

Federal Habeas-Corpus Procedural Basics: A Concise Introduction

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FEDERAL HABEAS-CORPUS PROCEDURAL BASICS: A
CONCISE INTRODUCTION

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Written by Gregory W. Gardner.

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FOREWORD

Abolitionist.

“He was so carried away by simulated emotion, that he was for one moment almost believing it himself.” This quote from Fyodor Dostoevsky’s masterpiece *The Brothers Karamazov* speaks directly to the problem with most advocacy for people on death row. Often, people simulate emotion to no practical end except to convince themselves of the altruism of their own emotion. If there is to be any real movement on any particular death row case, there will need to be more than simulated emotion. There will need to be practical resources to offer practical advice that can practically help those who sit on death row. In your hands, I believe that you hold such a resource. For well over a decade, I have tried to do something more than emote about the death penalty. One of the people who has helped me the most in such endeavors is Greg Gardner, a religious liberty expert and masterful appellate attorney.

“I’ll be working until the end.” I’d never heard a death row attorney talk like that before. Most haul ass as soon as the money runs out. Not Greg Gardner. I’d worked with a very troubled man on death row as his spiritual advisor for a short period of time. Honestly, I didn’t know him that well. In our first meeting, he screamed at me repeatedly and the screaming never seemed to stop. To say that he was difficult to work with is an understatement. Yet, Greg never gave up. Repeatedly, he filed new motions trying to save the man’s life. Greg has much to teach us about not giving up.

“I need your help.” One of the guys that I worked for on death row was abandoned by his attorneys at the very end of his case. When he reached out for help, he had days remaining before his execution date. Immediately, Greg Gardner sprung into action. All over the country, Greg has taken the cases of those who have been abandoned and

mistreated by their attorneys. In the process, he has learned a variety of new ways to fight for others. Greg has much to teach us about creatively pushing back against these death sentences.

“They’re trying to keep me out of the chamber.” Recently, death row inmate Scott Eizember asked me to be in the execution chamber with him during his execution. Instead of proceeding with grace, the Oklahoma Department of Corrections (DOC) decided to try to keep me out based on my past activism. Immediately, Greg Gardner filed a lawsuit in federal court and forced DOC to back down. Thanks to Greg’s work, I was in the execution chamber to perform my duties as Scott’s spiritual advisor. Greg has much to teach us about not backing down.

“Trust me on this one.” Throughout my work, I’ve been able to trust Greg Gardner. Now, you will be able to as well. Death penalty advocacy can be more than simulated emotion. The pages that you hold are a valuable guide to the death penalty appellate process that can help you offer real help to real people in real time. Together, we can fight back.

The Rev. Dr. Jeff Hood

January 18, 2023

INTRODUCTION

The information in this book will assist you in advocating for prisoners. I have seen ineffective campaigns that began with no chance of success because they did not understand the procedural posture of the prisoner's case. What could be successful? What is simple rabble-rousing? When is rabble-rousing the only available path?

You will not understand the answers to these and related questions unless you understand habeas-corpus procedural law. You must know what legal avenues are available to the prisoner before determining your message. This book contains the basic information needed for that journey.

Understand that this book is not enough to litigate, even in part, a federal habeas case. Do not file anything on behalf of any prisoners, and do not encourage prisoners to file their own pleadings. You will almost certainly hurt them.

I hope this book is helpful. To make it more helpful, I have set up a database with most of the cases cited. It should save you time searching the Internet for them. The database I use is Zotero. Email me to get an invite.

Respectfully,

Greg Gardner

Habeas Corpus Attorney

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CHAPTER 1: The Basic Statutes

18 U.S.C. § 3599. Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

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).

(2) 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).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than \$125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed \$7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

(Added Pub. L. 109–177, title II, §222(a), Mar. 9, 2006, 120 Stat. 231; amended Pub. L. 110–406, §12(c), Oct. 13, 2008, 122 Stat. 4294.)

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of

a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that 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; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(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.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) 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. 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.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, ch. 646, 62 Stat. 965; Pub. L. 89–711, §1, Nov. 2, 1966, 80 Stat. 1104; Pub. L. 104–132, title I, §§101, 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, 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.

(2) If the applicant 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—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(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.

(June 25, 1948, ch. 646, 62 Stat. 967; Pub. L. 89-711, §2, Nov. 2, 1966, 80 Stat. 1105; Pub. L. 104-132, title I, §104, Apr. 24, 1996, 110 Stat. 1218.)

CHAPTER 2: Appointment of Counsel and Funding

For death-row cases, 18 U.S.C. § 3599 controls the appointment of lawyers and funding.

Essentially, indigent death-row prisoners are entitled to counsel from investigation to the end of the litigation.^[1] This appointment is mandatory; courts have no discretion to deny indigent prisoners counsel.^[2] The statute also allows courts to appoint a second lawyer if the prisoner shows good cause that one is needed, given the seriousness and complexity of death-penalty litigation.^[3]

Once appointed, counsel can apply for expert services, including investigators.^[4] The court grants these requests if they are “reasonably necessary.”^[5] Requests are “reasonably necessary” when “a reasonable attorney would regard the services as sufficiently important”^[6] to develop a legal claim that can be potentially won.^[7] Claims can be potentially won if the pleaded claims are plausible.^[8]

CHAPTER 3: Defenses to Relief: Filing Deadline

Prisoners have one year after enumerated statutory events to file their federal habeas petitions.^[9]

By far, the most common event is after prisoners' convictions become final.^[10] A conviction becomes final in one of four situations. One, the conviction is final if the prisoner does not appeal the trial-court conviction when the time to file a notice of appeal expires.^[11] Two, a conviction is final if the prisoner only appeals to the state intermediate court when the time to seek review in the higher court expires.^[12] Three, a conviction becomes final if the prisoner seeks review in the highest state court but not the United States Supreme Court when the time to seek review in the Supreme Court expires.^[13] Four, a conviction becomes final if the prisoner seeks United States Supreme Court review when the Supreme Court denies relief.^[14]

The second statutory event is the removal of an impediment that the State created, which must violate the United States Constitution or laws.^[15] This impediment can be state courts delaying a petition being filed^[16] or state government moving prisoners to locations that prevent a timely filing.^[17] It also can be prosecutors hiding evidence needed to file a claim.^[18] These examples are only a sampling of possible impediments, and the principles in those cases can be applied to different factual scenarios.

The third statutory event is the date of a new constitutional rule that is applied retroactively.^[19] For filing-deadline purposes, prisoners must file their challenges within one year of the substantive Supreme Court

opinion being issued instead of one year after the Supreme Court recognizing the opinion as retroactive.^[20]

The final statutory event is the date when prisoners could have discovered new factual predicates if they had used due diligence to discover those facts.^[21] In other words, prisoners must work diligently to find new facts throughout their appellate and collateral process.^[22] Once prisoners know, or should know, about the new facts, they have one year to file in federal court.

