Capital § 2254 Habeas Cases: A Pocket Guide for Judges

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Introduction

Under 28 U.S.C. § 2254, a prisoner in custody pursuant to a state court judgment may seek relief in federal court by petitioning for a writ of habeas corpus. Civil in nature, habeas corpus petitions are initiated by the petitioner, who must demonstrate that the state court conviction or sentence was obtained in violation of federal statutory or constitutional law.

If a petitioner can establish entitlement to relief, a federal court generally grants a conditional writ of habeas corpus, directing the respondent to release the petitioner unless the constitutional violation is corrected in some other fashion. Most commonly, a federal court granting a conditional writ directs the state court to initiate retrial or resentencing proceedings within a reasonable period of time.

For capital cases, habeas corpus law has grown in complexity and volume since 1976, when the Supreme Court affirmed the constitutionality of the death penalty. Consequently, although the provisions of 28 U.S.C. § 2254 apply equally to capital and non-capital habeas cases, habeas petitions filed by state prisoners sentenced to death present unique challenges.

For example, capital petitioners are entitled to the appointment of counsel and "reasonably necessary" expert and investigative resources. Capital petitioners also commonly raise an extraordinary number of claims and routinely seek evidentiary development of these claims in federal court. Furthermore, as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress enacted special provisions applicable to capital habeas cases.[1]

This pocket guide is designed to provide a basic overview of the issues judges can expect to face when assigned a capital habeas case. It begins with appointment of counsel, budgeting concerns, and stays of execution. It then summarizes the primary procedural considerations that affect habeas cases—successive petitions, petition timeliness, state remedies exhaustion, procedural default, and amending

1. These provisions, set forth in Chapter 154 of Title 28, include a six-month limitations period and expedited review by the federal district and appellate courts for states that "opt in" by meeting specific requirements for the appointment and compensation of post-conviction counsel. *See* 28 U.S.C. §§ 2261–2266; *see also* Certification Process for State Capital Counsel Systems, 77 Fed. Reg. 7,559 (Feb. 13, 2012), 76 Fed. Reg. 11,705 (Mar. 3, 2011) (to be codified at 28 C.F.R. pt. 26).

a petition. The guide also addresses substantive considerations for case resolution, evidentiary development, and briefing procedures. Finally, the guide highlights some of the issues that often arise prior to an execution. For a more detailed explanation of the relevant law, as well as numerous sample orders and other materials used by some courts, consult the Federal Judicial Center's online *Resource Guide for Managing Capital Cases—Volume II: Habeas Corpus Review of Capital Convictions*.[2]

Initiation of the Case

A capital habeas case may be initiated by a prisoner proceeding pro se, by a prisoner's state post-conviction counsel, or by pro bono counsel (such as a regional legal organization) willing to assist a capital prisoner's transition from state court to federal court. The initial filings may include motions for appointment of counsel, leave to proceed in forma pauperis, and stay of execution, as well as a substantive habeas petition. The specific initiating documents will vary depending on (1) the need for counsel, (2) the practice of individual states in setting execution dates following completion of direct appeal and collateral review, and (3) the federal habeas statute of limitations period.

Although it is rare, some prisoners may enlist pro bono or retained counsel to represent them in federal habeas proceedings. More commonly, a prisoner will request appointment of counsel and leave to proceed in forma pauperis. Indigent state capital prisoners seeking federal habeas relief are entitled to the appointment of one or more attorneys under 18 U.S.C. § 3599(a)(2). Pursuant to the Supreme Court's decision in *McFarland v. Scott*,[3] a capital prisoner may initiate a habeas proceeding simply by requesting the appointment of counsel to prepare a habeas petition. Consequently, a court's first step in most capital cases is to resolve a motion for appointment of counsel.

In some states, courts issue an execution warrant upon completion of direct appellate and post-conviction review either automatically or at the request of prosecutors or the state's attorney general. In these states, the warrant pushes the prisoner into federal court, which then usually must address a motion to stay the execution pending resolution of the habeas proceedings.

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2. Revised March 2010. Available at http://cwn.fjc.dcn/fjconline/home.nsf/pages/1002 or http://www.fjc.gov/library/fjc_catalog.nsf.

3. 512 U.S. 849, 856–57 (1994).

In some instances, especially when a prisoner's state post-conviction counsel is well versed in federal habeas law, the prisoner may file a substantive habeas petition at the start of the case, along with a request to provide counsel with sufficient time to file an amended petition after completion of any necessary investigation. A substantive petition also may be filed at the outset if there are any concerns regarding expiration of the federal habeas statute of limitations, which for most cases runs for one year following the completion of direct appellate review and is tolled during state post-conviction review.

