. 656, 659 (1919) (original petition granted after summary contempt proceeding conducted by district judge to whom initial petition in regular course would have to be directed; district court's extension of contempt power "bears generally on the power and duty of courts in the performance of their functions" and "on the liberty of the citizen when called upon as a witness" and was sufficiently "erroneous" to require "prompt" correction). For more cases, *see* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 40.3 n.13 (2022).

[711] *See, e.g.*, Woodard v. Hutchins, 464 U.S. 377, 377, 104 S. Ct. 752, 752, 78 E. Ed. 2d 541, 543 (1984) (*per curiam*) (single circuit judge has jurisdiction under All Writs Act, 28 U.S.C. § 1651, to grant habeas corpus

1. Current Practice (as of March 2024)

Although statutes, rules, and prior court practice[712] call for habeas corpus petitions that are filed preemptively with the Supreme Court to be transferred to the appropriate lower court, the Supreme Court usually just denies such petitions instead of transferring them.[713] Such a denial, however, "is not an adjudication on the merits, and is made without prejudice to alternative or subsequent applications for relief."[714] This means that the Supreme Court's denial of your original writ of habeas corpus does not affect future filings of habeas corpus petitions, and it does not necessarily mean you did not make valid arguments.

petitioner stay of execution hours before execution is scheduled to occur); United States ex rel. Norris v. Swope, 72 S. Ct. 1020, 1021, 96 L. Ed. 1381, 1382 (1952) (Douglas, Circuit Justice, in chambers) (*dicta*) (original proceedings are appropriate in "exceptional circumstances"). For more cases, *see* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 40.3 n. 14 (2022).

712 *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 40.3 (2023) ("Although section 2241(b), Appellate Rule 22(a), prior Supreme Court practice, and prior and present court of appeals practice call for habeas corpus petitions that are filed further along in the appellate chain than is proper to be transferred to the appropriate lower court, the Supreme Court at present typically denies such petitions."); FED. R. APP. P. 22(a); Advisory Committee Note to FED. R. APP. P. 22(a).

713 *See, e.g.*, In re Bowe, No. 22-7871, 2024 WL 674656 (U.S. Feb. 20, 2024); In re Tripati, 474 U.S. 1048, 106 S. Ct. 838, 88 L. Ed. 2d 809 (1986); Ernest v. United States Attorney, 474 U.S. 1016, 106 S. Ct. 562, 88 L. Ed. 2d 548 (1985); Dixon v. Thompson, 429 U.S. 1080, 1080–1081, 97 S. Ct. 1085, 51 L. Ed. 2d 527 (1977) (citing authority); Wharton v. Crouse, 393 U.S. 815, 89 S. Ct. 139, 21 L. Ed. 2d 182 (1968) (petition denied; four justices would have transferred).

714 *Dixon v. Thompson*, 429 U.S. 1080, 1081, 97 S. Ct. 1085, 51 L. Ed. 2d 527 (1977). *Accord* S. CT. RULE. 20.4(b); Ex parte Davis, 318 U.S. 412, 63 S. Ct, 679, 87 L. Ed. 868 (1943); Ex parte Current, 314 U.S. 578, 62 S. Ct. 120, 86 L. Ed. 467 (1941).

APPENDIX A

THE NINE-STEP APPEALS AND HABEAS CORPUS PROCESS FOR PERSONS CONVICTED BY A STATE COURT

This chart represents the steps you usually must take when challenging a decision as a state incarcerated person. The chart starts from the initial trial and goes all the way through the resolution of the federal habeas corpus petition.

The first column, on the left, shows you how to pursue your direct appeal. Box 1 is your initial trial. After this trial, you pursue your direct appeal to the higher potentially available state court, shown in Box 2. After your direct appeal to the higher state courts, you may (but you are not required to) seek *certiorari* review by 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—which you are not required to file in every case, but often will need to file in order to fulfill the "exhaustion of remedies" requirement for filing a federal habeas petition.[715] You begin state post-conviction proceedings *after* your direct appeal process is complete. Depending on how state law defines the state post-conviction process, you may 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 higher state courts. Finally, in Box 6, you may (but you are not required) to seek review by the United States Supreme Court on a petition for a writ of *certiorari*, 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 any state post-conviction proceedings you decide to pursue, 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 (also referred to as the federal court of appeals). Finally, you may seek review to the United States Supreme Court in a writ of *certiorari*, Box 9.