These four statutory triggers begin the one-year deadline to file a petition for federal-habeas relief. Federal courts apply the one that gives prisoners the latest deadline.

This defense to relief is an affirmative defense that the State must raise in its answer to the prisoner's brief.^[23] Alternatively, the State may move to dismiss a late petition before filing its answer.^[24] If the State waives this filing-deadline defense, the court still may raise it.^[25] But if the State decides to affirmatively waive the defense, a court cannot overrule that decision.^[26]

EXCEPTION 1: Statutory Tolling

Courts must toll, or pause, the one-year deadline while prisoners are seeking collateral relief in the state courts.^[27] This time is tolled, or paused, when a state-court petition challenging the convictions is pending in the state courts.^[28] To qualify for this tolling, prisoners must properly file the state-court petition, meaning they must comply with state rules for filing a proper challenge to that state's convictions.^[29] And this properly filed petition must challenge the pertinent judgment or claim being presented to the federal court.^[30] It need not present

every claim to challenge that judgment, or conviction and sentence^[31] – even though state-court exhaustion usually requires it.^[32] Next, the time clock is only paused while the state-court petition is pending in the state courts.^[33]

Importantly, the time clock does not restart during statutory tolling. As mentioned above, it is only paused. For example, if the Supreme Court denies the prisoner’s petition for a writ of certiorari on Day 0, that is the day that the conviction becomes final. The prisoner then files his petition for state collateral relief on Day 360. The state petition is properly filed and challenges his capital conviction and death sentence. On that day, Day 360, the one-year federal deadline is tolled. Five years later, the highest state court denies the requested relief in the state petition. Those five years do not count toward the one-year federal deadline. But after the state court denies relief, the prisoner has only five days to file the federal petition. The one-year clock does not restart; it was only paused during those five years.

EXCEPTION 2: Equitable Tolling

Aside from statutory tolling, prisoners may be entitled to nonstatutory, equitable tolling in limited circumstances.^[34] Those limited circumstances are when prisoners “diligently” pursue their claims, but some “extraordinary circumstance” “prevented a timely filing.”^[35] When evaluating whether cases satisfy these circumstances, the Supreme Court emphasizes that the standard is flexible and must be judged on a case-by-case basis.^[36] To receive equitable tolling, prisoners have the burden to prove it is applicable.^[37]

Prisoners must review cases dealing with equitable tolling carefully. Because each is fact specific and judged on an individual basis, knowing

general principles is not enough to successfully prevail on this issue. Below are a small sampling of equitable-tolling scenarios and cases:

- Defense counsel's actions or omissions,^[38]
- Governmental actions,^[39] and
- Judicial actions or omissions.^[40]

Although these are only a small sample, use the cases' reasoning, and apply that reasoning to your facts.

CHAPTER 4: Defenses to Relief: Exhaustion of State Remedies

Generally, exhaustion means state prisoners must litigate all their claims in every level of state court before a federal court can grant relief on those claims.^[41] Congress requires prisoners to present claims to the state court to “channel claims into an appropriate forum,” preventing unnecessary federal litigation.^[42] It recognizes that state and federal courts are “equally bound to guard and protect rights secured by the Constitution.”^[43] The exhaustion requirement also protects state courts’ authority to correct errors in state judgments without federal intervention.^[44] Because of these policy considerations, exhaustion is a threshold issue that almost always is decided toward the beginning of habeas litigation.^[45]

To completely exhaust federal claims in state court, prisoners must fairly and fully present those claims. To fairly and fully present claims, the prisoner must give the state courts “one full opportunity to resolve” the federal claims by presenting the claims to every court in the state, including ones that are discretionary.^[46] Second, the federal claims must be presented in the procedural manner the state provides.^[47] If a state requires certain claims to be presented in post-conviction motions, the prisoner must file that claim in a post-conviction motion where the state court can consider its merits.^[48] Finally, the claim must be presented with a clear recitation of the factual^[49] and legal^[50] bases for relief. The federal habeas petition must not plead facts that “fundamentally alter” the factual basis presented to the state court.^[51] Similarly, the federal petition’s legal bases’ substance must be submitted.^[52]

Procedurally, prisoners, the State, or the courts can raise this defense. The State can raise it in its response^[53] if the prisoner does not preemptively raise it. And if neither party pleads it, the court can raise it on its own.^[54] Ultimately, prisoners need not plead exhaustion unless the State or court raises it first.^[55] They need not because exhaustion is an affirmative defense.^[56] Once the State or court raises the issue, the burden to prove exhaustion lies with the prisoner.^[57] So prisoners must present arguments that show they exhausted the facts and claims in their petition once the issue is raised.

The exhaustion requirement is not absolute, though. If prisoners do not exhaust their claims, exceptions could allow a federal court to hear their cases:

EXCEPTION 1: Lack of a State Corrective Process

The lack-of-a-corrective-process exception applies in two ways. The first part of this exception is if the state courts do not have an available process to correct the error.^[58] This part applies when state law does not provide a procedural mechanism to litigate the prisoner's claim.^[59]

The second part applies when the state's process is "ineffective to protect the rights" of the prisoner.^[60] It allows prisoners to forego the state process when a state process is available, but the process is ineffective to provide relief.^[61] This part applies when the state process is inadequate^[62] or pursuing the claim's remedy would be futile.^[63] A process is inadequate or futile, for example, when its existence is "a matter of conjecture"^[64] or so confusing that prisoners cannot be expected to adhere to it.^[65]

EXCEPTION 2: Mixed Petitions

A mixed petition is one in which the prisoner includes exhausted and unexhausted claims. Originally, federal courts dismissed these petitions entirely, allowing the prisoner to return to state court to exhaust every unexhausted claim.^[66] But if the claims are clearly without merit, the federal courts can dismiss them without allowing the prisoner to return to state court.^[67]

This total-exhaustion requirement has an important limitation. Now, when prisoners file mixed petitions, they can ask the federal court to stay those proceedings and hold them in abeyance, or a dormant state, while returning to state court to exhaust all claims.^[68] Under this

stay-and-abeyance procedure, federal courts grant the stay and hold the federal proceedings in abeyance while prisoners return to state court when the prisoners satisfy three conditions.^[69] Prisoners must have good cause for failing to exhaust the unexhausted claims; those unexhausted claims must be potentially meritorious; and prisoners must not be dilatory, or unnecessarily causing delay, in the habeas proceedings.
[70]

