ATTACHMENT

To the Letter from Members of the Criminal Law Committee of the National Association of Attorneys General dated July 5, 2017 to the Criminal Justice Section of the American Bar Association

RE: Comments on Proposed Standards Relating to Postconviction Remedies
SECTION-BY-SECTION ANALYSIS OF KEY PROPOSED STANDARDS


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(C) Adjudication on the merits. Adjudication of a claim on the merits entails determining any disputed facts reliably on the weight of the evidence after a fair and regular fact-finding process, identifying the relevant legal rules, applying the relevant legal rules to the facts, and preparing an opinion explaining the court’s factual and legal conclusions and the rationales on which the court relies.

I. Current Law

In Harrington v. Richter, 562 U.S. 86, 99 (2011), the Supreme Court held that states are not required to explain the basis for a decision rejecting a claim in order for it to be considered a rejection “on the merits” for purposes of 28 U.S.C. § 2254(d). This was the unanimous view of “every Court of Appeals to consider the issue.” Richter, 562 U.S. at 98.

II. How the Proposed Standard Departs from Current Law

The proposed definition would require a state court to prepare “an opinion explaining the court’s factual and legal conclusions and the rationales on which the court relies” before the state court resolution of a claim will be considered an “adjudication on the merits.” Unexplained denials, such as those contemplated by Richter (and every federal appellate court that confronted the question), would no longer be considered denials “on the merits” to which the federal courts must show deference under § 2254(d).

III. Concerns with the Proposed Standard

AEDPA amended § 2254(d) to forbid federal relief on any claim that a state court “adjudicated on the merits” unless the state court adjudication of the claim resulted in a decision that “was contrary to, or involved the unreasonable application of, clearly established law Federal law, as determined by the Supreme Court of the United States,” or the state court resolution “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.” This standard, often referred to as “AEDPA deference,” Johnson v. Williams, 133 S. Ct. 1088, 1094 (2013), limits the authority of the federal courts to grant habeas corpus relief to state prisoners. It is predicated upon the fundamental tenet of federalism that state courts are no less able to properly interpret the federal Constitution than are the inferior federal courts. See Lambert v. Blodgett, 393 F.3d 943, 974-75 (9th Cir. 2004). Federal courts may no longer review habeas petitioners’ constitutional claims de novo when state courts had addressed those claims on the merits.

The press of business in state courts, however, does not always permit the state courts to issue full, written opinions resolving every collateral attack on state court judgments—
particularly appeals of the denials of state habeas petitions. The Supreme Court has expressly recognized this, and approved of the practice of state courts issuing summary denials, holding that such summary denials are no less worthy of respect than lengthy written opinions. \textit{Richter}, 562 U.S. at 99. The proposed Standard seeks to undo that ruling, requiring written opinions before an adjudication will be considered “on the merits.” Absent such written opinions, federal courts would owe no deference to the state courts’ rejection of petitioners’ claims.

The Supreme Court explained, however, that “requiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition. The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed.” Denying AEDPA deference to summary denials would also undermine federalism, as well as the state’s interest in finality.

(A) Every state and the federal government should establish a system whereby a person who wishes to apply for state or federal postconviction relief, and who is unable to obtain counsel because of indigency, is provided with qualified publicly funded counsel to identify, investigate, and evaluate potential claims, to prepare and file an application advancing claims that warrant judicial attention, and to represent the applicant at all subsequent stages of state and federal postconviction proceedings. Every state and the federal government should also provide meaningful resources for persons who choose to proceed pro se.

(B) If qualified counsel is not provided as contemplated in (A), every state and the federal government should establish alternative legal services agencies or support other programs to advise persons about potential claims.

(C) If a person who is unable to obtain counsel because of indigency files a pro se application for state or federal postconviction relief, the court entertaining the application should have authority to appoint an attorney to represent the applicant.

(D) If it is necessary for an indigent applicant to conduct discovery, make submissions beyond the original papers, or prepare for and conduct a hearing, the court entertaining the application for state or federal postconviction relief should appoint counsel to represent the applicant for those purposes.

(E) No person who is unable to obtain counsel because of indigency should be executed if he or she has not been provided with publicly funded counsel.

I. Current Law

Under current federal (and most state) laws, there is generally no right to counsel on non-capital collateral review. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Coleman v. Thompson, 501 U.S. 722, 752 (1991). But see 18 U.S.C. § 3599 (giving state capital inmates the right to counsel on federal collateral review); McFarland v. Scott, 512 U.S. 849, 858 (1994). However, the federal courts and the states have mechanisms by which counsel will be appointed in other appropriate cases, at the discretion of the reviewing court. See, e.g., 18 U.S.C. § 3006A(a)(2)(B); In re Clark, 5 Cal. 4th 750, 779-80 (1993).

II. How the Proposed Standard Departs from Current Law

The proposed standard requires the appointment of counsel upon request to every state and federal prisoner (or, if the custody requirement is removed, per proposed Standard 22.11, every person convicted of a crime) whenever that indigent person wishes to apply for

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1 An exception is when a federal evidentiary hearing is ordered. See Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts (“If an evidentiary hearing is warranted, the district judge must appoint an attorney to represent the petitioner who qualifies to have counsel appointed under 18 U.S.C.A. § 3006A”).
postconviction relief. The courts would no longer have discretion to determine whether counsel is necessary for the fair adjudication of the claims.

III. Concerns with the Proposed Standard

Current federal and state practice reflects an important difference between the state’s relationship with the accused before the finality of conviction and that relationship after finality. At trial, an accused is brought into court against his or her will, and forced to face charges that may result in the deprivation of his or her liberty. The accused is entitled to a presumption of innocence; the appointment of counsel ensures that this presumption is respected. After judgment is final, however, the relationship has fundamentally changed. The presumption of innocence has been rebutted by evidence removing any reasonable doubt that the accused is guilty.

Upon a conviction becoming final, it is presumed that the proceedings were regular. *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). The concerns that animate the right to counsel at trial (that a presumptively innocent person stands before a tribunal without the knowledge or ability to answer the charges the state has made) do not exist. Rather, a guilty person now comes to court and seeks to upend the presumptively valid determination that his or her conviction is sound. Although an accused’s right to counsel is an important right in the context of the guilt determination, once guilt has been established, the state’s obligation to the defendant has been satisfied. To the extent the prisoner wishes to allege otherwise, the burden falls entirely upon the prisoner to bring that action; the state has discharged its obligations to the prisoner.

Requiring paid counsel on collateral review will encourage every convicted criminal to file a postconviction challenge, thereby burdening an already busy court system. Particularly because the proposed Standard articulates no limit on the requirement other than that the person “wishes to apply” for collateral relief, the ability of mischief-minded prisoners to damage the system would be greatly enhanced. *See Sanders v. United States*, 373 U.S. 1, 18 (1963) (recognizing that habeas proceedings may be brought merely to “vex, harass, or delay”). Further, such a rule will lead to an entirely new class of claims: ineffective assistance of post-conviction-collateral-review counsel. The availability of this new class of claims will lead to endless, repetitive rounds of litigation, with each succeeding counsel claiming that the only reason relief was not granted in the prior round was the incompetence of former counsel, *ad infinitum*. 
Proposed Standard 22.5. Cognizable Claims.

(A) The following claims should be cognizable in an application for state postconviction relief:

1. the court in which the applicant’s conviction was obtained or in which his or her sentence was imposed lacked personal or subject matter jurisdiction;
2. the applicant was convicted under an unconstitutional statute or for conduct that cannot constitutionally be made criminal;
3. the applicant’s conviction was obtained in violation of law, or his or her sentence was not authorized by law or was imposed in violation of law;
4. information so undermines the reliability of either the conviction or the sentence that one or both should be vacated;
5. the applicant’s sentence has been computed or administered in violation of law;
6. the applicant’s sentence cannot be lawfully executed or lawfully executed in the manner proposed;
7. the applicant’s sentence, while lawful at the time it was imposed, should be adjusted on the basis of current law; and
8. probation or parole has been administered in violation of law.

(B) A claim described in 22.5(A) should be cognizable in an application for federal postconviction relief if the claim raises a federal issue.