Generally, a capital prisoner does not seek federal habeas relief until after direct appeal and post-conviction proceedings conclude in state court. However, there are occasions when a prisoner attempts to initiate federal review at an earlier point. For example, this may occur if the prisoner is uncertain whether a state post-conviction petition has tolled the federal limitations period or if the prisoner experiences inordinate delay in the state court litigation.[4] A court faced with such a filing must decide whether to allow the prisoner to proceed in federal court (and possibly hold federal proceedings in abeyance) or to dismiss the action without prejudice until completion of state court proceedings.

Motion for Appointment of Counsel

The mechanism for soliciting and appointing qualified counsel varies from district to district, depending on local rule and practice. In some districts, the federal public defender manages the process, screening attorney applicants and making recommendations for appointment in specific cases. In others, the court utilizes a selection committee or maintains a list of qualified attorneys.

Courts sometimes encounter difficulty in finding qualified private attorneys for capital habeas cases. Accordingly, some have adopted flexible approaches to capital counsel appointment, including the following:

- *Appointing state post-conviction counsel as federal habeas corpus counsel.* In some districts, the state post-conviction attorney is available to continue representation of a client during federal habeas corpus proceedings. The quality of such an attorney depends in part on the state's program for post-conviction

4. *See, e.g.*, Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005) (noting that the filing of a protective petition within the limitations period may be appropriate where state timeliness rules are unclear).

appointment, but there are significant benefits to having state attorneys continue their representation of clients in federal court. For example, such an attorney is already well acquainted with the case, thus reducing the time (and expense) necessary to research the record and file the federal habeas corpus petition. Courts may also consider pairing a state post-conviction attorney who has little federal habeas experience with an experienced federal habeas Criminal Justice Act (CJA) attorney, thus providing continuity on the case as well as an opportunity to expand the pool of qualified federal habeas attorneys for future cases.

- *Appointing counsel from capital habeas units in federal defender offices.* Several federal and community defender offices accept appointment of their attorneys to capital habeas corpus cases, and some even have dedicated capital habeas units. Appointing these attorneys in lieu of appointing private attorneys with CJA funding not only generally ensures well-qualified counsel but also avoids the administrative complications of using CJA panel attorneys (e.g., budgeting and voucher review). Some courts, either pursuant to district policy or in an individual case, combine the use of federal defenders and private panel attorneys.
- *Appointing counsel from state-funded or privately funded capital representation centers.* State-funded or privately funded offices for capital representation exist in some states, such as Florida's Office of Capital Collateral Representation, the Arizona Capital Representation Project, the California Habeas Corpus Resource Center, Kentucky's Department of Public Advocacy, Texas' Office of Capital Writs, and the North Carolina Center for Death Penalty Litigation. District courts in these states often appoint lawyers from these offices as counsel in federal habeas corpus cases and compensate them for their work through CJA vouchers.
- *Appointing federal counsel for simultaneous representation in state post-conviction and federal habeas proceedings.*[5] For example, in

5. In *Harbison v. Bell*, 556 U.S. 180, 189–90 (2009), the Supreme Court observed that 18 U.S.C. § 3599(e) authorizes federally funded counsel to represent a client in "subsequent" stages of available judicial proceedings and that "[s]tate habeas is not a stage 'subsequent' to federal habeas." However, the Court further noted that a district court may determine on a case-by-case basis that it is appropriate for federally appointed

the District of Maryland, the state court and the federal court jointly appoint counsel to represent the petitioner in both the state post-conviction and federal habeas proceedings. Invoking the authority of *McFarland v. Scott*, the federal court authorizes CJA funds to compensate counsel for "federal research"—that is, research for claims that will eventually be filed in the federal habeas corpus petition.[6] Attorney fees and expert and investigative fees related to developing claims for state post-conviction litigation are paid by the state's public defender.

Budgeting and Voucher Review

Capital cases are exempt from statutory maximum case budgets for attorney time. Nonetheless, judicial oversight is necessary to ensure that the time and expenses billed by private counsel are reasonable and efficacious. In addition, at least one circuit has adopted a presumptive limit on attorney time. Consequently, some districts and circuits require CJA counsel to follow a formal budgeting process, including the use of automated forms, in preparing and submitting a budget for various stages of a case (e.g., reviewing the record, preparing the petition, or participating in an evidentiary hearing). After the court has approved a budget, it reviews submitted vouchers for consistency with the budget.