At each of the three points noted in this chart (Boxes 3, 6, and 9), you may ask the Supreme Court to hear your case on a writ of *certiorari*. You are not required to seek Supreme Court review, and if you do, the Supreme Court 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). The Supreme Court rarely grants these petitions, but it does so often enough to make it worth your while to consider in each case whether to file a *certiorari* petition.

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[715] Refer to Section A(3) ("When Should You File a Federal Habeas Petition?") of this Chapter for a discussion on whether and when to file state post-conviction proceedings.

DIRECT APPEAL	STATE POST-CONVICTION	FEDERAL HABEAS
(1) Trial	(4) Post-Conviction in Trial Court Where You Were 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 Appeals (Circuit Court)
↓	↓	↓
(3) U.S. Supreme Court	(6) U.S. Supreme Court	(9) U.S. Supreme Court

APPENDIX B

CHECKLIST OF STEPS FOR FEDERAL HABEAS CORPUS PETITIONERS FILING THEIR FIRST PETITION

Take each of the following steps in the process of submitting your federal habeas petition:

For state and federally incarcerated people:

(1) Seek help from an attorney.
(2) Identify at least one way in which your conviction or sentence violates the U.S. Constitution, federal law, or treaties.
(3) Describe in your habeas petition how your conviction or sentence violates the U.S. Constitution, federal law, or treaties.
(4) In your petition, discuss every possible violation and include a detailed explanation of the facts of each violation and the federal legal rules that make clear that a violation occurred.
(5) If the violation concerns the illegal search and seizure clause of the Fourth Amendment, show in your petition that you were denied a full and fair opportunity to pursue your Fourth Amendment claim at your trial and on your direct appeal in the state courts.
(6) In your petition, avoid relying on "new" rules of law ("new" rules of law are rules that were adopted or declared by a court after your trial and your direct appeal; for more information on new rules, see Subsection D(8)(c) of this Chapter, "New Laws: The *Teague* Rule.").
(7) Show in your petition that the violation had a substantial effect on the verdict or sentence in your case, so the violation was not "harmless."
(8) File your habeas petition within one year after your case became final in the state courts. Your case becomes final with the completion of your direct appeals (not counting the time after you file timely state post-conviction proceedings and before those proceedings are completed).
(9) In preparing your petition, use the "model form" habeas corpus petition that is required by the district court in which you intend to file. If the prison in which you are incarcerated does not have a copy of the model form, write to the clerk of the district court to ask for a copy of the form.
(10) Check your petition to be sure your arguments are clear, logical, and well-organized. Try to use the correct spelling and grammar. If possible, have someone else read over to make sure it is clear, logical, and well-organized, and that the spelling and grammar are correct.
(11) File three copies of the petition with the court and keep a fourth copy for yourself.

Additional requirements for people convicted by a state court:

(1) Make sure you are in state custody, meaning that you were convicted by a state court and that you are in a state jail or prison or otherwise subject to state-imposed limitations on your freedom to go where you want to go.
(2) Exhaust all state remedies on all claims you want to raise in your petition before filing that petition and explain in your habeas petition the steps you took to exhaust state remedies.
(3) Choose whether to file your federal petition in the district court for the district where you were convicted or in the district where you are incarcerated, if those districts are different.

Additional requirements for people convicted by a federal court:

(1) Make sure you are in federal custody, meaning that you were convicted by a federal court and that you are in a federal jail or prison or otherwise subject to federally imposed limitations on your freedom to go where you want to go.
(2) Title your petition a "Section 2255 motion" rather than calling it a "habeas corpus petition."
(3) Complete your direct appeal proceedings before filing your Section 2255 motion.

For state incarcerated people sentenced to death:

(1) If you do not have a lawyer, ask the federal district court to appoint a lawyer to represent you. It is required to appoint you counsel because you are under sentence of death.
(2) Apply for a stay of execution.
(3) Find out whether the state where you are incarcerated has met the guidelines in Section 2261 of the habeas corpus statute (meaning your state has "opted-into" swifter habeas proceedings by agreeing to provide you with fuller state post-conviction proceedings). If so, file your habeas petition within six months of the date your conviction becomes final at the end of direct appeal.

APPENDIX C

Examples of Habeas Claims Based on the Constitution

What follows is a list of examples of habeas claims based on the Constitution, separated by categories. Remember that this list does NOT include every possible example. If you think you experienced a violation of your rights not listed below, 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 court relies on to determine whether something was a violation or not. Shepardize[716] 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. (The process of developing your case is explained further in Subsection D(8)(b) of this Chapter ("Standards and Tests for Claims of Violations").)