I. Current Law

Many states (and the federal courts) limit claims that can be raised on collateral review to claims that could not have been raised on direct appeal. E.g., Ex parte Dixon, 41 Cal. 2d 756, 759 (1953); Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942). Stone v. Powell, 428 U.S. 465 (1976), forbids federal review of almost any claim that a state-court ruling violated the Fourth Amendment. And federal habeas courts may not grant relief based on errors of state law. See Estelle v. McGuire, 502 U.S. 62, 67 (1991).

II. How the Proposed Standard Departs from Current Law

The proposed Standard would require state postconviction courts to hear many matters that are traditionally heard on direct appeal (e.g., the constitutionality of the statute and the lawfulness of the sentence) and therefore are not cognizable on collateral review. Indeed, it includes broad categories that would seem to make virtually any conceivable error of any stripe (any “violation of the law” underlying the conviction or sentence) subject to postconviction review, even when states presently require that they be asserted only on direct appeal.

Subsection (B) states that any “claim” that “raises a federal issue” is “cognizable” on federal habeas review. This presumably includes Fourth Amendment claims, notwithstanding Stone v. Powell, and state-law claims.2

2 Proposed Standard 22.5 can literally be read as eliminating any and all procedural bases for rejecting a state or federal habeas petition. Because later proposed Standards address the procedural-default doctrine
III. Concerns with the Proposed Standard

The proposed standard eliminates the traditional distinction between direct-appeal claims and claims to be raised on collateral review. But there are logical, prudential reasons for distinguishing those claims that are well-suited from determination on direct review from those that should be raised on collateral review. The first such concern is finality, which “is essential to both the retributive and the deterrent functions of criminal law.” *Calderon v. Thompson*, 523 U.S. 538, 555 (1998). By requiring that any and all claims that fall within the four corners of the appellate record be raised on appeal, the state can be confident that, once the appeal is completed, the conviction and sentence comply with the law. Expanding (indeed, largely eliminating) the limits on collateral review would greatly disserve this important value. If any claim of any stripe can be raised at any time, finality would essentially be eliminated.

Also, opening up any conceivable aspect of the trial to potentially endless piecemeal attacks would needlessly clog up the courts with multiple collateral attacks. The Supreme Court has specifically condemned piecemeal litigation as abusive. *McClesky v. Zant*, 499 U.S. 467, 485 (1991). Particularly when coupled with the proposal that prisoners be given attorneys any time they wish to file a collateral attack, the likely result will be numerous, repetitive attacks on judgments.

Finally, the prudential concerns underlying *Stone v. Powell* do not bear repeating at length. Suffice to note the high Court’s conclusion that permitting such review is “outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.” 428 U.S. at 494. Likewise, federal habeas courts have long been viewed as the wrong forum for resolving state-law claims.

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and other procedural barriers to reaching the merits, we interpret this Standard as addressing only the types of merits claims that are cognizable, assuming the postconviction court is permitted to reach them.

(A) In general, a court entertaining an application for state or federal postconviction relief should consider a claim in light of current law and should award appropriate relief with respect to a claim the court finds to be meritorious.

(B) A federal court entertaining an application for federal postconviction relief from a state conviction or sentence should not consider a claim based on a new rule of procedural law, unless the new rule substantially enhances a court’s ability to determine a defendant’s factual guilt or suitability for a sentence of death. A court should regard a rule of procedural law as new only if it makes a clear break from the relevant rule articulated in Supreme Court opinions in place at the time the applicant’s conviction and sentence became final.

I. Current Law

Nearly thirty years ago, in its seminal decision, Teague v. Lane, 489 U.S. 288 (1989), the Supreme Court ruled that federal courts may not grant habeas corpus relief to prisoners based upon new constitutional rules of criminal procedure announced after a conviction becomes final, unless the new rule either: (1) is substantive or (2) is a watershed rule of criminal procedure, without which the likelihood of an accurate conviction is seriously diminished. 489 U.S. at 310 (plurality opinion); Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

The Teague retroactivity\(^3\) determination is applied in two steps. First, a federal court ascertains whether the rule is new. In making this determination, the court surveys the legal landscape as it existed on the date of finality and asks whether a state court would have felt compelled by existing precedent to grant the prisoner relief under the Constitution. Teague, 489 U.S. at 301-02. Second, if the rule is new, the court decides whether the new rule falls within one of the two narrow exceptions. If neither exception applies, the prisoner is not entitled to the benefits of the new rule. Id. at 311.

II. How the Proposed Standard Departs from Current Law

The proposed rule greatly expands the class of new procedural rules that would apply retroactively to cases on collateral review, including rules announced decades after convictions have become final. The proposed rule does this in two ways. First, it narrows the category of procedural rules that may be classified as “new.” For nearly three decades, the Supreme Court has broadly defined the term “new rule,” holding that a decision announces a new rule “if the result was not dictated by precedent existing at the time the defendant’s conviction became

\(^3\) The Supreme Court has recognized that the term “retroactivity” is misleading because it speaks in temporal terms. What a federal court is determining when it assesses the “retroactivity” of a new rule “is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.” Danforth v. Minnesota, 552 U.S. 264, 282 (2008).
final.” *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993) (internal quotation marks omitted). A result is not “dictated” by precedent if there is any “simple and logical difference” between the Court’s conclusion and the “precise holding[s]” of prior decisions. *Saffle v. Parks*, 494 U.S. 484, 490, 491 (1990). Applying that standard, the Supreme Court has found few rulings dictated by precedent; and therefore found most of its decisions to pronounce new (presumptively non-retroactive) rules.

The proposed “clear break” rule turns the retroactivity doctrine on its head. Proposed Rule 22.6 states that a rule is new only if it makes a “clear break” from Supreme Court precedent existing at the time the prisoner’s conviction and sentence became final. In *United States v. Johnson*, 457 U.S. 537 (1982), the Supreme Court defined “clear break” in the retroactivity context very narrowly, stating that a decision constitutes a “clear break” if it explicitly overrules a past precedent of the Court, disapproves a practice the Court had arguably sanctioned in prior cases, or overthrows a longstanding practice that lower courts had uniformly approved. *Id.* at 550-52. Very few cases would fall within the narrow definition of “clear break,” meaning most criminal procedure rules announced by the Court would be considered “old” rules that apply retroactively to convictions long since final.

The second way in which the proposed rule expands the retroactive application of new rules is through a broad exception to the very few claims that would otherwise be barred under the “clear break” test. Under existing law, the bar against the retroactive application of new rules is subject to a narrow exception for “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” *Saffle*, 494 U.S. at 495 (quoting *Teague*, 489 U.S. at 311). The Court has “repeatedly emphasized the limited scope of [this] exception, explaining that it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.” *Beard v. Banks*, 542 U.S. 406, 417 (2004) (internal quotation marks omitted). The Court has observed that “because any qualifying rule would be so central to an accurate determination of innocence or guilt [it is] unlikely that many such components of basic due process have yet to emerge.” *Id.* (internal quotation marks omitted). “In providing guidance as to what might fall within this exception,” the Court has repeatedly referred to the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel), “and only to this rule,” *Banks*, 542 U.S. at 417.

In contrast to the narrow watershed rule exception—requiring that the new rule be “central” to the accurate determination of innocence or guilt—proposed Standard 22.6 permits courts to consider an otherwise barred claim if the new rule “substantially enhances” the ability of a court to determine a defendant’s factual guilt or suitability for a sentence of death. Essentially, a court applying the proposed Standard may consider any claim that would otherwise be barred as retroactive (which itself would be an exceptionally small number) so long as the claim has some arguable relevance to the defendant’s factual guilt or capital sentence. By narrowly defining what constitutes a new rule, and then coupling that narrow definition with a broad exception, the proposed rule renders the nonretroactivity principle a virtual nullity.

III. Concerns with the Proposed Standard

The *Teague* non-retroactivity rule furthers the important interests of federalism and finality. As the Court explained in *Teague*, the “[a]pplication of constitutional rules not in
existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.” 489 U.S. at 309. Non-retroactivity principles are “motivated by a respect for the States’ strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on ‘the constitutional standards that prevailed at the time the original proceedings took place.’” Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) (quoting Teague, 489 U.S. at 306 (citations omitted)).