CHAPTER 5: Defenses to Relief: Procedural Defaults

If prisoners violate state procedural rules when presenting their federal claims to state courts, federal courts may be procedurally barred from hearing those claims. A procedural default is a prohibition against federal courts hearing federal claims because the prisoner did not follow state procedural rules.^[71] The procedural default can occur at any stage of state litigation: trial, direct appeal, or state habeas.^[72] This defense is an affirmative one, requiring the State to raise it.^[73] The court may raise the issue unless the State affirmatively waives it.^[74] To apply this procedural-bar defense, five prerequisites must be present. First, the prisoner must actually violate the state procedural rule.^[75] Second, the state procedural bar must be an adequate and independent state ground to deny the federal claims.^[76] A rule is adequate when it is not applied arbitrarily or in a manner that violates constitutional rights.^[77] And it is independent if it does not rely, even in part, on a federal law or constitutional principle.^[78] Third, the highest state court to rule on the matter must have clearly and unambiguously rejected the claim due to the procedural bar.^[79] Fourth, the State must have raised the defense in an adequate and timely manner.^[80] It is raised in a timely manner if it is raised in pleadings to any court, including appellate courts.^[81] Finally, the defense will apply only if the prisoner cannot excuse the procedural default. The primary excuse is cause to default and prejudice because of the default.^[82] This excuse is immediately below. The other excuse is actual innocence, discussed in Chapter 6.

EXCUSE: Cause and Prejudice

The primary means to escape a procedural default is through showing cause to violate the default and prejudice from the default. Cause is an external factor that prevented defense counsel from complying with the procedural rule.^[83] An external factor is one that “cannot fairly be attributed” to the defense team.^[84]

The Supreme Court has addressed a nonexhaustive list of factors that can constitute cause.^[85] First, government officials interfering with compliance can constitute cause.^[86] Second, the emergence of a novel legal claim not previously available also can constitute cause.^[87] Third, prisoners can sometimes show cause for failing to adhere to a state procedural rule when the factual basis for the claim was not reasonably available.^[88]

Fourth, actions or omissions of counsel can constitute cause.^[89] When attorneys abandon their clients, it constitutes cause.^[90] Generally, attorney negligence does not establish cause to excuse a procedural default.^[91] A narrow exception to this rule is when state habeas counsel provides ineffective assistance that results in a procedural default on an ineffective-assistance-of-trial-counsel claim.^[92] To satisfy this narrow exception, prisoners must prove the underlying ineffective-assistance-of-trial-counsel claim is substantial. A claim is substantial when it has “some merit.”^[93] Next, the claim must prove state-habeas counsel is ineffective under the normal standard in *Strickland v. Washington*, 466 U.S. 668 (1984).^[94] And state-habeas counsel’s ineffectiveness must have occurred in a proceeding where the prisoner had his only opportunity to raise ineffective-assistance-of-trial-counsel claims^[95] or, in practice, it is highly unlikely he could raise it elsewhere.^[96] This standard also applies

to prisoners who were unrepresented in state-habeas proceedings, except the prisoners obviously need not prove habeas counsel's ineffectiveness.
[97]

When satisfying this narrow exception, prisoners must do so without expanding the record – except in rare circumstances.^[98] The state record is the only basis on which this exception is judged; the federal court cannot hold a hearing to take more evidence.^[99] This restriction all but eviscerates the holdings in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), but these cases are still technically good law.^[100]

The second part of the cause-and-prejudice test requires prisoners to prove prejudice from the cause for default. To prove prejudice, prisoners must show that the underlying ineffective-assistance-of-trial-counsel claim is more than just the possibility of prejudice; instead, the trial errors “worked to [the prisoner’s] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.”^[101]

CHAPTER 6: Winning on the Merits: Actual Innocence

One exception to many defenses to relief is actual innocence: “We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass *whether the impediment is a procedural bar*, as it was in *Schlup* [*v. Delo*, 513 U.S. 298 (1995)] and *House* [*v. Bell*, 547 U.S. 518 (2006)], or, as in this case, *expiration of the statute of limitations*.”^[102] The Court also has held that actual innocence is an exception to the bar against filing successive habeas petitions.^[103] Besides these exceptions, the actual-innocence exception allows prisoners to obtain evidentiary hearings on new facts despite a failure to exhaust them in state court.^[104]

This actual-innocence exception applies to the culpability^[105] and sentencing^[106] phases of trial.

Prisoners have the burden to prove that “new facts raised sufficient doubt about [the prisoner’s] guilt to undermine confidence in the result of the trial”^[107] In other words, a prisoner “does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.”^[108]

If prisoners satisfy the standard of proof for actual innocence, they will have their underlying substantive claims, such as ineffective assistance of counsel or prosecutorial misconduct, heard.^[109] The Supreme Court has not ruled that innocence, by itself, is enough for habeas relief.^[110]

CHAPTER 7: Winning on the Merits: 28 U.S.C. § 2254(d)

After clearing all these defenses, prisoners must win on the merits of their claims. The statute with procedures for doing so is 28 U.S.C. § 2254(d), an important part of the Anti Terrorism and Effective Death Penalty Act (“AEDPA”).

Section 2254(d) is the gateway through which prisoners must pass to secure federal-habeas relief. This section forbids federal courts from granting habeas relief when the legal claims were “adjudicated on the merits in State court proceedings”^[111] If they were adjudicated on the merits, prisoners can only get relief if the state decision was “contrary to” or “involved an unreasonable application of” clearly established federal law.^[112] If the state decision did not violate these legal requirements, the state decision must have been “based on an unreasonable determination of the facts” in light of the evidence presented in state court.^[113]

First, courts must analyze whether the state court adjudicated the prisoner's federal claims on the merits. To be adjudicated on the merits in state court, the state court must rule on the substance of the prisoner's claims. An adjudication would not be on the merits, for example, if the state court denied relief on procedural grounds.^[114] Another primary way that state courts fail to address claims on their merits is by analyzing only parts of federal claims.^[115] And sometimes, state courts deny federal claims without explaining those denials. In that circumstance, there is a rebuttable presumption that the claims were adjudicated on their merits.^[116] This presumption can be overcome “when there is reason to think some other explanation for the state court's decision is

more likely.”^[117] And if the state court decision addresses some claims but not others, federal courts must employ the same rule to the unaddressed claims.^[118] If the claim is not adjudicated on the merits, federal courts review those claims under the more-favorable *de novo* standard of review.^[119] But if the state court adjudicated the federal claims on the merits, prisoners must meet one of the exceptions in § 2254(d)(1)-(2) to allow federal courts to review their claims.