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.

If you can identify violations, you should list every possible violation and every instance of each violation.

Investigation and Policing: A witness identified you through a police line-up or photograph in which the police were more suggestive than allowed,[717] violating your Fourteenth Amendment right to due process.

Your Confession: Your confession was obtained without your consent, in violation of your Fourteenth Amendment due process rights.[718] In order to prove that your confession was not voluntary, you must prove that your will was overborne (overtaken) (in other words, that the confession was extracted

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[716] By *Shepardizing*, you can make sure that the law has not changed over time. For more information about how to Shepardize a case, see Chapter 2 of the *JLM*, "Introduction to Legal Research."

[717] 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's degree of attention; (3) the accuracy of the witness's 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).

[718] *See* Miller v. Fenton, 474 U.S. 104, 110–112, 106 S. Ct. 445, 449–450, 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).

against your will).[719] Some facts that may support a claim that your will was overborne include threats of physical violence,[720] threats against loved ones,[721] repeated coercive questioning after you indicated that you wanted to stop answering questions,[722] fraudulent promises by police,[723] and other forms of ill treatment.[724]

Right to Counsel Violations: You were denied your Fifth and Sixth Amendment rights to counsel. You would claim this if:

- You were denied counsel that the state should have provided because you were indigent (poor).[725]
- You were denied the opportunity for new counsel when an irreconcilable (unsolvable) difference arose between you and your appointed counsel.[726]
- You were denied counsel at arraignment.[727]
- You did not voluntarily, knowingly, and intelligently waive your right to counsel during interrogation or discussions with police officers while in custody, or you asked for a lawyer while you were being interrogated, and the police did not provide you with a lawyer.[728]

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[719] *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).

[720] *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).

[721] *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).

[722] *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).

[723] *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).

[724] *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).

[725] *See* Gideon v. Wainwright, 372 U.S. 335, 343–345, 83 S. Ct. 792, 796–797, 9 L. Ed. 2d 799, 804–805 (1963) (holding that, in a criminal trial, if a defendant cannot afford counsel, counsel must be provided); *see also* Swenson v. Bosler, 386 U.S. 258, 259, 87 S. Ct. 996, 997, 18 L. Ed. 2d 33, 35 (1967) (holding that the right to counsel on direct appeal in state courts cannot be denied to a defendant solely because he is unable to afford a lawyer).

[726] *See* Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000) (holding that a trial court may not ignore the timely motion for new counsel by an indigent defendant with appointed counsel). *But see* United States v. Calabro, 467 F.2d 973, 986 (2d Cir. 1972) (holding that defendant must show good cause for rejecting assigned counsel, such as a complete breakdown in communication, a conflict of interest, or irreconcilable conflict with the attorney); United States v. Garey, 540 F.3d 1253, 1259–1260, 1270 (11th Cir. 2008) (finding that defendant waived the right to counsel when his request for substitute counsel was denied for lack of actual conflict of interest and he still rejected his appointed counsel three days before trial); Jones v. Walker, 540 F.3d 1277, 1290–1291, 1295–1296 (11th Cir. 2008) (finding no violation of the right to counsel when a defendant proceeds *pro se* after refusing to work with an assigned public defender and is denied his request to have another public defender assigned to him).

[727] *See* Rothgery v. Gillespie County, 554 U.S. 191, 213, 128 S. Ct. 2578, 2592, 171 L. Ed. 2d 366, 383 (2008) (holding that the 6th Amendment's guarantee of the right to counsel applies at a defendant's first appearance before a judicial officer where the defendant should be told of the formal accusations against him and the restrictions imposed on his liberty).