“The States possess primary authority for defining and enforcing the criminal law [and] in criminal trials . . . hold the initial responsibility for vindicating constitutional rights.” Engle v. Isaac, 456 U.S. 107, 128 (1982). “Federal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.” Id. These incursions result in both a financial and administrative burden to states. Indeed, “[i]n many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards.” Teague, 489 U.S. at 310 (citation omitted). “State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.” Isaac, 456 U.S. at 128 n.33. Teague minimizes these intrusions by limiting the ability of federal courts to upset state convictions through retroactive application of new constitutional rules. Moreover, perpetual relitigation imposes a heavy financial toll on governments and a heavy psychological toll on defendants, society, and victims. In short, the “costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application.” Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment).

In addition, the proposed Standard would be difficult to apply. Rule 22.6’s proposed “clear break” test has never been applied by the Supreme Court to cases on collateral review and was repudiated in Griffith v. Kentucky, 479 U.S. 314 (1987), for cases on direct review. And for good reason. Legal commentators have pointed out that the “clear break” test is difficult to apply and can lead to inconsistent and unfair results. See, e.g., Charles Leonard Scalise, A Clear Break From the Clear Break Exception Of Retroactivity Analysis: Griffith v. Kentucky, 73 Iowa L. Rev. 473, 489 (1988) (“Another problem with the clear break exception was defining exactly what constituted a clear break. The Court itself appears unsure of what creates a clear break exception.”) (footnote omitted); Julie R. O’Sullivan, United States v. Johnson: Reformulating The Retroactivity Doctrine, 69 Cornell L. Rev. 166, 199 (1983) (noting the “difficulty of administering the ‘clear break’ test”). On the other hand, the Teague retroactivity test is well established: it has been the law for nearly 28 years and there is a very large body of case law and commentary interpreting and expounding upon its application.
Proposed Standard 22.10. Applications.

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(B) An applicant for state or federal postconviction relief should not be required to verify his or her factual allegations, to support factual allegations with affidavits or other evidence, or to demonstrate how he or she intends to prove the truth of factual allegations.

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I. Current Law

Verification Requirement: Federal law provides that an “[a]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.” 28 U.S.C. § 2242. Most states also require petitioners to verify their petitions for postconviction relief. ABA Standards for Criminal Justice 22-3.3, commentary (1980) (noting there is “virtually a universal requirement of verification of applications” for postconviction relief).

Evidentiary Support Requirement: A federal habeas petitioner is not required to provide evidentiary support for his claims at the time the 28 U.S.C. § 2254 habeas petition is filed. Many states, however, require petitioners to include with their postconviction review applications copies of reasonably available documentary evidence supporting their claims. See, e.g., People v. Duvall, 886 P.2d 1252 (Cal. 1995) (requiring habeas petition to “include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations”); 725 Ill. Comp. Stat. 5/122-2 (2016) (“The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.”); Mont. Code Ann. § 46-21-104(1)(c) (2015) (requiring petitioner to attach “affidavits, records, or other evidence establishing the existence” of facts alleged in the petition); Nev. Rev. Stat. § 34.370(4) (requiring petitioners to attach affidavits, records or other evidence supporting the factual allegations of the petition) (2015); Or. Rev. Stat. § 138.580 (2015) (requiring “affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition”).

II. How the Proposed Standard Departs from Current Law

Verification Requirement: The proposed rule eliminates any verification requirement by petitioners seeking postconviction relief.

Evidentiary Support Requirement: The proposed rule eliminates any requirement that petitioners demonstrate how they intend to prove the truth of factual allegations, or support their factual allegations with affidavits or other evidence, even if the evidence is in their possession or reasonably available.
III. Concerns with the Proposed Standard

Verification Requirement: The verification requirement helps to ensure that a petitioner provides accurate factual allegations. Its function is “to discourage frivolous and unfounded allegations which must be addressed by trial courts already overburdened with a proliferation of post-conviction remedy motions.” *Mills v. State*, 769 S.W.2d 469, 470 (Mo. App. 1989). As one court put it:

The verification requirement is not a shallow gesture of form over substance. It provides a base for perjury prosecution of those who attempt to mislead courts and is designed to discourage frivolous and unfounded allegations which the movant knows are false or those who make brash, unfounded statements not knowing or caring if they are true. The rules contemplate limiting the proliferation of baseless postconviction remedy motions, and to require verification of pro se and amended motions places no undue burden on the movant who need only sign and have his signature acknowledged. It gives pause to those who would mislead the court or abuse the system but creates no bar to those with reasonable bases for such claims.

*Rodden v. State*, 795 S.W.2d 393, 399 (Mo. 1990) (Rendlen, J., concurring) (citation omitted); see also *Smith v. State*, 918 So. 2d 141, 154 (Ala. Crim. App. 2005) (identifying the primary policy objectives underlying the verification requirement as “ensuring that the averments in the petition are based on merit and truth and protecting against the filing of frivolous petitions”). The requirement has been described as “of substantive importance to prevent perjury.” *Carey v. State*, 596 S.W.2d 688 (Ark. 1980).

Indeed, as noted in the commentary to ABA Standard 22-3.3, the verification requirement “may have a salutary effect” and “is worth employing,” so long as it does not interfere with the processing of legitimate claims. The importance of deterring frivolous actions is also recognized in the comments to the Uniform Post-Conviction Procedure Act § 3 (1980) (“The purpose of a requirement of formal verification is to deter and, if appropriate, to punish persons who knowingly submit false allegations,” and “[t]his purpose could be accomplished by amendment of the perjury statute to encompass unverified post-conviction applications”).

Evidentiary Support Requirement: The requirement that a petitioner provide reasonably available documentary evidence to support his claims, including affidavits and transcripts, is a sound one. Once a defendant is convicted, the presumption of innocence falls away and is replaced with a presumption in favor of the propriety of the proceedings. *See Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (“It must be remembered . . . that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity.”). A habeas petitioner has the burden to prove that he is entitled to relief. *Isaac*, 456 U.S. at 134-35; see also *State ex. rel. Winfield v. Roper*, 292 S.W.3d 909, 910 (Mo. 2009) (en banc); *State ex rel. Scott v. Boles*, 147 S.E.2d 486, 487 (W. Va. 1966). Thus, it only makes sense to require petitioners attacking their convictions or sentences to provide at least some evidence upfront to substantiate their claims.
Moreover, it is well documented that applications for postconviction review, both state and federal, place a heavy burden on scarce judicial resources. In addition to the problems raised by a large volume of applications for habeas corpus that are repetitious and patently frivolous, serious administrative problems have developed in the consideration of applications that appear meritorious on their face, only later to be found wholly lacking in merit. *Brown v. Allen*, 344 U.S. 443, 536 (1953) (stating that “floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own”); see also *United States v. Hayman*, 342 U.S. 205, 212 (1952); Jennifer Gwynne Case, Note, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 Wm. & Mary L. Rev. 669, 688 (2008) (declaring “the volume of habeas petitions in federal courthouses has increased greatly because of petitioners filing a large number of frivolous petitions,” and that “[t]his increase in petitions ‘has delayed the administration of justice, prevented the finalization of verdicts, frustrated federal-state relations, and undermined public confidence in the criminal justice process’” (quoting Mark M. Oh, Note, *The Gateway for Successive Habeas Petitions: An Argument for Schlup v. Delo’s Probability Standard for Actual Innocence Claims*, 19 Cardozo L. Rev. 2341, 2342 (1998)). Requiring petitioners to include reasonably available documentary evidence with their applications for relief enables courts to determine at an earlier stage whether postconviction relief may be warranted. This not only eases the already significant burden faced by postconviction courts, it frees up resources to allow more careful consideration of potentially meritorious claims.

   (A) An application for state postconviction relief should not be subject to a
   “custody” requirement.

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I. Current Law

   Each state, either by statute or rule of court, has at least one type of postconviction
remedy. In the District of Columbia and 26 states, the principal postconviction remedy includes a
custody requirement. The custody requirement usually means that postconviction relief will be
denied if the petitioner is not, at the time the remedy is sought, in custody pursuant to
a criminal judgment. See Donald E. Wilkes, Jr., State Postconviction Remedies and Relief Handbook with
Forms § 2:5 (2016-2017); Brian R. Means, Postconviction Remedies § 1:3 (West 2016)
(“Generalizing, a proceeding in habeas corpus today is still initiated by a petition for the writ,
filed with a court having jurisdiction of the person who allegedly holds the prisoner in unlawful
custody.”).