Although there are no statutory maximums for attorney time in capital cases, funding for expert, investigative, and other services is limited to a total of $7,500 per case, unless the presiding judicial officer certifies the need for a greater amount and that amount is approved by the chief judge (or a designee) of the circuit. Consequently, even if a judge is not inclined to budget attorney time, budgeting for expert, investigative, or other services provides an effective vehicle for determining whether such services are "reasonably necessary" for the representation of the petitioner.[7]

For cases with appointed counsel, the court's case-management responsibilities also include the review and approval of expenses

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counsel to exhaust a claim in state court during the course of federal habeas representation. *Id.* at 190 n.7. This guide does not attempt to resolve any potential conflict between the Court's holding in *Harbison* and federal courts' appointment of federal counsel for simultaneous representation in state post-conviction and federal habeas proceedings.

6. 512 U.S. 849 (1994).

7. 18 U.S.C. § 3599(f).

submitted in CJA vouchers. Some district judges choose to review the vouchers themselves, while others use magistrate judges, death penalty law clerks, or staff attorneys to conduct the review. In a few districts, CJA attorney administrators are designated specifically for reviewing vouchers.

The Guidelines for Administering the CJA and Related Statutes, in volume VII of the *Guide to Judiciary Policy*, urge courts to permit interim payments in death penalty cases and to issue a separate memorandum or order outlining billing procedures when appointing counsel. Such a document might include details on budgeting and voucher submission, such as hourly rates, a list of reimbursable expenses, and standards for requesting funds for investigators and experts. Counsel find such memoranda and orders helpful for understanding the court's expectations, and courts benefit because the provision of such information reduces billing errors, unnecessary expenditures, and unreasonable time requests for specific tasks.

Stay of Execution

Stays of execution are routinely granted for prisoners who have not previously sought federal habeas review. In *McFarland v. Scott*, the Supreme Court held that once a capital petitioner has invoked the right to habeas counsel, federal jurisdiction exists and the court has the power to grant a stay.[8] Pursuant to *McFarland*, a federal court's exercise of stay jurisdiction prior to a petition being filed is within the court's discretion, but denial of a prepetition stay is improper if the imminence of a scheduled execution does not afford a petitioner's appointed counsel time to meaningfully research and present habeas claims.

Under 28 U.S.C. § 2251(a)(3), a federal court is expressly permitted to stay execution of a state prisoner's capital sentence for up to ninety days after counsel is appointed. However, because this ninety-day period often will run out prior to filing of the petition, courts may continue to rely on *McFarland* to issue discretionary stays of execution.

Procedural Considerations

At the start of a case, it is important for a court to determine whether the petitioner is seeking habeas relief for the first time, whether the petition is timely, and whether the petition raises unexhausted

8. *McFarland*, 512 U.S. at 858.

claims. The filing of an unauthorized successive petition, a late petition, or a mixed petition containing unexhausted claims may provide grounds for summary dismissal. Such issues may be raised by the respondents in an answer or motion to dismiss, or by the district court sua sponte after providing the petitioner with notice and an opportunity to be heard.

A court also may have to address allegations that a petitioner's claim is procedurally barred from federal habeas review, either because the state court's decision rests on independent and adequate state grounds or because the petitioner no longer has an available state court remedy to exhaust a claim not previously presented in state court. In addition, a petitioner may seek leave to amend a pending habeas petition.

Successive Petitions

Under section 2244(b)(1), a district court may not entertain a successive petition that attempts to relitigate claims presented in a prior petition. Consequently, if a prisoner files a second petition and the claims raised therein were already addressed by the court in the prisoner's first habeas proceeding, the petition should be summarily dismissed.

If in a second or successive petition a prisoner attempts to raise new claims not presented in the first petition, section 2244(b)(3) requires the prisoner to first seek an order from the court of appeals authorizing the filing of such claims.[9] A district court may not consider a successive petition in the absence of such authorization. Under section 2244(b)(2), an appellate court may authorize a successive petition under only very limited circumstances: The claim must rely on a new, retroactive rule of constitutional law or allege facts previously undiscoverable through the exercise of due diligence, *and* the claim must show by clear and convincing evidence that, but for constitutional error, no fact finder would have found the petitioner guilty of the underlying offense. Thus, if a petition filed in district court is a second or successive petition, attempts to raise new claims not presented in the first petition, and is not accompanied by an appellate court's authorization to file, summary dismissal is appropriate.