If the state court adjudicated the claim on the merits, courts next determine if and what the clearly established federal law is. They do so because it is a threshold issue before determining if that federal law is violated.^[120] If the Supreme Court has not decided the clearly established federal law for the claim, the prisoner’s claim fails.^[121] To determine what the clearly established federal law, prisoners must find legal principles that are holdings^[122] from Supreme Court cases^[123] that existed at the time the state court issued its decision.^[124] The legal rule is restrictive and narrow, limited to “squarely addresse[d]” holdings from the Supreme Court.^[125]

If the Supreme Court has issued clearly established federal law squarely addressing the prisoner’s claim, the court must determine if the state court adjudication is contrary to that clearly established law.^[126] A state court adjudication is contrary to clearly established federal law when it “contradicts” that federal law or involves “materially indistinguishable facts” and reaches a contrary result.^[127]

If the state-court decision is not contrary to clearly established federal law, courts will determine whether it is an “unreasonable application of” that law.^[128] A state-court adjudication is an unreasonable application of clearly established federal law when it is “so lacking in justification

that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”^[129] In other words, no judge could believe the state-court adjudication is reasonable for prisoners to prevail on this portion of the statute.

When the state court decisions are unexplained, as discussed above, federal courts must apply any “arguments or theories [that] could have supported” the adjudication denying state relief.^[130] If any federal argument or theory “could have supported” the adjudication, the State prevails.^[131]

Finally, if prisoners do not win on these legal considerations, they can still secure relief if the state court’s factual determinations are unreasonable “in light of the evidence presented in the State court proceeding.”^[132] To be unreasonable, the state-court factfinding must be more than different from the federal court’s independent judgment.^[133] Instead, prisoners must show the factfinding is unreasonable. This term, like in § 2254(d)(1), is difficult to define.^[134] Although the Supreme Court has not yet defined unreasonable in this context, it likely will treat it as in the section addressing an unreasonable application of clearly established federal law, especially because the Court has cited cases defining that phrase in this portion of the statute.^[135]

Importantly, prisoners are not entitled to habeas relief just because they satisfy the procedural hurdles in § 2254(d). Winning this step only allows courts to adjudicate prisoners’ claims on their merits; prisoners still must show they are imprisoned in violation of the Constitution.^[136] Although these legal considerations can be similar and sometimes intertwined, courts will treat them as separate steps to relief.

CHAPTER 8: Winning on the Merits: The Intersection of Harmless Error, AEDPA, and Law and Justice

Even if prisoners prevail on the substantive merits, their win will be subjected to the harmless error standard of review.^[137] This standard evaluates whether the error potentially granting habeas relief “had a substantial and injurious effect or influence in determining the jury’s verdict.”^[138] If courts have a grave doubt about the error’s impact on the jury’s verdict, the prisoner wins on the merits, securing habeas relief.^[139]

Just because prisoners satisfy this harmlessness test, they do not necessarily secure habeas relief. Next, they must satisfy the scriptures in 28 U.S.C. § 2254(d).^[140] Those are discussed above in Chapter 7.

Finally, prisoners must show that law and justice require habeas relief.^[141] This phrase is still new in the Supreme Court, and future cases will doubtlessly continue to define it. But one court has defined it as requiring prisoners to show innocence.^[142]

CHAPTER 9: Initial Appeal Procedures

If prisoners are unsuccessful in their efforts before a district court, they must seek appellate relief. Before doing so, prisoners must ensure the court entered a final order.^[143] If it did not, the appellate court has no jurisdiction to hear the appeal.^[144] An order completely denying relief constitutes a final order.^[145] But an order generally is not final if it rules on some claims but not others.^[146]

Once the district court issues a final order, prisoners should note an appeal to the court of appeals within 30 days of the final order.^[147] This notice of appeal must be filed with the district court clerk and not the court of appeals' clerk.^[148] Before a court of appeals can hear an appeal, a court must issue a Certificate of Appealability ("COA").^[149] A COA is a judicial finding that an appeal has sufficient merit, allowing a prisoner to litigate the appeal.^[150] Prisoners must seek a COA from the district court and, if it does not issue one, the court of appeals. The district court must rule first, so if the district court has not yet ruled on whether a COA is warranted, prisoners must ensure the district court does so.^[151] If the court has not before the notice of appeal is filed, that notice should trigger action from the court to make a ruling.^[152] Afterward, the appeal moves to the court of appeals. Once in the court appeals, the prisoner must obtain a COA on any claims the district court denied a certificate.^[153]

When applying for a COA, prisoners have the burden to make a "substantial showing of the denial of a constitutional right."^[154] Prisoners can make a substantial showing when "jurists of reason could disagree with the district court's resolution of his constitutional claims or

that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.”^[155] This consideration must incorporate the highly deferential standard of review in habeas corpus to determine if the district court’s application of that deference is debatable among jurists.^[156] Prisoners must make this showing for each claim in the appeal instead of an overall showing on all claims cumulatively.^[157] And if a claim has multiple elements internally, prisoners may have to make a substantial showing on each element.^[158] Courts must adjudicate this COA decision before a “full consideration of the factual or legal bases adduced in support of the claims.”^[159] If the circuit court does not grant a COA, it does not have jurisdiction over the case and cannot hear the appeal.^[160] If the court does grant a COA, the appeal will proceed in a normal fashion to decide the merits of the claims.

CHAPTER 10: After Habeas is Exhausted: Stays of Execution

If you are not victorious in the appellate process, you probably will eventually get an execution date. At that point, you must seek a stay of execution.

Federal courts have the right to stay a state death warrant under federal-habeas law.^[161] Courts grant stays to give appointed counsel time to “meaningfully . . . research and present a defendant’s habeas claims.”^[162] In these prefiling situations, prisoners must demonstrate how their claims have possible merit.^[163] In all stages, at least one claim must be nonfrivolous^[164] or colorable^[165] and require further habeas proceedings.^[166] Relatedly, no statute, rule, or controlling caselaw can foreclose habeas relief.^[167] When constitutional claims are nonfrivolous, courts should give them “the careful attention they deserve.”^[168] And when making these merits and stay decisions, courts may use summary procedures if proper notice is given.^[169]

After these preliminary stays, prisoners will seek stays of execution when their initial habeas-corpus litigation ends. This procedure is more difficult. To obtain a stay in this procedural posture, prisoners must establish four factors: whether the stay applicant has made a strong showing that he is likely to succeed on the merits; whether the applicant will be irreparably injured absent a stay; whether issuance of the stay will substantially injure the other parties interested in the proceeding; and where the public interest lies.^[170]