[728] *See* Brewer v. Williams, 430 U.S. 387, 403, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424, 439 (1977) (placing the burden on the prosecutor to show that the defendant has voluntarily, knowingly, and intelligently waived his right to counsel); Miranda v. Arizona, 384 U.S. 436, 471–472, 86 S. Ct. 1602, 1626, 16 L. Ed. 2d 694, 722 (1966) (stating that defendant must be informed of his rights before he may be considered to have knowingly and intelligently waived his right to counsel); *see also* Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1528, 128 L. Ed. 2d 293, 298 (1994) (finding that defendant must be given *Miranda* warnings if he is in custody

- Your lawyer provided such poor representation that it amounts to ineffective assistance of counsel.[729]
- The trial court unreasonably denied your request to proceed pro se (as your own attorney).[730]
- You were convicted based on information provided by an informant who was "bugged" (or "wearing a wire"), or who reported jail cell conversations between you and him in violation of the Fifth or Sixth Amendments.[731]
- You were temporarily banned from consulting with your attorney.[732]
- Your attorney did not inform you that you could be deported if you agreed to a guilty plea.[733]
- Your attorney performed so poorly that it changed the outcome of your trial.[734]

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and being questioned). *But see* Texas v. Cobb, 532 U.S. 162, 167–168, 121 S. Ct. 1335, 1340, 149 L. Ed. 2d 321, 328 (2001) (holding that the 6th Amendment right is "offense specific" and that a defendant charged with burglary did not have a right to counsel when being interrogated about a murder from the same incident); Young v. Walls, 311 F.3d 846, 850 (7th Cir. 2002) (explaining that the purpose of *Miranda* warnings is to protect a suspect from coerced self-incrimination and finding that police failure to give *Miranda* warnings to a suspect is not unconstitutional where the suspect confessed because he wanted to talk).

[729] *See* Wiggins v. Smith, 539 U.S. 510, 534–535, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471, 492–493 (2003) (holding that, where defense counsel's failure to investigate defendant's background cannot be characterized as reasonable professional conduct, such errors violate defendant's Sixth Amendment rights if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). See Part D(8)(b) of this Chapter ("Standards and Tests for Claims of Violations"), for more information on ineffective assistance of counsel.

[730] 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 counsel provided by just anyone; 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).

[731] *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).

[732] *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).

[733] Padilla v. Kentucky, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284, 294 (2010); *see also* Chaidez v. U.S., 568 U.S. 342, 344, 133 S. Ct. 1103, 1105, 185 L. Ed. 2d 149, 155 (2013) (holding that *Padilla* does not apply retroactively to cases that were already final on direct review when *Padilla* was decided).

[734] McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763, 774 (1970) (holding that "defendants cannot be left to the mercies of incompetent counsel"); Berghuis v. Thompkins, 560 U.S. 370, 389, 130 S. Ct. 2250, 2264, 176 L. Ed. 2d 1098, 1116 (2010) (holding that to be successful on a habeas petition, petitioner must show both that counsel's assistance constituted "deficient performance" and that there is a reasonable probability that counsel's failings changed the outcome of the trial). *See* Hinton v. Alabama, 571 U.S. 263, 271–

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.[735]

Your Guilty Plea:

- Your guilty plea was unconstitutional because you pleaded guilty involuntarily.[736]
- You pleaded guilty as part of a plea bargain agreement that was broken.[737]

276, 134 S. Ct. 1081, 1087–1090, 188 L. Ed. 2d 1, 7–11 (2014) (holding that counsel's performance was deficient because they failed to replace an inadequate expert due to a mistaken belief about funding caps; remanding to the district court to determine if the error might have changed the outcome of trial); Porter v. McCollum, 558 U.S. 30, 40–44, 130 S. Ct. 447, 453–456, 175 L. Ed. 2d 398, 406–409 (2009) (holding that counsel's failure at capital sentencing to present evidence of the accused's mental health, family background, or military service was deficient and that such deficiency was prejudicial). *But see* Marshall v. Rodgers, 569 U.S. 58, 61–65, 133 S. Ct. 1446, 1449–1451, 185 L. Ed. 2d 540, 543–545 (2013) (holding that the trial court did not err when it denied petitioner's motion for counsel to file a motion for a new trial, because the petitioner had waived his right three previous times); Cullen v. Pinholster, 563 U.S. 170, 187–196, 131 S. Ct. 1388, 1401–1407, 179 L. Ed. 2d 557, 573–579 (2011) (holding that counsel was not ineffective in failing to consult additional psychiatrist for mitigating evidence); Bobby v. Van Hook, 558 U.S. 4, 11–12, 130 S. Ct. 13, 19, 175 L. Ed. 2d 255, 260–261 (2009) (holding that a decision not to seek more mitigating evidence for state incarcerated petitioner was within the range of professional decisions and thus not deficient counsel); Staten v. Davis, 962 F.3d 487, 496–497 (9th Cir. 2020) (concluding that petitioner's trial lawyer rendered deficient performance by failing to offer evidence that gang members appeared to take credit for the crime petitioner was charged with committing, but rejecting petitioner's ineffective assistance claim because the error was not prejudicial to the petitioner, given other compelling evidence establishing the petitioner's guilt).