9. Felker v. Turpin, 518 U.S. 651, 657 (1996) (explaining that section 2244(b)(3) creates a "gatekeeping" mechanism in the court of appeals for the consideration of second or successive petitions in a district court and that the grant or denial of authorization by an appellate court is not appealable).

An exception to the requirement of prior appellate court authorization has been recognized for claims alleging mental incompetence for execution under *Ford v. Wainwright*[10] because such claims generally do not become ripe until after the first request for habeas relief has been denied and an execution date is imminent.[11] Other exceptions include petitions dismissed without prejudice for failure to exhaust state court remedies,[12] petitions dismissed as premature or for some other procedural defect,[13] and petitions raising claims not available at the time of the previous petition.[14]

Timeliness of Petition

Under section 2244(d)(1), as amended by AEDPA, a habeas petition must be filed within one year of the date on which (1) the judgment of conviction became final (the most common situation); (2) an impediment to filing, created by the state or federal government, was removed; (3) the Supreme Court recognized the right asserted and made it retroactively applicable to cases on collateral review; or (4) the factual predicate of the claim could have been discovered by due diligence. Because the statute of limitations is not jurisdictional, district courts are not obligated to raise the time bar sua sponte, but may do so after providing the parties with fair notice and an opportunity to present their positions.[15]

Section 2244(d)(2) tolls the one-year limitations period for section 2254 cases while a "properly filed" petition is "pending" on "state post-conviction or other collateral review." The Supreme Court has

10. 477 U.S. 399 (1986).

11. *See* Panetti v. Quarterman, 551 U.S. 930, 945 (2007).

12. Slack v. McDaniel, 529 U.S. 473, 485–86 (2000) (holding that a petition dismissed for failure to exhaust state remedies is not second or successive).

13. *See, e.g.*, Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45 (1998) (holding that a petition is not second or successive when it raises only one claim previously dismissed as premature); Muniz v. United States, 236 F.3d 122, 129 (2d Cir. 2001) (per curiam) (concluding that a petition is not second or successive when the first petition was incorrectly dismissed as untimely).

14. *See, e.g.*, Leal Garcia v. Quarterman, 573 F.3d 214, 223–24 (5th Cir. 2009) (holding that a petition raising a claim based on President Bush's declaration ordering states to review certain Vienna Convention claims was not successive because the declaration was issued after completion of the first petition); Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003) (holding that a petition raising a claim challenging an involuntary medication order entered after completion of the first petition was not second or successive).

15. Day v. McDonough, 547 U.S. 198, 209–10 (2006).

held that this tolling period includes the time between a lower state court's decision and the filing of a notice of appeal to a higher state court,[16] but does not include the time between denial of state post-conviction relief and pendency of a petition for certiorari in the U.S. Supreme Court seeking review of that denial.[17] Statutory tolling during the pendency of "other collateral review" also does not include federal habeas review.[18] Many other issues surrounding tolling, such as the meaning of "pendency" and "properly filed," continue to be litigated.

The Supreme Court has held that in addition to statutory tolling, a habeas petitioner may be entitled to equitable tolling if he or she diligently pursued his or her rights and was prevented from timely filing a petition by some extraordinary circumstance.[19] A court may need to hold an evidentiary hearing to determine whether a petitioner acted with diligence and whether extraordinary circumstances exist to justify the untimely filing.[20]

Exhaustion of State Remedies

Under section 2254(b)(1), a writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. To exhaust a federal constitutional claim, a petitioner must "fairly present" in state court both the operative facts and federal legal theory of his or her claim in a procedurally appropriate manner.[21]

In some instances, a petition may include claims that were not fairly presented and exhausted in state court. In that situation, the court may need to determine whether the petitioner has any available remedies in state court. Such an inquiry necessarily requires an examination of state post-conviction law. Respondents can, of course, waive exhaustion but rarely do.

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16. Carey v. Saffold, 536 U.S. 214, 217, 221 (2002).

17. Lawrence v. Florida, 549 U.S. 327, 332 (2007).

18. Duncan v. Walker, 533 U.S. 167, 172 (2001).

19. Holland v. Florida, 130 S. Ct. 2549, 2562 (2010).

20. *See, e.g.*, Earl v. Fabian, 556 F.3d 717, 728 (8th Cir. 2009) (remanding for factual development on whether state created an impediment preventing the petitioner from timely filing a habeas petition); Roy v. Lampert, 465 F.3d 964, 975 (9th Cir. 2006) (remanding for evidentiary hearing on equitable tolling claim); Keenan v. Bagley, 400 F.3d 417, 422 (6th Cir. 2005) (same).

21. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999); Anderson v. Harless, 459 U.S. 4, 6 (1982).

In *Rhines v. Weber,* the Supreme Court recognized the authority of a district court to hold a petition in abeyance in order to allow a petitioner to present unexhausted claims to the state court and then return to federal court for review of the fully exhausted petition.[22] However, the Court held that such a procedure is appropriate only if (1) the petitioner demonstrates good cause for the failure to exhaust the claims in state court; (2) the petitioner demonstrates that the unexhausted claims are not plainly meritless; and (3) the district court finds that the petitioner has not engaged in abusive litigation tactics or intentional delay. Because under section 2254(b)(2) unexhausted claims may be dismissed if they are plainly meritless, some courts find it more efficient to first review the merits of such claims before determining the availability of state court remedies or directing a petitioner to initiate an often time-consuming state exhaustion process.

In the event a court determines that a stay of proceedings is appropriate while a petitioner returns to state court, it must also decide whether federally appointed habeas counsel will be permitted to represent the petitioner in state court proceedings (if permissible to the state court) and, in the case of CJA counsel, will be compensated under 18 U.S.C. § 3599. The Committee on Defender Services recommends that district courts, in making this determination, consider, inter alia, the following factors on an individualized, case-by-case basis:

- the availability of the petitioner's original state post-conviction counsel or other qualified state counsel;
- the availability of state funds for investigative and expert services;
- the willingness of the state court to appoint and compensate the petitioner's federal counsel (if CJA panel attorneys);
- any unwarranted delay that would be caused by lack of continuity;
- the number and nature of the claims to be exhausted;
- whether the necessary investigation and research to present the claim have already been done by federal counsel; and
- whether it would be in the interests of justice.

22. 544 U.S. 269, 277–79 (2005).

Procedural Default

As a matter of comity and federalism, federal courts generally may not review a state court's denial of a federal constitutional claim if the state court's decision rests on a state procedural ground that is independent of the federal question and adequate to support the judgment.[23] This "adequate and independent state ground" doctrine requires finding, among other things, that the state procedural rule is not ambiguous and is "firmly established and regularly followed."[24]

A federal court may also find claims to be procedurally defaulted if the petitioner failed to present them in state court and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred."[25]

Because the doctrine of procedural default is based on comity, federal courts retain the power to consider the merits of a procedurally defaulted claim if the petitioner demonstrates legitimate cause for the failure to properly exhaust the claim in state court and prejudice from the alleged constitutional violation,[26] or shows that a fundamental miscarriage of justice would result if the claim is not heard on the merits in federal court.[27]

Amending a Petition

Section 2242 permits a petitioner to seek leave to amend a habeas petition pursuant to Rule 15 of the Federal Rules of Civil Procedure. After a brief period in which a party may amend a petition as of right, an amended pleading is allowed only within the court's discretion, based on an assessment of the following factors: (1) undue delay,

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23. Coleman v. Thompson, 501 U.S. 722, 729–30 (1991).

24. Walker v. Martin, 131 S. Ct. 1120, 1127–28 (2011); Beard v. Kindler, 130 S. Ct. 612, 617–18 (2009).

25. *Coleman*, 501 U.S. at 735 n.1.

26. *See* Maples v. Thomas, 132 S. Ct. 912, 922–23 (2012) (explaining that "cause" exception to procedural default exists where objective factors external to the defense impeded petitioner's efforts to comply with state procedural rules); Murray v. Carrier, 477 U.S. 478, 488 (1986) (same).

27. *See* Schlup v. Delo, 513 U.S. 298, 324–27 (1995) (providing for "fundamental miscarriage of justice" exception to procedural default where prisoner can show actual innocence of the offense); Sawyer v. Whitley, 505 U.S. 333, 347 (1992) (providing for "fundamental miscarriage of justice" exception to procedural default where prisoner can show ineligibility for the death penalty).

(2) bad faith or dilatory motive, (3) undue prejudice to opposing party, and (4) futility of amendment.[28]

With respect to futility of amendment, timeliness may be the determinative factor. In *Mayle v. Felix*, the Supreme Court construed the relation-back principle in Federal Rule of Civil Procedure 15(c)(2) and held that new claims supported by facts that differ in both "time and type" from those included in the original, timely-filed petition do not relate back and are thus untimely.[29] In contrast, if a new claim merely clarifies or amplifies facts already alleged in the original petition, it may relate back to the date of that pleading and avoid a time bar.