In one specific post-filing motion, successive petitions,^[171] the Supreme Court has adopted a tougher burden of proof. First, the petition must

not be subject to dismissal for failure to abide by the rules for successive petitions.^[172] Second, the successor petition must plead “substantial grounds upon which relief might be granted.”^[173] To do so, the claims must be “debatable among jurists of reason.”^[174]

In appellate review of motions to stay, prisoners must seek a COA on their underlying claims that the district court denied.^[175] If a COA is granted, courts of appeals must recognize that a COA normally is an adjudication that the appeal is nonfrivolous when determining if a stay is appropriate.^[176] Additionally, prisoners have a right to address the merits of their appeals after a COA is granted.^[177] These merits determinations can be through summary procedures^[178] unless those procedures would prejudice the prisoners’ preparation of their appeals.^[179] Summary decisions, however, cannot result in cursory or inadequate treatment of prisoners’ claims.^[180] If not summarily dismissed, courts of appeals must reach a merits decision using normal procedures^[181] and ordinarily should grant a stay.^[182]

If the court of appeals does not grant a stay of execution, prisoners must seek a stay in the Supreme Court. The Court has ruled that prisoners should ordinarily ask lower courts for stays of execution first.^[183] And to secure a stay of execution in the Court, prisoners must satisfy three requirements. First, they must show a “reasonable probability” that the Court will exercise jurisdiction, normally through granting a petition for a writ of certiorari.^[184] Second, they must demonstrate a “significant possibility” of winning a reversal.^[185] Third, prisoners must prove a “likelihood” of “irreparable harm” if the Court does not grant a stay.^[186]

Prisoners have the burden, at every stage of litigation, to prove they are entitled to a stay of execution.^[187]

CHAPTER 11: After Habeas is Exhausted: Successive Petitions

Overview

When prisoners file petitions after their initial one, they normally face special, heightened procedural rules.^[188] If the petition is second or successive, 28 U.S.C. § 2244(b)^[189] has four requirements before the district court will hear the merits of the petition. First, the petition must be a second or successive one. Second, a claim presented must not present a claim in their initial petition again presented in the second-or-successive one.^[190] Third, if the new petition contains new claims, they must fit into one of two exceptions to the bar against hearing those claims: a new constitutional rule of law that the Supreme Court made retroactive^[191] or new facts that could not have been discovered earlier using “due diligence”^[192] clearly and convincingly establishing actual innocence.^[193] Fourth, prisoners must prove that they satisfy § 2244(b)’s requirements. To do so, they first must file their petition with a motion for authorization in the court of appeals.^[194] That court must determine if prisoners plead a *prima facie* case.^[195] If prisoners successfully plead a *prima facie* case, the court of appeals will return the petition to the district court.^[196] Once in the district court, prisoners must prove that they, beyond a *prima facie* case, satisfy § 2244(b).^[197]

Defining Second-Or-Successive Petitions

To ascertain if § 2244(b) applies, prisoners must determine if the new petition is a second or successive one. To make this determination, courts will consider two prerequisites: whether the earlier petition actually

counts as the first petition and whether the newer petition counts as the successive one. Generally, a claim is second or successive when it could have been included in a prior petition but was not due to deliberate abandonment of the claim or inexcusable neglect.^[198] The easiest example of when a prior petition is the first for successive-petition purposes is a claim presented to the district court that the court denies on its merits.^[199] But dismissal on procedural grounds that the prisoner can fix do not count as a first petition.^[200] For example, if a court dismisses a claim because the prisoner missed the filing deadline, the petition counts as the first one because it cannot be fixed. But if the court dismisses the claims for failure to exhaust state remedies, allowing the prisoner to return to state court to exhaust the claims, the petition will not count as the first.

Next, petitions with unripe, or unavailable, claims will not be considered first ones.^[201] This exception commonly occurs when a claim in the first petition is dismissed because it cannot be presented until the prisoner has an execution date, such as an incompetence-to-be-executed claim.^[202] In that case, the dismissal will not bar the prisoner from raising the claim again in another petition when he has an execution date.

Relatedly, petitions will not be considered second-or-successive petitions if they include claims that were unripe in the initial petition.^[203] In this situation, prisoners do not file unripe claims in their initial petitions because the claims are unavailable.^[204] Instead, they file those claims in a second-or-successive petition when they are ripe for review. As with above, prisoners cannot file incompetence-to-be-executed claims until they have an execution date,^[205] so they need not include those claims in their initial habeas petition.^[206] Therefore, the later filing would not

be a second-or-successive petition; it would be treated as an initial one.
[207]

Another second-in-time petition that does not count as a second-or-successive one is when a new or intervening judgment issues between the two habeas petitions.^[208] This new-judgment situation happens, for example, when a prisoner wins a partial victory in habeas review, resulting in a new state-court judgment. Then, that prisoner can challenge the new judgment without qualifying under § 2244(b). When the state court issues a new judgment in the prisoner's case, a second-in-time petition challenging the new judgment is treated as an initial petition.^[209]

New-Claim Petition Procedures

If the claim or petition is second or successive after that analysis, prisoners must navigate § 2244(b). First, if a claim is the same as one presented in the previous petition, it is absolutely barred^[210] unless the first claim was unripe.^[211] If the essential character of the claims is the same, the claim is the same even if it includes new facts in support.^[212]

After this initial step, prisoners will move to the two statutory exceptions to hear a second-or-successive petition, one of which they must meet.
[213] The first is a new rule of constitutional law that the Supreme Court makes retroactive.^[214] To make this determination, prisoners must first show that the Supreme Court rule of law, in fact, is new. A rule is new when it “br[oke] new ground or impose[d] a new obligation on the States.”^[215] Conversely, a rule is not new when it was “*dictated* by precedent existing at the time the defendant’s conviction became final.”

[216] Second, the new rule must be a constitutional one, as opposed to a statutory or equitable one.^[217] Third, the Supreme Court must have made the new rule of constitutional law retroactive to cases in collateral review.^[218] Fourth, the new rule of constitutional law must have been previously unavailable to the prisoner.^[219] A new rule is previous unavailable if the prisoner could not have placed it in a previous federal-habeas petition.^[220]

The second exception is newly discovered evidence tending to prove actual innocence.^[221] To prove this element, prisoners first must show that the new evidence actually is newly discovered.^[222] Evidence is not new if it was available at trial, but the prisoner did not investigate or hire an expert to uncover it.^[223] Second, prisoners must prove that they could not have discovered the new evidence before their first habeas petition using due diligence.^[224] Prisoners do not display this due diligence if they could have discovered the underlying facts earlier, even if those facts are new to them when discovered.^[225] Instead, prisoners must investigate their cases at all stages of the litigation in an effort to uncover helpful facts.^[226] Diligence requires prisoners to show “prompt action” when “in a position” to discover the new facts.^[227] This requirement means prisoners must cooperate fully with their counsel, giving them facts and leads to investigate as early as possible. Third, prisoners must show, by clear and convincing evidence, that the newly discovered evidence would have resulted in no reasonable factfinder would have convicted when viewing the evidence as a whole in light of the pleaded constitutional claim.^[228] For this provision, prisoners must plead an underlying constitutional violation that would have resulted, when combined with the newly discovered facts, in an acquittal.^[229]

Once prisoners pass through these statutory requirements, their cases will be heard on the merits.