II. How the Proposed Standards Departs from Current Law

   The proposed rule eliminates the “in custody” requirement.

III. Concerns with the Proposed Standard

   There are good reasons for maintaining the “in custody” requirement in those states
where it remains a condition to obtaining postconviction relief. Presently, the term “custody” is
interpreted expansively to encompass the vast majority of challenges to a conviction or sentence.
Minnesota v. Murphy, 465 U.S. 420, 430 (1984) (stating that the “in custody” requirement is
“defined broadly to effectuate the purposes of the writ”). Although the custody requirement
historically was applied strictly to require actual physical detention, over time state and federal
courts alike began to apply an expansive interpretation of the meaning of “custody.”

   4 As it exists today, the meaning of “custody” is often applied broadly to include any restraints not shared by
the public generally that significantly confine and restrain freedom. See Maleng v. Cook, 490
U.S. 488, 490-92 (1989). The most obvious case where the “in custody” requirement is satisfied
is where a petitioner is subject to civil or criminal confinement, including a jail, prison, mental
institution, or half-way house. But the custody requirement is satisfied for far less significant
infringements on freedom. These include constraints associated with parole, probation, bail, own
cognizance release, federal supervised release, mandatory attendance in rehabilitation programs,
and community service. Examples of the few circumstances that generally do not satisfy the

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4 Although the Supreme Court’s expansive interpretation of the “in custody” requirement is not binding
on a state’s custody requirement, most states either treat the Supreme Court’s decisions as persuasive
authority or interpret the state’s custody requirement even more broadly. See, e.g., People v. Villa, 45 Cal.
4th 1063, 1069 (2009); Rawlins v. State, 182 P.3d 1271, 1275 (Kan. Ct. App. 2008); Lebron v. Comm’r of
Corr., 876 A.2d 1178, 1193 (Conn. 2005); McMannis v. State, 536 A.2d 652, 657 (Md. 1998); State v.
Smith, 700 So. 2d 493, 495 (La. 1997).
custody requirement include challenges to fines, restitution orders, loss of a driver’s license, and registration as a sex or narcotics offender. Means, *Postconviction Remedies*, supra, § 7:4.

Expanding the writ of habeas corpus to include non-custodial challenges undermines the essential function the writ is intended to serve. From as early as the middle of the Fourteenth Century, the writ of habeas corpus has been used to challenge the continued detention of an incarcerated or otherwise held individual. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 739-744 (2008) (emphasizing the historical centrality of the habeas writ in safeguarding liberty); *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (citing release of persons held illegally as the traditional purpose of the habeas corpus writ). Literally, the Latin phrase habeas corpus ad subjiciendum translates, “you should have the body for submitting.” The custody requirement preserves the extraordinary nature of habeas corpus relief for cases involving restraints on individual liberty. *Hensley v. Mun. Court, San Jose-Milpitas Jud. Dist.*, 411 U.S. 345, 351 (1973). Eliminating the custody requirement diminishes the essential purpose the writ is intended to serve and results in an unfocused, all-purpose remedy.

Eliminating the custody requirement would also distract courts from cases where an individual’s actual liberties are at stake. Last year, individuals in custody filed more than 23,000 federal habeas petitions.5 And as Chief Justice Roberts noted in his 2016 Year-End Report on the Federal Judiciary (at 12), the total number of civil filings that year was 291,851. Allowing habeas petitions to be filed by persons not in custody would only add to that deluge of cases and diminish courts’ ability to pay adequate attention to the petitions from persons who satisfy the current custody requirement.

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An application for state or federal postconviction relief should not be subject to a limitation period, but should be subject to ordinary equitable considerations, including laches.

I. Current Law

In 1996 Congress imposed a one-year limitation period for state prisoners to file a federal habeas corpus petition. See 28 U.S.C. § 2244(d). The limitation period, adopted as part of AEDPA, typically runs from the date the state-court judgment becomes final and is tolled during the pendency of state postconviction proceedings.

II. How the Proposed Standard Departs from Current Law

The proposed rule implicitly calls for the repeal of § 2244(d) and would replace it with “equitable considerations, including laches.”

Although federal habeas corpus petitions were not traditionally subject to a laches defense or limitations period, as the scope of habeas corpus review expanded, the need to address undue delays became apparent. In 1977, the Supreme Court proposed Rule 9(a) of the Habeas Corpus Rules, which would have created a rebuttable presumption of prejudice in favor of the state if the habeas petition was filed more than five years after the judgment of conviction. As finally adopted, however, Rule 9(a) created a weaker form of laches that permitted dismissal of a petition only “if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing.” Concluding that the laches doctrine was not sufficiently addressing the problem of unduly delayed federal habeas petitions, Congress replaced it in 1996 with the one-year limitations period set forth in § 2244(d). The proposed Standard would mark a return to former Rule 9(a).

III. Concerns with the Proposed Standard

As the Supreme Court explained in Duncan v. Walker, 533 U.S. 167 (2001), “[t]he 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.” Id. at 179 (citation omitted). A strict time limit is particularly important in capital cases. The influential Powell Report recommended a limitations period for first habeas petitions for this reason, stating: “In death penalty jurisdictions, the sole incentive for a prisoner to initiate post-conviction review is either the scheduling of an execution date or the threat to schedule one. . . . It is clear that there must be a substitute mechanism to cause understandably reluctant state prisoners to seek post-conviction review when such action may remove the only obstacle preventing the State from carrying out the death sentence.” U.S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 19 (1989).

The laches doctrine embodied in former Rule 9(a) had proved ineffective in addressing undue delay by state prisoners. As a discretionary remedy applied by courts sitting in equity, it
failed to provide clear and consistent guidance on when a federal habeas petition was untimely. More troubling, it permitted consideration of habeas applications presented decades after convictions became final, when case files had often been destroyed, evidence had disappeared, and witnesses had been deceased or impossible to find. See, e.g., Hairston v. Cox, 459 F.2d 1382, 1386 (4th Cir. 1972) (refusing to grant dismissal on theory of laches notwithstanding 26-year delay between finality of conviction and filing for federal habeas relief); Hawkins v. Bennett, 423 F.2d 948, 951 (8th Cir. 1970) (holding that petitioner not barred from pursuing habeas relief notwithstanding 42-year delay between finality of conviction and seeking federal habeas relief). Congress and the states had good cause to believe that the doctrine failed adequately to protect their interests in finality. If “[c]riminal conviction ought to be final before society has forgotten the crime that justifies it,” Martinez v. Ryan, 566 U.S. 1, 26 (2012) (Scalia, J., dissenting), something more than laches is necessary.

(A) A court entertaining an application for state or federal postconviction relief should typically adjudicate a cognizable claim on the merits.

(B) A court entertaining an application for state or federal postconviction relief should not decline to consider a claim, a factual allegation, or evidence supporting a factual allegation solely on the ground that the applicant should have advanced the claim, a factual allegation, or evidence earlier. Nor should a court decline to consider a claim, a factual allegation, or evidence supporting a factual allegation solely on the ground that a failure to present the claim, allegation, or evidence in previous proceedings formally violated a procedural rule operating in those proceedings, resulting in a forfeiture of the ability to advance the claim, allegation, or evidence in that context. A court should consider a claim in any circumstances to avoid a miscarriage of justice.

(C) A court entertaining an application for state or federal postconviction relief should have discretion to decline to consider a claim, a factual allegation, or evidence supporting a factual allegation if the applicant has engaged in strategic or manipulative litigation behavior. An applicant has engaged in strategic or manipulative litigation behavior if he or she has deliberately postponed the presentation of a claim, a factual allegation, or evidence in order to gain a litigation advantage. Illustrations of strategic behavior include deliberately delaying the presentation of a claim, a factual allegation, or evidence to avoid confusing the jury or distracting the jury from other defenses, or to save the claim for postconviction proceedings. Illustrations of manipulative behavior include deliberately delaying the presentation of a claim, a factual allegation, or evidence to prejudice the respondent’s ability to reply, a court’s ability to correct error, or the ability of a state or the federal government to take corrective action. An allegation that an applicant has engaged in strategic or manipulative behavior should be an affirmative defense that must be raised and established by the respondent in conformity with ordinary rules of practice.