Substantive Considerations

When addressing the merits of a claim presented in a habeas corpus petition to which AEDPA applies, a federal court must first determine whether the claim was "adjudicated on the merits" in state court.[30] If so, the federal court must then assess the reasonableness of the state court's ruling in considering whether a petitioner is entitled to relief on a meritorious claim. As amended by AEDPA, section 2254 precludes habeas relief absent a showing that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). This is a highly deferential standard for evaluating state court rulings, which the petitioner bears the burden of meeting.[31]

If the state court did not address the claim on the merits (e.g., the court failed to address the claim or applied an inadequate state procedural bar), the federal court conducts de novo review and the restrictions of section 2254(d) are inapplicable.

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28. Foman v. Davis, 371 U.S. 178, 182 (1962).

29. 545 U.S. 644, 657 (2005).

30. 28 U.S.C. § 2254(d); *see* Harrington v. Richter, 131 S. Ct. 770, 784–85 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

31. Woodford v. Visciotti, 537 U.S. 19, 24–25 (2002) (per curiam).

Section 2254(d)(1)

The threshold question under section 2254(d)(1) is whether the petitioner seeks to apply a rule of law that was clearly established at the time his or her state court conviction became final.[32] Therefore, a court must first identify the "clearly established Federal law," if any, that applies to the petitioner's claim. "Clearly established" federal law consists of the holdings and legal principles set forth by the Supreme Court as of the time the state court renders its decision.[33] While circuit precedent may be persuasive in determining what law is clearly established, a circuit court decision is not itself "clearly established Federal law, as determined by the Supreme Court" within the meaning of section 2254(d)(1).[34]

The Supreme Court has provided guidance in applying section 2254(d)(1). A state court decision is "contrary to" the Supreme Court's clearly established precedents if (1) the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law; or (2) the state court was presented with a set of facts that was materially indistinguishable from facts underlying a decision of the Supreme Court but reaches a different result.[35] The Court has observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause."[36]

Under the "unreasonable application of federal law" provision of section 2254(d)(1), a federal habeas court may grant relief if a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply."[37] For a federal court to find a state court's application of Supreme Court precedent "unreasonable" un-

32. Williams (Terry) v. Taylor, 529 U.S. 362, 390 (2000).

33. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Carey v. Musladin, 549 U.S. 70, 76 (2006); Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003).

34. Renico v. Lett, 130 S. Ct. 1855, 1866 (2009); Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

35. *Terry Williams*, 529 U.S. at 405–06; *see* Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam).

36. *Terry Williams*, 529 U.S. at 406.

37. *Id.* at 407.

der section 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable."[38]

A state court's decision is entitled to deference even if the state court provides no reasoning for its ruling. If a state court summarily denies a claim without explanation, the petitioner must show there was no reasonable basis for the state court to deny relief.[39] This requires a federal habeas court to "determine what arguments or theories supported, or . . . could have supported, the state court's decision."[40] The court then must ask "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent" with a prior decision of the Supreme Court.[41]

Finally, review under section 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.[42] As a practical consequence, because new evidence introduced in federal court has no relevance to section 2254(d)(1) review, a court may prefer to determine whether the petitioner has satisfied section (d)(1) before considering the appropriateness of expanding the state court record or holding an evidentiary hearing to develop facts in support of a claim.

Section 2254(d)(2)

Under the standard set forth in section 2254(d)(2), habeas relief is available only if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding."[43] State court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Harm or Prejudice Requirements

If a petitioner has met his or her burden under section 2254(d)(1) or (d)(2), or these provisions are inapplicable (e.g., the state court did

38. *Id.* at 409; Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam).
39. Harrington v. Richter, 131 S. Ct. 770, 784 (2011).
40. *Id.* at 786.
41. *Id.*
42. Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011).
43. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

not adjudicate the claim on the merits), review in the district court is de novo.[44] To warrant habeas relief, a petitioner must then establish one of the following:

- the constitutional error is structural and prejudice is presumed;[45]
- the constitutional error includes a finding of prejudice;[46] or
- the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict."[47]

Evidentiary Development

If a state court has addressed a claim on the merits, a federal court may not consider new evidence developed in federal habeas proceedings in support of that claim absent a showing under section 2254(d) that the state court's denial of relief was contrary to or based on an unreasonable application of controlling Supreme Court law, or was based on an unreasonable determination of the facts in light of the evidence presented in state court.[48] If a petitioner has met this burden or section 2254(d) is inapplicable (e.g., the state court did not adjudicate the claim on the merits), evidentiary development may be necessary to resolve a claim.