[735] 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 has 'a rational as well as factual understanding of the proceedings against him.'" Godinez v. Moran, 509 U.S. 389, 391, 113 S. Ct. 2680, 2682, 125 L. Ed. 2d 321, 327 (1993). *See* 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 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).

[736] *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, 493–495, 82 S. Ct. 510, 513–514, 7 L. Ed. 2d 473, 478–479 (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).

[737] *See* Santobello v. New York, 404 U.S. 257, 262, 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

- You pleaded guilty without understanding the charges against you,[738] or language difficulties prevented you from understanding the charges against you.[739]
- You pleaded guilty without understanding the consequences of pleading guilty.[740]

Timing of Conviction and Trial:

- The statute of limitations had already run out when you were charged with the offense,[741] or you were charged with a federal, non-capital crime more than five years after the crime occurred.[742]
- You were denied your Sixth Amendment right to a speedy trial.[743]

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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).

[738] *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 the trial judge's plea allocution was insufficient to ensure that defendant understood the elements of the charges he faced, and the trial judge failed to inquire into defendant's mental competence after defendant told the judge about his poor education and drug addiction).

[739] 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).

[740] *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, 720–722 (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).

[741] 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.

[742] *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.

[743] 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* Boyer v. Louisiana, 569 U.S. 238, 133 S. Ct. 1702, 18 L. Ed. 2d 774 (2013) (holding that the right to speedy trial was not denied despite multiple delays and Hurricane Rita, because there was not enough evidence to declare the delay was caused by the State's failure to fund the defense); 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).

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.[744]
- 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.[745]
- During trial, the prosecutor commented on your post-arrest silence in violation of your Fifth Amendment right against self-incrimination;[746] or the prosecutor made an improper summation.[747] (A summation, or closing argument, is the argument made to the jury at the end of a trial.)

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[744] *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).

[745] 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, 453–458, 92 S. Ct. 1653, 1661–1664, 32 L. Ed. 2d 212, 222–225 (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.

[746] *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 remained silent to police after *Miranda* warnings at time of his arrest); Griffin v. California, 380 U.S. 609, 615 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106, 110 (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, 1416–1417 (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, 559–561, 100 S. Ct. 1358, 1364–1365, 63 L. Ed. 2d 622, 630–631 (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.

[747] *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 (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).

- 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.[748]

Access-to-Evidence Violations:

- The prosecution withheld requested[749] evidence that could have helped your case, in violation of the Fourteenth Amendment.[750]
- The state failed to preserve important evidence in your investigation.[751]

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[748] *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). *But see* 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's use of a psychologist's report solely to rebut petitioner's psychological evidence was not a 5th Amendment violation).

[749] 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, 2397–2400, 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, 678, 681–682, 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).

[750] *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) ("Because 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. 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 who 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).

[751] *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

- You were denied expert assistance you needed at trial, in violation of the Fourteenth Amendment.[752]
- The prosecution admitted hearsay (out-of-court statements) against you in violation of the Confrontation Clause of the Sixth Amendment,[753] and the admitted hearsay did not qualify as one of the many exceptions to the hearsay rule.[754]

Witness Violations:

- You were denied the right to cross-examine a witness who testified against you.[755]

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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.

[752] *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).

[753] 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 a statement originally made out-of-court and that is being presented in court for its truth. FED. R. EVID. 801–807. For more information on the hearsay rules and their exceptions, *see* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE (2006); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE (2003); Reiner v. Woods, 955 F.3d 549, 554–563 (6th Cir. 2020) (holding that the district court wrongly admitted hearsay statements during a murder trial and that admission was not harmless, because there could have been substantial and injurious effect on the jury's verdict). *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).

[754] 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).

[755] *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 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

- A witness lied on the stand about having been granted leniency from the police in exchange for testifying against you.[756]

The Jury:

- You were denied your Sixth Amendment right to a trial by a fair and impartial jury because you were denied a trial by jury.[757]
- You were tried by a jury of fewer than six members,[758] or you were convicted by a non-unanimous jury vote (meaning that at least one juror voted "not guilty").[759]
- The community where members of the jury work or live was exposed to inflammatory media accounts about your case.[760]

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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").