I. Current Law

“The procedural default doctrine . . . provides that when a prison has defaulted a claim by violating a state procedural rule which would constitute adequate and independent grounds to bar direct review in the United States Supreme Court, he may not raise the claim in federal habeas, absent a showing of cause and prejudice or actual innocence.” Brian R. Means, Federal Habeas Manual § 9B:1, at 975-76 (Thomson Reuters 2016) (citing Coleman v. Thompson, 501 U.S. 722, 729-30 (1991)). “Thus a prisoner who fails to satisfy the state procedural requirements forfeits his right to present his claim in federal habeas.” Id. at 976 (citing Murray v. Carrier, 477 U.S. 478, 485-92 (1986)).
II. How the Proposed Standard Departs from Current Law

The proposed Standard would return to the deliberate bypass standard for procedurally defaulted claims of *Fay v. Noia*, 372 U.S. 391 (1963). It would allow federal habeas courts routinely to hear on the merits claims that petitioners never properly presented to the state courts and therefore never gave state courts the opportunity to address. The Supreme Court, in a series of cases beginning with *Wainright v. Sykes*, 433 U.S. 72 (1977), and culminating in *Coleman v. Thompson*, supra, expressly repudiated the deliberate by-pass standard. *See, e.g.*, *Sykes*, 433 U.S. at 88 (“The contemporaneous-objection rule . . . deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right.”).

III. Concerns with the Proposed Standard

The procedural-default doctrine, in its current form, plays a critical role in ensuring that federal habeas practice remains consistent with principles of comity and federalism. “[A]s a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act.” *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (citing *Ex parte Royall*, 117 U.S. 241, 251 (1886)). As the Court explained in *Rose*, “[t]he exhaustion doctrine is principally designed to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings.” *Id.* at 518. In short, “in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoners’ federal rights.” *Coleman*, 501 U.S. at 731.

The procedural-default doctrine is a necessary concomitant to the exhaustion doctrine. That is because “[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer ‘available’ to him.” *Id.* at 732. Without the procedural-default doctrine, “habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court.” *Id.* The doctrine, in its current form, also recognizes that a state’s procedural rules “are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system.” *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). For example, the contemporaneous-objection rule “enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question.” *Sykes*, 433 U.S. at 88. And the rule “may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality of criminal litigation.” *Id.*

The proposed Standard threatens these important principles. As the Supreme Court explained, “*Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules.” *Coleman*, 501 U.S. at 750. By diminishing the consequences of violating those rules, *Fay*’s deliberate bypass standard “may encourage ‘sandbagging’ on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.” *Sykes*, 433 U.S. at 89; see also *McClesky v. Zant*, 499 U.S. 467, 491-92 (1991) (noting that habeas corpus review “may give litigants incentives to
withhold claims for manipulative purposes and may establish disincentives to present claims when the evidence is fresh”). These concerns are only exacerbated by the Standard’s placing on the state the burden of proving that a defendant deliberately bypassed a state procedural rule. The defendant, not the state, has access to the facts necessary to show that he did not “engage in strategic or manipulative behavior.”

In addition, requiring an already-strained federal judge to review the merits of every claim asserted raises the very real possibility that those claims with real merit will be overlooked. The proposed Standard, in the words of Justice Jackson, “sanctions progressive trivialization of the writ until stale, frivolous and repetitious petitions inundate the docket of the lower courts . . . It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.” *Brown*, 344 U.S. at 536–37 (Jackson, J., concurring in the result) (footnotes omitted).

(A) A court entertaining an original application for state or federal postconviction relief should consider any cognizable claim, unless the claim is manifestly frivolous.

I. Current Law

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides: “The clerk must promptly forward the petition to a judge under the court’s assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner” (emphasis added). Several courts of appeal have interpreted this preliminary screening rule to permit district courts to summarily dismiss habeas petitions that, on their face, fail to state a claim, see, e.g., Williams v. Kullman, 722 F.2d 1048, 1050 (2nd Cir. 1983); Small v. Endicott, 998 F.2d 411, 414 (7th Cir. 1993), or whose “factual allegations . . . are ‘palpably incredible’ or ‘patently frivolous or false.’” Small, 998 F.2d at 414 (quoting Blackledge v. Allison, 431 U.S. 63, 76 (1977)); see also Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

II. How the Proposed Standard Departs from Current Law

The proposed Standard would limit the circumstances in which a district court could summarily dismiss a petition based on a preliminary screening. Under the proposal, the court may do so only when “the claim is manifestly frivolous,” a narrower standard than Rule 4’s “plainly appears . . . that the petitioner is not entitled to relief.”

III. Concerns with the Proposed Standard

Congress adopted Rule 4 to avoid burdening states with claims that plainly lack merit. See Allen v. Perini, 424 F.2d 134, 141 (6th Cir. 1970), cited in, Advisory Committee’s Notes on Habeas Rule 4 (1976). As the Perini court stated: “The public interest may be affected seriously by habeas corpus actions. Although this case primarily involves the constitutional rights of the prisoner, the public has a right of protection against the release of convicted criminals except where violations of constitutional rights have been established. The public has a right to be represented by counsel, who in this case is the Office of the State Attorney General. An indiscriminating and automatic issuance of show cause orders by a District Judge immediately after the filing of all petitions for writ of habeas corpus could create an impossible bottleneck in the office of a State Attorney General.” Perini, 424 F.2d at 141.

6 Like proposed Standard 22.5, proposed Standard 22.14 can literally be read as eliminating any and all procedural bases for rejecting a habeas petition. In light of the proposed Standard’s title, “Preliminary Screening,” we interpret it as addressing only when a district court may properly dismiss a petition without calling for an answer by the respondent.
The proposed Standard would limit the effectiveness of the screening process by forcing states to respond to habeas petitions even where the judge concludes that, on their face, they plainly fail to state a viable legal claim. Presumably, many habeas petitions plainly fail to state a claim but cannot fairly be described as “manifestly frivolous.” The proposal would needlessly force states to respond to them.
Proposed Standard 22.15. Stays.

(A) A court with jurisdiction to entertain an application for state or federal postconviction relief filed by a person under sentence of death should grant a request to stay the execution until all state and federal postconviction proceedings contemplated by these Standards, as well as clemency proceedings, are complete.

... 

I. Current Law

Under present law, a court entertaining a stay pending judicial review must consider four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (citing *Hilton v. Braunksill*, 481 U.S. 770, 776 (1987)).

It is “not clear” precisely which standard governs stays in capital cases. *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016). Some courts proceed under the *Nken* factors, but others also consider factors discussed in *Barefoot v. Estelle*, 463 U.S. 880 (1983), such as (1) whether the applicant’s claims meet the certificate of probable cause (or certificate of appealability) standard; (2) whether the court can adjudicate the merits of those claims before the scheduled execution date; (3) whether there are local rules addressing capital litigation, such as expedited briefing schedules, threshold frivolousness review by the court, etc.; and (4) the number of prior petitions. *Id.* at 888-89, 894-95; see, e.g., *Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995).

The last *Barefoot* factor reflects that the availability of a stay is at its peak at early stages of litigation, then generally declines over time. For direct appeals and the first round of state and federal collateral review, stays appear to be granted as a matter of course. See, e.g., *Lonchar v. Thomas*, 517 U.S. 314 (1996); Utah Code Ann. § 77-19-8. For later proceedings, particularly those on the eve of an execution, stays are less common. See, e.g., *Gomez v. U.S. Dist. Court, N.D. Cal.*, 503 U.S. 653 (1992) (per curiam). Nevertheless, it appears that—with the exception of denials for eleventh-hour stays leading up to an execution—stays are routinely granted during the pendency of both direct and collateral capital litigation. On the other hand, current law does not appear to grant prisoners any right to a stay pending the outcome of the clemency process.