CHAPTER 12: After Habeas is Exhausted: Rule 60(b) Motions

Motions under Federal Rule of Civil Procedure 60(b) are the other vehicle to challenge convictions and sentences after initial habeas petitions are exhausted. Rule 60(b) allows postjudgment relief in these circumstances:

- Clerical mistakes,^[230]
- Prisoners’ mistakes, inadvertence, surprise, or excusable neglect,^[231]
- Newly discovered evidence,^[232]
- The State’s fraud, misrepresentation, or other misconduct,^[233]
- Any factor rendering the judgment void,^[234] and
- Other reasons that justify relief.^[235]

Of these reasons, the last two can be filed within a reasonable time.^[236] The others must be filed within a reasonable time no later than a year,^[237] except clerical errors can be fixed at any time.^[238]

Because we are focusing on post-habeas litigation, we will review Rule 60(b)(6), reopening proceedings for “any other reason that justifies relief.” This section is used when extraordinary circumstances require relief.^[239] To determine if extraordinary circumstances are present, courts should consider a wide range of factors. Importantly, these factors may include “the risk of injustice to the parties” and “the risk of

undermining the public’s confidence in the judicial process.”^[240] Additionally, a prisoner’s attorney’s gross negligence amounting to abandonment can be extraordinary circumstances.^[241] And a change in substantive law also can be an extraordinary circumstance.^[242] Be mindful, however, that this list is nonexhaustive.

If prisoners show extraordinary circumstances, they also need to show that their motion is not actually a second-or-successive petition. A Rule 60(b) motion challenges, among other things, the habeas court’s procedural motion^[243] or a defect in the integrity habeas proceeding that does not lead to a merits-based attack on the judgment.^[244] And these motions are treated as second-or-successive petitions when they present a claim of constitutional error, newly discovered evidence, or a claim challenging the merits of the judgment.^[245]

If prisoners satisfy these requirements, district courts will hear their claims on their merits.

[1] 18 U.S.C. § 3599(a)(1)(A)-(B). *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994); *Battaglia v. Stephens*, 824 F.3d 470, 473-74 (5th Cir. 2016) (citing *Rosales v. Quarterman*, 565 F.3d 308, 312 (5th Cir. 2009) (per curiam)).

[2] § 3599(a)(2).

[3] § 3599(d).

[4] § 3599(f).

[5] *Ibid.*

- [6] *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018).
- [7] *Id.* at 1093-94.
- [8] *Id.* at 1094.
- [9] 28 U.S.C. § 2244(d)(1).
- [10] § 2244(d)(1)(A)
- [11] *Hunter v. Ferrell*, 587 F.3d 1304, 1306 (11th Cir. 2009) (per curiam); *Cousin v. Lensing*, 310 F.3d 843, 845 (5th Cir. 2002).
- [12] *Gonzalez v. Thaler*, 565 U.S. 134, 653-54 (2012).
- [13] *Flanagan v. Johnson*, 154 F.3d 196, 97 (5th Cir. 1998).
- [14] *Bond v. Moore*, 309 F.3d 770, 773-74 (11th Cir. 2002); *United States v. Thomas*, 203 F.3d 350, 356 (5th Cir. 2000). *See Clay v. United States*, 537 U.S. 522, 539 n.4 (2003).
- [15] 28 U.S.C. § 2244(d)(1)(B).
- [16] *Cricheley v. Thaler*, 586 F.3d 318, 321 (5th Cir. 2009).
- [17] *Earl v. Fabian*, 556 F.3d 717, 719-20 (8th Cir. 2009).
- [18] *Lewis v. United States*, 985 F. Supp. 654, 657 (S.D. W. Va. 1997).
- [19] 28 U.S.C. § 2244(d)(1)(C).
- [20] *See, e.g., Howard v. United States*, 374 F.3d 1068, 1073, 1076, 1080-81 (11th Cir. 2004).
- [21] 28 U.S.C. § 2244(d)(1)(D).

- [22] *E.g., Jefferson v. United States*, 730 F.3d 537, 545-46, 547-48 (6th Cir. 2013).
- [23] *See* Rule 5(b), Rules Governing Section 2254 Cases in the United States District Courts.
- [24] Rule 4, Rules Governing Section 2254 Cases in the United States District Courts.
- [25] *Wood v. Milyard*, 566 U.S. 463, 471 n.5 (2012).
- [26] *See Day v. McDonough*, 547 U.S. 198, 210 n.11 (2006).
- [27] 28 U.S.C. § 2244(d)(2).
- [28] *See, e.g., Trapp v. Spencer*, 479 F.3d 53, 58-59 (1st Cir. 2009). *Cf. Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003).
- [29] *Artuz v. Bennett*, 531 U.S. 4, 8 (2000).
- [30] 28 U.S.C. § 2244(d)(2).
- [31] *See Ford v. Moore*, 296 F.3d 1035, 1039 (11th Cir. 2002).
- [32] Discussed in Chapter 8.
- [33] *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002).
- [34] *Holland v. Florida*, 560 U.S. 631, 645 (2010).
- [35] *Id.* at 649.
- [36] *Id.* at 649-50.
- [37] *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

- [38] *E.g., Maples v. Thomas*, 565 U.S. 266, 282 (2012) (Alito, J., concurring); *Holland v. Florida*, 560 U.S. 631, 645 (2010); *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007).
- [39] *E.g., Pliler v. Ford*, 542 U.S. 225, 235 (2004) (O'Connor, J., concurring); *In re Hearn*, 376 F.3d 447, 455-57 (5th Cir. 2004).
- [40] *E.g., Pliler v. Ford*, 542 U.S. 225, 235 (2004) (O'Connor, J., concurring) ; *Hardy v. Quarterman*, 577 F.3d 596, 598-99 (5th Cir. 2009) (per curiam); *Spottsville v. Terry*, 476 F.3d 1241, 1245-46 (11th Cir. 2007) (per curiam).
- [41] 28 U.S.C. § 2254(b)(1).
- [42] *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).
- [43] *Rose v. Lundy*, 455 U.S. 509, 518 (1982).
- [44] *Ibid.*
- [45] *Day v. McDonough*, 547 U.S. 198, 205 (2006).
- [46] *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); see *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).
- [47] *Castille v. Peoples*, 489 U.S. 346, 347 (1989).
- [48] See, e.g., *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *Mauk v. Lanier*, 484 F.3d 1352, 1357 (11th Cir. 2007).
- [49] See, e.g., *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).
- [50] See, e.g., *Picard v. Connor*, 404 U.S. 270, 275 (1971).