Whether a petitioner in federal court is permitted to further develop facts in support of habeas claims may depend on the individual state's post-conviction process. In states where prisoners are provided with the opportunity to develop post-conviction claims and

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44. *See, e.g.*, Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (noting that when a state court's adjudication of a claim is based on an unreasonable application of federal law, a federal court must then "resolve the claim without the deference AEDPA otherwise requires").

45. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 264 (1986) (holding reversal mandatory for unlawful exclusion of members of a defendant's race from grand jury); McKaskle v. Wiggins, 465 U.S. 168, 177–78 n.8 (1984) (observing that deprivation of the right to self-representation at trial cannot be harmless); Waller v. Georgia, 467 U.S. 39, 49 & n.9 (1984) (noting that petitioner is not required to prove prejudice from violation of public-trial guarantee).

46. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring showing of both deficient performance and prejudice to establish violation of Sixth Amendment right to counsel); Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring that suppressed evidence favorable to an accused be material to guilt or punishment in order to establish due process violation from prosecution's failure to disclose).

47. *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

48. Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011).

hearings are held to resolve disputed facts, further evidentiary development in federal court occurs infrequently. However, when a petitioner presents one or more colorable claims that have survived all procedural impediments and that, despite the petitioner's diligence in state court, were not adequately developed in state proceedings, evidentiary development in federal court may be required. The three procedures for fact development are an evidentiary hearing, discovery, and record expansion.

Evidentiary Hearing

An evidentiary hearing is authorized under Rule 8 of the Rules Governing § 2254 Cases for the development of a colorable claim when the state court has not reliably found the relevant facts and the claim, if proved, would entitle the petitioner to relief. However, pursuant to section 2254(e)(2), a federal court may not hold a hearing unless it first determines that the petitioner exercised diligence in trying to develop the factual basis of the claim in state court.[49] If the failure to develop a claim's factual basis is attributable to the petitioner (i.e., he or she was not diligent in state court), a federal court may hold an evidentiary hearing only if the claim relies on (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence." In addition, "the facts underlying the claim [must] be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the [petitioner] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2).

When an evidentiary hearing is granted, the court should initiate additional case-management procedures to prepare for the hearing. For example, the court may recommend that the parties meet and confer within a specified time, or may require a prehearing conference at which both parties meet with the judge to discuss how the hearing will substantively proceed. The court also should consider issuing a scheduling order that sets forth relevant deadlines (for completing prehearing discovery, introducing evidence, filing objections, identifying witnesses, and submitting a statement of disputed and undisputed facts).

49. *See* Williams (Michael) v. Taylor, 529 U.S. 420, 435 (2000).

Disputed facts can be resolved in ways other than the presentation of live testimony, including by declaration, deposition, and documents produced through discovery or record expansion. In some cases, the parties may agree on some facts and enter a formal stipulation to that effect. These alternative methods may be more efficient in terms of judicial economy and cost-effective from a case-management perspective because they reduce the number of issues that require specific attention at the live evidentiary hearing.

Discovery

Unlike the usual civil litigant in federal court, a habeas petitioner is not entitled to discovery as a matter of course. Rather, formal discovery is authorized in Rule 6 of the Rules Governing § 2254 Cases only if authorized by the judge upon a showing of good cause. Good cause exists where specific allegations in the petition convince the court that the petitioner may be entitled to relief if the evidence solicited were to be developed.[50] The expansive construction of relevance in civil cases—to embrace all information "reasonably calculated to lead to the discovery of admissible evidence," as specified in Federal Rule of Civil Procedure 26(b)(1)—is not appropriate in capital habeas cases, given the limited nature of a habeas corpus proceeding.

Record Expansion

The record expansion procedure under Rule 7 of the Rules Governing § 2254 Cases facilitates the court's consideration of evidence developed through investigation and discovery. Under Rule 7(a), the court may require authentication of the materials presented. Record expansion follows and works in tandem with sections 2246 and 2247 to allow admissibility of proceedings and records conducted or filed in state court, or developed on federal habeas corpus. If the petitioner seeks to expand the record to introduce new evidence never presented in state court for the purpose of establishing the factual predicate of a claim, he or she must satisfy section 2254(e)(2) and show that he or she exercised diligence in state court to develop the evidence now proffered in federal proceedings.[51] If the petitioner seeks to expand the record for reasons other than to introduce new evidence to bolster the merits of his or her claim, the diligence requirement of section 2254(e)(2) may not apply.