II. How the Proposed Standard Departs from Current Law

The proposed Standard encourages state and federal courts adjudicating postconviction applications to grant, essentially as a matter of course, any request to stay the execution until both state and federal habeas proceedings, as well as clemency proceedings, are “complete.” It does not take into account either (1) the merits of the underlying claims or (2) the number of prior collateral actions—factors long considered by courts and basic to current law. The proposed standard also appears to sanction stays during the pendency of clemency proceedings, contrary to current law.
III. Concerns with the Proposed Standard

Given the gravity and irreparability of the harm inherent in an offender’s execution, the balance of these factors will inherently favor a capital petitioner. Cf. Williams, 50 F.3d at 1360 (noting that irreparable harm inquiry is “different” in capital cases). The existing standard is, therefore, more than adequate to protect the interests of any capital litigant. At the same time, the current standards recognize the states’ interest in imposing their sentences. As the Supreme Court has explained, capital petitioners “might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. Without time limits [on stays], petitioners could frustrate AEDPA’s goals of finality by dragging out indefinitely their federal habeas review.” Ryan v. Gonzales, 133 S. Ct. 696, 709 (2013) (internal quotation marks omitted); see also Alex Kozinski & Sean Gallagher, Death: The Ultimate Run-on Sentence, 46 Case W. Res. L. Rev. 1, 5-11 (1995) (discussing extensive litigation delays in carrying out death sentences). The Supreme Court has also made clear that courts “may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.” Gomez, 503 U.S. at 654 (vacating stay where “claim could have been brought more than a decade ago” and where there was “no good reason for this abusive delay,” which was “compounded by last-minute attempts to manipulate the judicial process”).

The proposed standard would impair the states’ interest in administering death sentences without endless delay. This is especially true when it is considered in conjunction with other portions of these proposed guidelines that refuse to impose any real limitation on the timing or number of petitions an offender may file. See Proposed Standards 22.12, 22.13, 22.21. Insisting that a stay be granted in every capital case where post-conviction litigation or a clemency request is filed (and thus pending) would enable a capital offender to indefinitely postpone his execution by filing a single claim at a time, in piecemeal fashion, regardless of merit. That is, whether proceedings are “complete” under the proposed standard will necessarily depend on whether the capital litigant has filed a petition for some form of relief. By failing to consider the merits of the underlying claims and the number of previous actions, the proposed standard could encourage successive filings whose value would lie not in the merits of the underlying claims, but in the petition’s ability—merely by its existence—to cause further delay.

An applicant for state or federal postconviction relief should be entitled to discovery with respect to the claims advanced in his or her application. Discovery in postconviction cases should be governed by ordinary rules of practice.

I. Current Law

A habeas petitioner is “not entitled to discovery as a matter of ordinary course.” Bracy v. Gramley, 520 U.S. 899, 904 (1997); see also Habeas Rule 6(a); Harris v. Nelson, 394 U.S. 286, 300 (1969). Instead, a district court must specifically authorize discovery and, before it does, must require the petitioner to show “good cause” for his discovery request. See Bracy, 520 U.S. at 904; Dist. Attorney’s Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 72 (2005). A petitioner meets this threshold by proffering “specific allegations . . . [that] show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief.” Harris, 394 U.S. at 300. In addition, as discussed with respect to proposed Standard 22.17, infra, AEDPA restricted federal courts’ ability to consider evidence outside the state-court record, making discovery unnecessary in many cases. See 28 U.S.C. § 2254(d), (e)(2); Cullen v. Pinholster, 563 U.S. 170, 184-86 (2011).

II. How the Proposed Standard Departs from Current Law

The proposed Standard proclaims that a petitioner “should be entitled” to discovery, in all cases. (Emphasis added.) The proposal does not contain a good-cause requirement or reference the district court’s gatekeeping role. Nor does it take into account those cases where the petitioner’s claims must be judged based only on the state-court record. To the contrary, the proposal embraces the position that a petitioner should receive discovery as a matter of course.

III. Concerns with the Proposed Standard

The district court’s role as a gatekeeper of discovery, combined with the good-cause standard, ensures that states do not expend resources responding to abusive or frivolous discovery requests while simultaneously permitting discovery when it is in the interests of justice. See Advisory Committee’s Notes on Habeas Rule 6(a) (1976) (“it is felt the requirement of prior court approval of all discovery is necessary to prevent abuse”); Harris, 394 U.S. at 300 (recognizing that district courts may limit discovery). These limitations further the interest of comity, federalism, and finality that AEDPA protects.

The proposed Standard embraces a position both the Supreme Court and Congress have long rejected: that a petitioner should receive discovery as a matter of course. It thereby encourages the type of abusive discovery that prompted Rule 6(a)’s adoption, which would waste the time and resources of state attorneys and officers.
Proposed Standard 22.17. Determinations of Facts

(A) A court entertaining an application for state or federal postconviction relief should resolve any dispute regarding the facts alleged to support a claim. The court should employ the ordinary means by which factual disputes are resolved in criminal or civil cases, such as the receipt and examination of exhibits and affidavits and, where appropriate, the conduct of an evidentiary hearing. If a hearing is held, live testimony subject to cross-examination is generally preferable to affidavits or other written or recorded representations of testimony. Interactive video communications may be sufficient and appropriate in some cases.

(B) A court should have discretion to adopt a determination of historical fact reached previously by another court, if the determination was made reliably on the weight of evidence after a fair and regular fact-finding process and no new information bearing on the factual issue has since come to light.

....

I. Current Law

Under AEDPA, if a state court has adjudicated a claim’s merits, a federal court may not consider evidence outside the state-court record to resolve that claim, regardless of whether a factual dispute exists. See 28 U.S.C. § 2254(d)(2) (limiting review of whether state court unreasonably determined the facts to the state-court record); Pinholster, 563 U.S. at 184–85 (holding that evidence introduced for the first time in federal court has “no bearing on” the 28 U.S.C. § 2254(d)(1) analysis). Further, AEDPA circumscribes a federal court’s ability to conduct an evidentiary hearing or expand the record even when a state court has not resolved a claim’s merits. See 28 U.S.C. § 2254(e)(2); see also Pinholster, 563 U.S. at 185–86. Under § 2254(e)(2), “a state prisoner seeking to submit additional evidence to the federal court . . . must demonstrate that neither he nor his attorney were at fault in failing to develop that evidence in state court or, if he was at fault, he satisfies one of the two exceptions” for claims based on new retroactive constitutional rules or new facts, plus a showing of actual innocence. Means, Federal Habeas Manual § 4.5, at 484-85. Pre-AEDPA law similarly restricted a petitioner’s ability to obtain a federal evidentiary hearing. See Keeney v. Tamayo-Reyes, 504 U.S. 1, 5-9 (1992).

AEDPA also expressly requires a federal habeas court to defer to a state court’s factual findings unless they are unreasonable, 28 U.S.C. § 2254(d)(2), or unless the petitioner shows by clear and convincing evidence that they are incorrect. Id. § 2254(e)(1). Pre-AEDPA law likewise required deference to state court factual findings. See Miller v. Fenton, 474 U.S. 104, 105 (1985) (“Under 28 U.S.C. § 2254(d), state-court findings of fact ‘shall be presumed to be correct’ in a federal habeas corpus proceeding unless one of eight enumerated exceptions applies.”).

II. How the Proposed Standard Departs from Current Law

The proposed Standard conflicts with current law with respect to both when federal habeas courts may expand the record and the level of deference they must accord state court factual findings. As to the former, the proposal promotes liberal evidentiary development, encouraging district courts to resolve, through an evidentiary hearing if necessary, “any dispute
regarding the facts alleged to support a claim.” (Emphasis added.) Contrary to \textit{Pinholster} and AEDPA’s express terms, the proposed Standard would allow federal habeas courts to consider and develop new evidence with respect to claims adjudicated on the merits in state court. And contrary to AEDPA and pre-AEDPA law, the proposal would encourage district courts to conduct evidentiary hearings or otherwise expand the record to resolve factual disputes, regardless whether a petitioner was “at fault in failing to develop that evidence in state court.”

Further, the proposed Standard makes deference to state-court factual findings \emph{discretionary}. Rather than requiring district courts to defer to state-court factual findings unless those findings are unreasonable or clearly erroneous, as AEDPA commands, the proposal presumes that the findings are entitled to \textit{no} deference unless the court first determines that they were entered reliably, after an appropriate fact-finding process. And if the petitioner advances any “new information” relevant to the factual issue, no matter how insignificant, the court lacks discretion to defer to the state court’s findings.