- [51] *Vasquez v. Hillery*, 474 U.S. 254, 257-58 (1986).
- [52] *Picard v. Connor*, 404 U.S. 270, 278 (1971).
- [53] Rule 5(b), Rules Governing Section 2254 Cases in the United States District Courts.
- [54] *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).
- [55] *Hampton v. Miller*, 927 F.2d 429, 431 (8th Cir. 1991); *McGee v. Estelle*, 722 F.2d 1206, 1212 (5th Cir. 1984).
- [56] *Darr v. Burford*, 339 U.S. 200, 218 (1950).
- [57] *See, e.g., Brown v. Cuyler*, 669 F.2d 333, 336 (3d Cir. 1982).
- [58] 28 U.S.C. § 2254(b)(1); *Engle v. Isaac*, 456 U.S. 107, 125-26 (1982).
- [59] *Young v. Ragen*, 337 U.S. 235, 239 (1949).
- [60] 28 U.S.C. § 2254(b)(1)(B)(i).
- [61] *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (per curiam).
- [62] *Young v. Ragen*, 337 U.S. 235, 239 (1949).
- [63] *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981).
- [64] *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (per curiam).
- [65] *Marino v. Ragen*, 332 U.S. 561, 564 (1947) (Rutledge, J., concurring).
- [66] *Rhines v. Weber*, 544 U.S. 269, 273-74 (2005); *Rose v. Lundy*, 455 U.S. 509, 518-19, 522 (1982). *See Slack v. McDaniel*, 529 U.S. 473, 486 (2000).

- [67] 28 U.S.C. § 2254(b)(2). *See Mercadel v. Cain*, 179 F.3d 271, 276 (5th Cir. 1999).
- [68] *Pace v. DiGuglielmo*, 544 U.S. 408, 416-17 (2005).
- [69] *Rhines v. Weber*, 544 U.S. 269, 278 (2005).
- [70] *Ibid.*
- [71] *Murray v. Carrier*, 477 U.S. 478, 485-92 (1986).
- [72] *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).
- [73] *Trest v. Cain*, 522 U.S. 87, 89 (1997).
- [74] *Day v. McDonough*, 547 U.S. 198, 207-08 (2006).
- [75] *Lee v. Kemna*, 534 U.S. 362, 366-67, 385 (2002).
- [76] *Beard v. Kindler*, 558 U.S. 53, 55 (2009); *Coleman v. Thompson*, 501 U.S. 722, 729-32 (1991).
- [77] *Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (per curiam).
- [78] *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).
- [79] *Harris v. Reed*, 489 U.S. 255, 262, 265 n.12 (1989).
- [80] *Lee v. Kemna*, 534 U.S. 362, 376 n.8 (2002).
- [81] *See ibid.*
- [82] *Dretke v. Haley*, 541 U.S. 386, 393 (2004); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

- [83] *Murray v. Carrier*, 477 U.S. 478, 488 (1986).
- [84] *Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991).
- [85] *Murray v. Carrier*, 477 U.S. 478 (1986).
- [86] *Id.* at 488.
- [87] *Smith v. Murray*, 477 U.S. 527, 536 (1986).
- [88] *Ibid.*
- [89] *See, e.g., Maples v. Thomas*, 565 U.S. 266, 282 (2012).
- [90] *Ibid.*
- [91] *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991).
- [92] *Davilia v. Davis*, 137 S. Ct. 2058, 2062-63 (2017); *Trevino v. Thaler*, 133 S. Ct. 1911, 1918-20 (2013); *Martinez v. Ryan*, 566 U.S. 1, 14 (2012).
- [93] *Martinez v. Ryan*, 566 U.S. 1, 14 (2012).
- [94] *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013).
- [95] *Martinez v. Ryan*, 566 U.S. 1, 14 (2012).
- [96] *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013).
- [97] *Id.* at 1918.
- [98] *Shinn v. Ramirez*, 142 S. Ct. 1718, 1735 (2022).
- [99] *Ibid.*

- [100] *Id.* at 1741 (Sotomayor, J., dissenting).
- [101] *United States v. Frady*, 456 U.S. 152, 170 (1982).
- [102] *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (emphasis added).
- [103] *Schlup v. Delo*, 513 U.S. 298, 317, 320-21 (1995). *See McCleskey v. Zant*, 499 U.S. 467, 495 (1991).
- [104] *See* 28 U.S.C. § 2254(e)(2)(B); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992).
- [105] *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995).
- [106] *Sawyer v. Whitley*, 505 U.S. 333, 335-36 (1992).
- [107] *Schlup v. Delo*, 513 U.S. 298, 317 (1995).
- [108] *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).
- [109] *Herrera v. Collins*, 506 U.S. 390, 400, 404 (1993).
- [110] *See ibid.*
- [111] 28 U.S.C. § 2254(d).
- [112] § 2254(d)(1).
- [113] § 2254(d)(2).
- [114] *See, e.g., Cone v. Bell*, 556 U.S. 449, 472 (2009).
- [115] *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam).

[116] *Harrington v. Richter*, 562 U.S. 86, 99-100 (2011).

[117] *Ibid.*

[118] *Johnson v. Williams*, 568 U.S. 289, 293 (2013).

[119] *See, e.g., Miller v. Johnson*, 200 F.3d 274, 281 & n.4 (5th Cir. 2000).

[120] *Lockyer v. Andrade*, 583 U.S. 63, 71 (2003).

[121] *Wright v. Van Patten*, 552 U.S. 120, 126 (2008).

[122] *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

[123] *Ibid.*

[124] *Ibid.*

[125] *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008).

[126] *See* § 2254(d)(1).

[127] *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

[128] *See* § 2254(d)(1).

[129] *E.g., Mays v. Hines*, 141 S. Ct. 1145, 149 (2021) (per curiam); *Shinn v. Kayer*, 141 S. Ct. 517, 520 (2020) (per curiam); *Woods v. Eitherton*, 136 S. Ct. 1149, 1152-53 (2016); *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

[130] *Harrington v. Richter*, 562 U.S. 86, 98-100 (2011).

[131] *See ibid.*

[132] 28 U.S.C. § 2254(d)(2).

[133] *Wood v. Allen*, 558 U.S. 290, 301 (2010).