[756] Giglio v. United States, 405 U.S. 150, 154–155, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (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 it unconstitutional that 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).

[757] U.S. CONST. amend. VI; *see* Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491, 496 (1968) (applying the 6th 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 6th Amendment right.

[758] *See* 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 also* Williams v. Florida, 399 U.S. 78, 86, 90 S. Ct. 1893, 1898, 26 L. Ed. 2d 446, 453 (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").

[759] *See* 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); *see also* FED. R. CRIM. P. 31(a) (requiring a unanimous verdict in all federal jury cases); United States v. Ferris, 719 F. 2d 1405, 1407 (9th Cir. 1983) ("Unanimity, of course, means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense"); *see also* Ramos v Louisiana, 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583, 491 (2020) ("There can be no question either that the 6th Amendment's unanimity requirement applies to state and federal criminal trials equally").

[760] *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*; *see also* Woods v. Dugger, 923 F.2d 1454, 1460 (11th Cir. 1991) (finding 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).

- Members of certain racial, religious, gender, or age-based (the elderly) groups were excluded from the jury pool,[761] or the prosecutor intentionally used his or her peremptory challenges (peremptory challenges are when the prosecutor or petitioner eliminates potential jurors without a reason) to remove members of a particular racial group or gender from the jury.[762]
- Members of a distinct class or group, such as blacks or women, were systematically excluded from the grand jury in violation of the Fourteenth Amendment.[763]
- The jury instructions[764] were unconstitutional because they did not tell the jury the prosecution must prove all elements of guilt beyond a reasonable doubt,[765] or the instructions

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[761] *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).

[762] *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).

[763] *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 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).

[764] 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 that guilt must be found "beyond a reasonable doubt" for the defendant to be guilty.

[765] *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

did not tell the jury the prosecution must overcome a presumption of innocence in order to convict you.[766]

- Evidence was insufficient to sustain the jury's verdict of guilty beyond a reasonable doubt.[767]
- The jurors' decision was influenced by racist opinions.[768]
- The judge gave improper jury instructions that did not allow the jury to consider mitigating evidence, such as mental disability and a history of severe childhood abuse.[769]

The Judge: The judge was biased against you because he was corrupt and you did not bribe him.[770]

Your Lawyer:

- Your lawyer did not represent you effectively at trial.[771]

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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).

[766] *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); *see also* 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).

[767] *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, § 2254(d) of the federal habeas statute applies a stronger standard to this determination, so a federal reviewing court must give strong deference to the state court's findings. See Subsection I(2)(g) of this Chapter ("Standard of Review in Appeals (law and fact)") 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).

[768] Tharpe v. Sellers, 583 U.S. 33, 35, 138 S. Ct 545, 546, 199 L. Ed. 2d 424, 425 (2018) (remanding for further consideration of whether the case should be reopened, considering that a juror's racially discriminatory statements made after petitioner's capital murder trial potentially provided clear evidence that racial animus had influenced the jury's conviction and imposition of the death sentence).

[769] Abdul-Kabir v. Quarterman, 550 U.S. 233, 255, 127 S. Ct. 1654, 1669, 167 L. Ed. 2d 585, 602 (2007) (holding that sentencing juries must be allowed to consider mitigating evidence such as mental disabilities and a history of childhood abuse).

[770] 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).

[771] 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). Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) (holding that to be successful on a habeas petition, petitioner must show that counsel's assistance is both ineffective and prejudicial to the outcome of the trial. Ineffective assistance of counsel is among the most promising habeas claims. The standard for determination of ineffective assistance of counsel is discussed in Subsection D(8)(b) of this Chapter ("Standards and Tests for Claims of Violations"). Your trial counsel may have been ineffective for any number of 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

- Your lawyer did not file an appeal although you would have wanted to file one.[772]
- Your lawyer did not represent you effectively in your direct appeal (also known as a "first appeal as of right").[773]