### III. Concerns with the Proposed Standard

Like the limitations on discovery, AEDPA’s mandatory deference and restriction on evidentiary development “carries out AEDPA’s goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance.” \textit{Pinholster}, 563 U.S. at 185 (internal quotation marks omitted). Limiting a federal court’s ability to develop a claim’s facts, and requiring it to adopt a state court’s reasonable and not-clearly-erroneous factual findings, ensure that state courts retain their principal role in evaluating alleged constitutional errors and insulate state-court judgments from intrusive second-guessing by federal courts. \textit{Cf. Lewis v. Jeffers}, 497 U.S. 764, 780–81 (1990) (“We have never required federal courts to peer majestically over the [state] court’s shoulder so that [they] might second-guess its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language.”) (internal quotation marks omitted). In no other context do federal courts utterly ignore factual findings made by state courts in the same dispute. Habeas corpus may be distinctive, but there should be a limit to federal courts’ ability to disregard the work their state court peers have done.

Proposed Standard 22.17 instead would encourage federal habeas courts to disregard state-court factual findings and substitute their own, often after conducting evidentiary hearings. These procedures would displace state courts as the “principal forum” for resolving challenges to state convictions and associated evidentiary disputes, \textit{Harrington v. Richter}, 562 U.S. 86, 103 (2011), and would undermine the goal of Congress and the Supreme Court of ensuring that “the state trial on the merits [is] the ‘main event,’ so to speak, rather than a ‘tryout on the road’ for what will later be the determinative federal habeas hearing.” \textit{Sykes}, 433 U.S. at 90.

(A) If a court entertaining an application for state or federal postconviction relief concludes that the claim is meritorious, the court should award any form of relief that the law and justice require.

I. Current Law

Once a district court concludes that a habeas petitioner has a meritorious claim (that is not barred by a procedural obstacle), a district court has discretion regarding the relief it may award. But this discretion is not unlimited. “In deciding the appropriate remedy, the federal court must balance two separate habeas principles: to ‘dispose of the matter as law and justice require,’ 28 U.S.C. § 2243, and to avoid directly interfering with a state court’s conduct of state litigation.” Means, Federal Habeas Manual § 13.4 at 1498. The Supreme Court has therefore held that federal habeas courts have the power in the appropriate case to order the applicant’s release, conditionally or otherwise, but lack the power to revise a challenged state court judgment itself to correct constitutional error. See Fay, 372 U.S. at 430-31. Unconditional, immediate release is considered appropriate only in those rare cases “where the nature of the error is incurable,” such as “(1) unlawful prosecutions; (2) failures to comply with the conditional writ; and (3) extraordinary circumstances, typically involving egregious conduct by the government.” Means, Federal Habeas Manual § 13.8 at 1501-02. Federal habeas courts also lack the power to order damages. See Wolff v. McDonnell, 418 U.S. 539, 554 (1974).

II. How the Proposed Standard Departs from Current Law

The proposed Standard could eliminate or diminish the limits on district courts’ discretion to revise state court judgments, grant unconditional relief, and award damages.7

III. Concerns with the Proposed Standard

As the Third Circuit observed, habeas relief should be carefully sculpted to produce the “least intervention into the state criminal process.” Henderson v. Frank, 155 F.3d 159, 168 (3d Cir. 1998). “[F]ederal remedies should be designed to enable state courts to fulfill their constitutional obligations to the defendant.” Dickerson v. Vaughn, 90 F.3d 87, 92 (3d Cir. 1996). To the extent proposed Standard 22.19(A) expands district courts’ authority to revise state court judgments, grant unconditional relief, or award damages, it threatens to undermine those interests.

7 Like proposed Standards 22.5 and 22.14, proposed Standard 22.19(A) can be interpreted as eliminating all procedural bases for rejecting a habeas petition. In light of proposed Standard 22.19’s title, “Relief,” we interpret it as addressing only what types of relief a district court may enter after ruling for a petitioner.
Proposed Standard 22.19(B). Relief.

(B) A court entertaining an application for state or federal postconviction relief should not award relief from a criminal conviction or sentence if the error in the relevant proceeding was harmless. The court should employ the same harmless error analysis that would have been applied if the harmless error had arisen on direct review.

I. Current Law

A federal habeas petitioner is not entitled to relief based on state trial court error unless he can establish that the error “had a substantial and injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619, 637(1993) (internal quotation marks omitted). In addition, where a state court held that the error was harmless, that determination is subject to AEDPA deference. See Davis v. Ayala, 135 S. Ct. 2187, 2198-99 (2015); Welch v. Hepp, 793 F.3d 734, 738-39 (7th Cir. 2015).

II. How the Proposed Standard Departs from Current Law

The proposed Standard states that courts “should employ the same harmless error analysis that would have been applied if the harmless error issue had arisen on direct review.” On direct review, the state has the burden of demonstrating that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). The Chapman standard is far more difficult for a state to meet. The proposed Standard also makes no provision for deference to a state court’s harmless-error analysis, and instead implies that the federal court will engage in de novo review.

III. Concerns with the Proposed Standard

The Court adopted the “substantial and injurious effect” harmless-error standard in Brecht because it recognized that “[d]irect review is the principal avenue for challenging a conviction,” and that “[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.” 507 U.S. at 633 (internal quotation marks omitted). In short, “[o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under Chapman undermines the States’ interest in finality and infringes upon their sovereignty over criminal matters.” Id. at 637. The Court also pointed to difficulty of retrying defendants, given “the ‘erosion of memory’ and ‘dispersion of witnesses’ that accompany the passage of time.” Id.

The proposed Standard, if adopted, would impair the interests in “finality, comity, and federalism” that underlie the Brecht harmless-error rule. Ayala, 135 S. Ct. at 2198. It would force states to retry defendants years after the offense even where the constitutional error did not result in “actual prejudice.” Because retrial is often difficult or impossible, this will “frequently cost society the right to punish admitted offenders” and “may reward the accused with complete freedom from prosecution.” Isaac, 456 U.S. at 127, 128. States therefore maintain an abiding interest in preserving the Brecht harmless-error standard.
Proposed Standard 22.20. Appellate Review.

(A) A trial level judgment granting or denying an application for state or federal postconviction relief should be subject to appellate review according to ordinary rules of practice. No threshold screening of a claim on the merits should be required before an appeal can go forward.

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I. Current Law

The federal habeas corpus statute has long imposed a threshold screening requirement. Under 28 U.S.C. § 2253(c)(1)(A), “[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in an habeas proceeding in which the detention complained of arises out of process issued by a State Court . . . .” The statute further states that “[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” Id. § 2253(c)(2). Such a certificate must indicate “what specific issue or issues satisfy [this] showing.” 28 U.S.C. § 2253(c)(3). Only those specific issues are cognizable on appeal. Prior to AEDPA, a habeas petitioner had to obtain a certificate of probable cause to appeal a district court’s denial of habeas relief. See Act of Feb. 13, 1925, ch. 229, §§ 6(d), 13, 43 Stat. 940, 942.

The Supreme Court has explained that to demonstrate “a substantial showing of the denial of a constitutional right,” the applicant must show “that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted).

II. How the Proposed Standard Departs from Current Law

The proposed Standard would altogether eliminate the requirement that a petitioner obtain a certificate of appealability in order to appeal a district court decision denying his petition.

III. Concerns with the Proposed Standard

Federal law has long required habeas petitioners to obtain certificates of appealability (or certificates of probable cause) “to appeal in order to prevent frivolous appeals from delaying the States’ ability to impose sentences, including death sentences.” Barefoot, 463 U.S. at 892. Moreover, permitting appeals from habeas denials to proceed without any screening would needlessly burden federal appellate courts that are already taxed with heavy dockets, much of which is made up of state and federal prisoner litigation. See n.5, supra. The COA requirement protects federal appellate courts from being overburdened with meritless litigation and allows them to focus on those cases with potential merit. Cf. Jones v. Bock, 549 U.S. 199, 203 (2007) (recognizing the risk that “the flood of nonmeritorious claims” could “submerge and effectively preclude consideration of the allegations with merit”). The proposed Standard, by eliminating the COA requirement, would damage these interests.
Proposed Standard 22.21(A). Relitigation.

   (A) In the absence of new information, if a claim advanced in an application for state postconviction relief from a state conviction or sentence was adjudicated on the merits either in the course of trial and direct review or in proceedings on a prior postconviction application, the state court entertaining the postconviction application ordinarily should not revisit the issues previously determined. If a claim was not previously adjudicated on the merits, the court entertaining the application should adjudicate the claim on the merits.