[134] *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)).

[135] *Ibid.*

[136] *See* 28 U.S.C. § 2254(a).

[137] *Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting).

[138] *Id.* at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

[139] *O'Neil v. McAninch*, 513 U.S. 432, 437-38 (1995).

[140] *Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022).

[141] *E.g., Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022).

[142] *Crawford v. Cain*, __ F.4d __, __ (5th Cir. 2022).

[143] *See, e.g., Andrews v. United States*, 373 U.S. 334, 340 (1963).

[144] *Ibid.*

[145] *See Browder v. Director*, 434 U.S. 257, 265-67 (1978).

[146] *Collins v. Miller*, 252 U.S. 364, 365 (1920).

[147] Fed. R. App P. 4(a).

[148] *See* Fed. R. App. P. 4(d).

[149] 28 U.S.C. § 2253(c).

[150] *See* § 2253(b)-(c); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

[151] *See, e.g., Cardenas v. Thaler*, 651 F.3d 442, 445 (5th Cir. 2011).

[152] Fed. R. App. P. 22(b)(1).

[153] 28 U.S.C. § 2253(c)(1).

[154] § 2253(c)(2).

[155] *Buck v. Davis*, 137 S. Ct. 759, 773 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

[156] *See Miller -El v. Cockrell*, 537 U.S. 322, 341 (2003).

[157] *See, e.g., Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1991).

[158] *See, e.g., United States v. Ratliff*, 719 F.3d 422, 423-24 (5th Cir. 2011).

[159] *Buck v. Davis*, 137 S. Ct. 759, 773 (2017); *Miller -El v. Cockrell*, 537 U.S. 322, 336 (2003).

[160] *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

[161] 28 U.S.C. § 2251.

[162] *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

[163] *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007).

[164] *See, e.g., Goode v. Wainwright*, 670 F.2d 941, 942 (11th Cir. 1982).

[165] *McFarland v. Scott*, 512 U.S. 849, 860 (1994) (O'Connor, J., concurring in part and dissenting in part).

[166] *Mattheson v. Maggio*, 714 F.2d 362, 365 (5th Cir. 1983).

[167] *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983).

[168] *Id.* at 888.

[169] *Id.* at 889, 894.

[170] *Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 771, 776 (1987)).

[171] *See* 28 U.S.C. § 2244(b).

[172] *Barefoot v. Estelle*, 463 U.S. 895 (1983); *Delo v. Stokes*, 495 U.S. 320, 321-22 (1990) (per curiam).

[173] *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

[174] *Id.* at 893 n.4.

[175] *See id.* at 893-94

[176] *Id.* at 894.

[177] *Id.* at 886, 888-89, 893-94.

[178] *Id.* at 889-894.

[179] *Id.* at 890.

[180] *Id.* at 892.

[181] *Id.* at 886, 893-95.

[182] *Id.* at 888-89.

[183] *Id.* at 895.

[184] *Ibid.*

[185] *Ibid.*

[186] *Ibid.*

[187] *See id.* at 896.

[188] *See generally* 28 U.S.C. § 2244(b).

[189] Reproduced in Chapter 1.

[190] 28 U.S.C. § 2244(b)(1).

[191] § 2244(b)(2)(A).

[192] § 2244(b)(2)(B)(i).

[193] § 2244(b)(2)(B)(ii).

[194] § 2244(b)(3)(A).

[195] § 2244(b)(3)(C).

[196] *Ibid.*

[197] § 2244(b)(4).

[198] *McCleskey v. Zant*, 499 U.S. 467, 489 (1991).

[199] *See, e.g., In re Phillips*, 879 F.3d 542, 549 (4th Cir. 2018).

[200] *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998).

[201] *Ibid.*

[202] *Ibid. Cf. Panetti v. Quarterman*, 551 U.S. 930, 954 (2007).

[203] *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007).

[204] *Ibid.*

[205] *Ibid.*

[206] *See ibid.*

[207] *Ibid.*

[208] *Magwood v. Patterson*, 561 U.S. 320, 341-42 (2010).

[209] *Ibid.*

[210] 28 U.S.C. § 2244(b)(1).

[211] *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998).

[212] *See, e.g., Gimenez v. Ochoa*, 821 F.3d 1136, 1141 (9th Cir. 2016).

[213] *See* 28 U.S.C. § 2244(b)(2)(A)-(B).

[214] § 2244(b)(2)(A).

[215] *Teague v. Lane*, 489 U.S. 288, 301 (1989).

[216] *Ibid.*

[217] 28 U.S.C. § 2244(b)(2)(A); *Unthank v. Jett*, 549 F.3d 534, 535-36 (7th Cir. 2008).

[218] § 2244(b)(2)(A); *Tyler v. Cain*, 533 U.S. 656, 663 (2001); *In re Jackson*, 776 F.3d 292, 294-96 (5th Cir. 2015).

[219] § 2244(b)(2)(A).

[220] *In re Cathey*, 857 F.3d 221, 230 (5th Cir. 2017) (per curiam).

[221] 28 U.S.C. § 2244(b)(2)(B)(i).

[222] *See* § 2244(b)(2)(B)(i).

[223] *See, e.g., Nooner v. Hobbes*, 689 F.3d 921, 934 n.8 (8th Cir. 2012).

[224] *See* 28 U.S.C. § 2244(b)(2)(B)(i).

[225] *See, e.g., In re Boshears*, 110 F.3d 1538, 1541 (11th Cir. 1997).

[226] *Ibid.*

[227] *Johnson v. United States*, 544 U.S. 295, 308 (2005).

[228] 28 U.S.C. § 2244(b)(2)(B)(ii).

[229] *See* § 2244(b)(2)(B)(ii); *House v. Bell*, 547 U.S. 518, 539 (2006).

[230] Fed. R. Civ. P. 60(b)(2).

[231] Fed. R. Civ. P. 60(b)(1).

[232] Fed. R. Civ. P. 60(b)(2).

[233] Fed. R. Civ. P. 60(b)(3).

[234] Fed. R. Civ. P. 60(b)(4).

[235] Fed. R. Civ. P. 60(b)(6).

[236] Fed. R. Civ. P. 60(c)(1).

[237] Fed. R. Civ. P. 60(c)(1).

[238] Fed. R. Civ. P. 60(a).

[239] *See Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

[240] *Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017).

[241] *Brooks v. Yates*, 818 F.3d 532, 534-35 (9th Cir. 2016) (per curiam); *Foley v. Biter*, 793 F.3d 998, 1000 (9th Cir. 2015).

[242] *Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005).

[243] *See, e.g., Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006).

[244] *See Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005).

[245] *See, e.g., Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006).

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