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suppression motion against prosecution's evidence);. *See* Hinton v. Alabama, 134 S. Ct. 1081 (2014) (holding that counsel was ineffective assistance when they failed to replace an inadequate expert due to a mistaken belief about funding caps, and remanding to the district court for determination if this was prejudicial); Porter v. McCollum, 130 S. Ct. 447 (2009) (holding that counsel's failure at a capital sentencing to present evidence of the accused's mental health, family background, or military service was both ineffective assistance and prejudicial). *But see* Marshall v. Rodgers, 133 S. Ct. 1446 (2013) (holding that the Ninth Circuit did not err when they denied petitioner's motion for counsel to file a motion for a new trial, because the petitioner had waived his right three previous times); Cullen v. Pinholster, 131 S. Ct. 1388 (2011) (holding that counsel was not ineffective in failing to consult additional psychiatrist for mitigating evidence); Martel v. Claire, 132 S. Ct. 1276 (2010) (failure to pursue exoneration DNA test did not justify new counsel and may not be a violation of the Sixth Amendment's effective counsel requirement); Bobby v. Van Hook, 130 S. Ct. 13 (2009) (holding that a decision not to seek more mitigating evidence for state incarcerated petitioner was within the range of professional decisions and thus not deficient counsel); Staten v. Davis, 962 F.3d 487 (9th Cir. 2020) (holding that petitioner's habeas petition is rejected, because although counsel performed deficiently by failing to offer evidence that gang members appeared to take credit for the crime, this did not prejudice the petitioner, because there was other compelling evidence pointing towards the petitioner); 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).

[772] 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).

[773] *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) (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."). However, the petitioner must still show that the outcome of their trial was prejudiced, even if they have already shown that the counsel was deficient. *See* Beghuis v. Thompkins, 130 S. Ct. 2250 (2010). For more information on ineffective assistance of counsel claims, see *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel," and Part G in *JLM*, Chapter 9, "Appealing Your Conviction or Sentence."

The Law and Statutes:

- You were convicted under a statute that is unconstitutional.[774]
- You received a certain type of punishment, and the law now forbids this type of punishment.[775]
- You were convicted for an act that is no longer a crime under current law.[776]
- A state statute cancels your provisional early release credits after you have already earned them.[777]

Double Jeopardy:

- 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.
- You were convicted in a second trial after your first trial was declared a mistrial in violation of the Fifth Amendment.[778]
- You were tried a second time for the same offense after a reviewing court had reversed your earlier conviction because the evidence at your first trial was insufficient to support a conviction.[779]

Other Procedural Problems at Trial:

- You were denied the right to be present at your trial.[780]

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[774] 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); *see also* Vuitch v. Hardy, 473 F.2d 1370, 1370-1371 (4th Cir. 1973) (finding defendant doctor entitled to habeas corpus because the state abortion statute was unconstitutional). *But see* Glasgow v. Moyer, 225 U.S. 420, 429, 42 S. Ct 753, 756, 56 L. Ed. 1147, 1150 (1912) ("If a court has jurisdiction of the case the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact").

[775] For more information, see Subsection D(8)(c)(iv)(b) ("New Rules Prohibiting Punishments in All or Certain Situations") of this Chapter.

[776] For more information, see Subsection D(8)(c)(iv)(a) ("New Rules Decriminalizing Behavior in All or Certain Situations") of this Chapter.

[777] *See* Lynce v. Mathis, 519 U.S. 433, 445-447, 117 S. Ct. 891, 898-899, 137 L. Ed. 2d 63, 74–76 (1997) (holding retroactive cancellation, which actually increased the incarcerated person's punishment through re-arrest, violated the *Ex Post Facto* Clause).

[778] 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. *See* 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); *see also* Love v. Morton, 112 F.3d 131, 137-139 (3d Cir. 1997) (affirming grant of habeas relief from conviction on retrial after first trial court judge declared a mistrial soon after the 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 also* 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).

[779] *See* Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150-2151, 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); *see also* 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).

[780] *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); *see also* 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 waived 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

- You were prohibited from testifying on your own behalf.[781]
- The court in which you were convicted did not have the power to convict you because it did not have jurisdiction.[782]
- You were convicted without using a certain procedure that the law now says is necessary to ensure the fundamental fairness of a trial.[783]
- An error occurred during trial that made the trial fundamentally unfair in violation of the Fourteenth Amendment.[784]

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and injurious effect." *See* 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).

[781] *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); *see also* 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).

[782] *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); *see also* 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); *see also* 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.

[783] For more information, see Subsection I(2)(d) ("How to Select Claims/Issues for Appeals") of this Chapter.

[784] *See* Riggins v. Nevada, 504 U.S. 127, 137–38, 112 S. Ct. 1810, 1816–17, 118 L. Ed. 2d 479, 490–91 (1992) (finding that the forced administration of an antipsychotic drug to the 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); *see also* 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 dock 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 dock).