I. Current Law

   Many States have rules or decisions that bar state postconviction courts from hearing claims that were, or could have been, previously adjudicated in state court. For example, under Michigan Court Rule 6.508(D)(2), a state postconviction court may not grant relief to an applicant if the petition “alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the [applicant] establishes that a retroactive change in the law undermined the prior decision.” And if the applicant raises a claim that was not raised on direct appeal or in a prior postconviction motion, before the court considers the claim on its merits the applicant must demonstrate (1) good cause for failure to raise such a claim on appeal or in the prior motion, and (2) actual prejudice from the irregularities that support the claim for relief. The court may waive the “good cause” requirement if the reviewing court determines that there is a significant possibility that the applicant is innocent of the crime. Mich. Ct. R. 6.508(D)(3).

II. How the Proposed Standard Departs from Current Law

   The propose Standard appears consistent with state bars on raising claims that were already adjudicated on the merits. But the proposed Standard conflicts with the common state bar on raising claims that an applicant could have raised, but failed to, in a prior state court proceeding. For example, contrary to Michigan Court Rule 6.508(D)(3), the proposal places no additional burden on an applicant who failed to raise a claim on direct appeal (even though he could have done so) and instead raises it for the first time on postconviction review.

III. Concerns with the Proposed Standard

   The Supreme Court has explained the importance of a state “rule requiring a defendant initially to raise a legal issue on appeal, rather than on postconviction review.” Reed v. Ross, 468 U.S. 1, 10 (1984). Such a rule

   affords the state courts the opportunity to resolve the issue shortly after trial, while the evidence is still available both to assess the defendant’s claim and to retry the defendant effectively if he prevails in his appeal. This type of rule promotes not only accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case.

   Id. at 10-11. The proposed Standard threatens to undermine those interests.
Proposed Standard 22.21(C). Relitigation.

(C) . . . . If a state court previously adjudicated a claim on the merits, the federal court should not ignore the state court’s decision. Nor should the federal court defer to the state court decision. The federal court should treat a state court interpretation of federal law as persuasive authority: a nonbinding judicial determination of a federal question rendered by a court in another jurisdiction.

I. Current Law

Under 28 U.S.C. § 2254(d), adopted as part of AEDPA, if a state court has adjudicated a claim on the merits, the reviewing federal court can grant habeas relief only if the state court’s resolution of the claim “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 . . . 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.” This is often referred to as “AEDPA deference.”

As interpreted by the Supreme Court, § 2254(d) authorizes federal habeas relief only if the federal court finds a state court’s resolution of an issue “objectively unreasonable.” Williams v. Taylor, 529 U.S. 362, 409 (2000). This creates “a substantially higher threshold” to obtain relief than de novo review. Renico v. Lett, 559 U.S. 766, 773 (2010). This is because “an unreasonable application of federal law is different from an incorrect application of federal law.” Id. (quoting Williams, 529 U.S. at 410). “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” Id. (quoting Williams, 529 U.S. at 411). Rather, to obtain “habeas corpus [relief] . . . , a state prisoner must show that the state court’s ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” Richter, 562 U.S. at 103.

II. How the Proposed Standard Departs from Current Law

The proposed Standard would eliminate AEDPA deference and reinstate the pre-AEDPA standard, under which federal habeas courts address the merits de novo—even where the state court issued a reasoned decision on the merits.

III. Concerns with the Proposed Standard

AEDPA deference “serves important interests of federalism and comity.” Woods v. Donald, 135 S. Ct. 1372, 1376 (2015). Through AEDPA, “Congress has commanded a renewed respect for state courts and their judgments, a respect which recognizes their role as coequal parts of our national judicial system. Under prior habeas practice, the state courts and lower federal courts had not been considered ‘coordinate’; Congress has decided they should be.” Kent Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 953 (1998) (internal footnotes and quotation marks omitted). For that reason, “federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong.” Donald, 135 S. Ct. at 1376.
AEDPA deference also ensures that federal habeas review is only “a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.” Richter, 562 U.S. at 102-03 (internal quotation marks omitted). Allowing federal habeas to operate as yet another round of appeal—as de novo review would do—“disturbs the State’s significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.” Id. at 103 (internal quotation marks omitted).

The proposed ABA standard would undermine those objectives. State courts would once again be treated as inferior tribunals: One federal district court judge could override a unanimous seven-Justice state high court. And federal habeas would replace the direct appeal as “the principal avenue for challenging a conviction.” Brecht, 507 U.S. at 633.
Proposed Standard 22.21(D). Relitigation.

(D) A court entertaining an application for state or federal postconviction relief should revisit a factual or legal issue that was previously determined in the course of an adjudication on the merits if one of the parties presents new information that undermines the reliability or validity of the previous determination. Illustrations include information indicating that the applicant may be actually innocent and judicial decisions that change the law governing the applicant’s claim.

I. Current Law

Under 28 U.S.C. § 2254(d), where a state court has adjudicated a claim on its merits, federal habeas review of the claim is limited to the record that was before the state court at the time of its decision. Pinholster, 563 U.S. at 182. A habeas applicant cannot expand that record in federal court. And in Greene v. Fisher, 565 U.S. 34, 34 (2011), the Court interpreted § 2254 to provide that whether a state court’s adjudication of a claim is objectively unreasonable must be determined by reference to the law in effect at the time of the state court merits adjudication.

In addition, as discussed in regard to proposed Standard 22.17, § 2254(e)(2) provides that “a state prisoner seeking to submit additional evidence to the federal court . . . must demonstrate that neither he nor his attorney were at fault in failing to develop that evidence in state court or, if he was at fault, he” shows that his claim relies on new retroactive law or new facts and he can also show actual innocence. Means, Federal Habeas Manual § 4.5, at 484-85.

II. How the Proposed Standard Departs from Current Law

The proposed Standard would entitle a habeas petitioner to expand the record in federal court based on new information even where expanding the record would be barred by § 2254(d), as interpreted in Pinholster. And to the extent the proposal suggests that changes in the law should allow a federal court to revisit a claim that a state court has adjudicated on the merits, that conflicts with Greene’s holding the state court merits ruling should be assessed by reference to the law in effect at the time of its merits adjudication.

The proposed Standard also would entitled a habeas petitioner to present new evidence in circumstances that § 2254(e)(2) would forbid. Although § 2254(e)(2) includes exceptions based on new retroactive law and new facts, its exceptions are narrower than the proposed Standard.

III. Concerns with the Proposed Standard

As the Supreme Court explained in Pinholster, if state courts are to have “primary responsibility” over prisoners’ claims, federal habeas review generally should be “limited to . . . the record before the state court.” 563 U.S. at 181 (internal quotation marks omitted). The AEDPA deference requirement would mean little if a petitioner could “overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo.” Id. at 182. How can “a state court . . . be deemed to have unreasonably applied federal law to evidence it did not even know existed[?]” Id. at 183 n.3. For similar reasons, allowing federal habeas courts readily to accept new evidence also
undercuts the exhaustion doctrine. State courts are not truly given the first opportunity to address legal claims if they are not presented with the facts that bear on the claim.

It is therefore proper, if new evidence or law arises in a case, to allow the states the first opportunity to address this new evidence or law. Most states allow prisoners to introduce new evidence or new retroactive law in state postconviction proceedings, particularly where the prisoner is able to present a strong case of actual innocence and the prisoner acted with due diligence. See Donald E. Wilkes, Jr., State Postconviction Remedies and Relief Handbook with Forms § 1:4 (2016-2017) (“Newly discovered evidence of innocence is a recognized ground for relief from a conviction under the principal postconviction remedies of 37 states.”); id. at 8 (“Among the many other grounds for relief from a conviction or sentence under various state principal postconviction remedies are claims that (1) there has been a significant, retroactive change in law entitling the convicted person to relief . . .”).

A balanced approach to postconviction proceedings would encourage prisoners to pursue those state avenues before they pursue relief in federal courts—consistent with the primary role states, as coequal sovereigns, are supposed to have over state criminal matters. See Brecht, 507 U.S. at 635; Isaac, 456 U.S. at 128.