50. Bracy v. Gramley, 520 U.S. 899, 908–09 (1997).

51. Holland v. Jackson, 542 U.S. 649, 653 (2004) (per curiam).

Briefing Procedures

The approach utilized by a district court to manage a first-time habeas petition often revolves around local practice and culture, as well as specific issues presented by an individual case. The most common method of capital case management is the creation and use of standardized orders and local rules setting forth general procedures and briefing schedules. Such orders and rules convey the relevant procedures and policies for capital habeas corpus litigation either for a particular judge or for the district as a whole.

A general procedures order might include such matters as the court's expectations of the parties in preparing for a case-management conference (e.g., meeting to confer on briefing deadlines or obtaining prior counsel's files), submission of the state court record, and directives with respect to the filing of the petition or amended petition, as well as other briefs and motions. Case-management conferences are excellent tools for ensuring that briefing schedules are met and for quickly resolving problems with, for example, obtaining prior counsel's files or the state court record. They also provide an opportunity for judges to meet separately with CJA counsel to discuss budgeting and cost management.

Because federal habeas corpus law minimizes the number of times a defendant may file a habeas petition, judges sometimes emphasize in their initial orders of appointment and procedure the importance of presenting every known claim in the first petition. Courts can expect counsel to request significant time and expense in the preparation of that petition, especially if they are new to the case.

Rule 2 of the Rules Governing § 2254 Cases directs that a petition "specify all grounds for relief available to the petitioner," including the facts supporting each ground. Because capital habeas petitioners have the assistance of counsel, many courts also require that the petition include legal points and authorities in support of the petitioner's claims. However, the latter may also be filed separately if, for example, there is insufficient time remaining under the applicable limitations period or if the court prefers to analyze claims subject to a procedural defense before having the parties expend time and resources briefing the merits of the claims.

The scope of the respondent state's answer, which ordinarily should be filed sixty to ninety days after the petition, will vary depending on the type of petition filed. In districts that prefer to address procedural defenses before briefing points and authorities,

the answer may be limited to appropriate admissions and denials, together with the assertion of procedural defenses. Alternatively, if the petition is a comprehensive filing that includes all grounds for relief, supporting facts, and legal points and authorities, the answer also should be comprehensive, alleging all procedural and substantive defenses. If the petition and answer are fully briefed, generally a reply is permitted.

Requests for evidentiary development may be filed as standalone motions, or as part of a merits brief, or included within the petition itself. However, given the usual length and complexity of a capital habeas petition, the latter approach may lead to an unmanageably large pleading.

Some courts also permit the filing of motions for summary judgment following the filing of the petition or answer, or both. However, many courts discourage such motions because briefing is cumbersome (and costly if the petitioner is represented by CJA counsel) and summary judgment rarely resolves all issues in a case, leading to additional briefing, time, and expense.

There are numerous case-management options, and no one methodology constitutes the "right way" to handle a capital habeas case. Common case resolution approaches include

1. addressing procedural defenses before merits and evidentiary issues;
2. addressing evidentiary development simultaneous with procedural defenses or merits;
3. considering evidentiary development and merits prior to procedural defenses; and
4. separating a petition's claims into distinct groups (such as ineffective assistance of counsel or jury selection issues) and addressing the most colorable first.

Execution-Related Matters

In advance of a concrete execution date, some district courts either formally (e.g., by local rule, general order, or status hearing) or informally (e.g., by written or oral communication with habeas counsel) establish procedures for any "last minute" filings, such as civil rights actions, successive habeas petitions, motions for temporary restraining order or preliminary injunctive relief, and stays of execution.

Such procedures may include requiring counsel to provide

1. courtesy copies of any state court filings;
2. prior notice to the court during regular business hours if an after-hours filing is contemplated; and
3. twenty-four-hour contact information for counsel for both parties as well as the prison warden.

A court also may want to establish internal guidelines or checklists for court staff that set forth filing and appeal procedures. A contact list for all counsel, prison officials, and appellate court personnel is another valuable tool.

Imminent execution dates also generally involve applications for clemency. Under *Harbison v. Bell*, federally appointed counsel are entitled to payment of attorneys' fees for representing a condemned client in state clemency proceedings where compensation in state court is unavailable.[52] Consequently, some attorneys may request a budget for such time as well as the appointment of experts or investigators to assist with the clemency application.

52. 556 U.S. 180, 193 (2009).

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