No. 19-6181 (CAPITAL CASE)

In the Supreme Court of the United States

MARK ROBERTSON,
Petitioner,
vs.

LORIE DAVIS, Director, Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS……..……..…..i

TABLE OF AUTHORITIES……..……..…ii

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI……..……..…..1

I. Ensuring the Judiciary's Uniform Provision of Representation to Qualifying Prisoners Pursuant to a Single Federal Statute Is a Compelling Reason to Grant Certiorari……..……..……1

II. The Director's Arguments on the Merits Are Premature and Unpersuasive…….……..3

III. The Qualified Bar Prohibiting Article III Courts From Hearing Evidence Is Not a Procedural Obstacle to Relief in This Case…….…..……7

A. Mr. Robertson Sought Representation to Discover and Plead Factual Allegations, not to Present Evidence at a Hearing…….9

B. Section 2254(e)(2) Would Not Operate to Bar an Evidentiary Hearing on Claims in Which Cause for Procedural Default Exists……..….9

IV. The Court Should Decide Whether Filing an Amended Habeas Application in This Posture Was Prohibited by 28 U.S.C. § 2244(b).....14

CONCLUSION……...……..15

TABLE OF AUTHORITIES

Cases **Pages(s)**

Ayestas v. Davis,
138 S. Ct. 1080 (2018).....1, 2, 3

Bailey v. Alabama,
219 U.S. 219 (1911).....11

Bank Markazi v. Peterson,
136 S. Ct. 1310 (2016).....13, 14

Barrientes v. Johnson,
221 F.3d 741 (5th Cir. 2000) 9, 10

Canales v. Stephens,
765 F.3d 551 (5th Cir. 2014) 10

Heiner v. Donnan,
285 U.S. 312 (1932).....11

Holland v. Jackson,
542 U.S. 649 (2004).....8

Janecka v. Cockrell,
301 F.3d 316 (5th Cir. 2002) 9

Jones v. Davis,
No. 19-6465 2

Mobile, J. & KCR Co. v. Turnipseed,
219 U.S. 35 (1910).....11

New York Indians v. United States,
170 U.S. 1 (1898).....3

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995).....13

Porter v. McCollum,
558 U.S. 30 (2009).....5, 7

Sibbash v. Wilson & Co.,
312 U.S. 1 (1941).....13

Tijerina v. Estelle,
692 F.2d 3 (5th Cir. 1982) 9

Tot v. United States,
319 U.S. 463 (1943) 11

Wiggins v. Smith,
539 U.S. 510 (2003) 7

Williams v. Taylor,
529 U.S. 362 (2000) 5, 7

Statutes

18 U.S.C. § 3599 ..... *passim*

18 U.S.C. § 3599(f) 2

28 U.S.C. § 2244(B) 14

28 U.S.C. § 2246 8

28 U.S.C. § 2247 8

28 U.S.C § 2254 11

28 U.S.C. § 2254(b) 12, 13

28 U.S.C. § 2254(d) 13, 14

28 U.S.C. § 2254(e)(1) 6, 12, 14

28 U.S.C. § 2254(e)(2) ..... *passim*

28 U.S.C. § 2254(e)(2)(A)-(B) 10

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Mr. Robertson files this reply to the State's Brief in Opposition (hereinafter "Opp.").

I. ENSURING THE JUDICIARY'S UNIFORM PROVISION OF REPRESENTATION TO QUALIFYING PRISONERS PURSUANT TO A SINGLE FEDERAL STATUTE IS A COMPELLING REASON TO GRANT CERTIORARI

The Director argues the questions presented by Mr. Robertson are unworthy of the Court's attention and the expenditure of limited judicial resources. Opp. at 14–15. Yet, it is the same question that the Chief Justice of the Court created an ad hoc committee to study. Appointed to the committee were, *inter alia*, six sitting federal judges and an assistant circuit executive. 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act at ix.[1] The Committee held seven hearings across the United States at which 229 witnesses testified, including other circuit, district, and magistrate judges; circuit executives; and officials and staff from the Administrative Office of the U.S. Courts. *Id*. at 3. The Committee also met privately with leaders of the Administrative Office, members of Judicial Conference Committees, and other relevant agencies, offices, and courts. *Id*. at 4. It also received written comments from district, circuit, and magistrate judges, the American Bar Association, the Federal Bar Association, the Association of American Law Schools, the National Legal Aid and Defender Association, and the National Conference of Women's Bar Associations, among others. *Id*. In short, the federal judiciary's implementation of the representation rights contained in the Criminal Justice Act and 18 U.S.C. § 3599 is a question of significant national importance worthy of the Court's time.

Moreover, the deprivation of meaningful representation under § 3599 continues unabated in the Fifth Circuit after the Court's decision in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). On

[1] Available online at: https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf.

October 29, 2019, the *Ayestas* petitioner returned to this Court by filing another petition for a writ of certiorari seeking review of the Fifth Circuit's decision to affirm the denial of all investigative services to assist his § 3599 counsel in that case. *Ayestas v. Davis*, No. 19-569 (raising as a question presented "[w]hether, under 18 U.S.C. § 3599(f), a reasonable attorney would regard the pursuit of services to investigate a capital defendant's mental health as 'sufficiently important,' *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018), where it is plausible that the failure to investigate that aspect of petitioner's background on state postconviction review could, given substantial authority recognizing counsel's duty to do so, excuse the procedural default of an ineffective assistance of trial counsel claim"). *See also Jones v. Davis*, No. 19-6465 (raising § 3599 questions related to denial of all investigative assistance). In these cases, appointed counsel in the district court who were deprived services were solo practitioners or employed by a non-profit firm without the financial resources to make unrecompensed investigative expenditures on behalf of clients.

Habeas applicants represented by Federal Defender Offices, by contrast, have faced no such constraints on their capacity to investigate the legality of their clients' confinement. But whether an applicant is represented by a Federal Defender or a solo practitioner comes down to the luck of the draw. Although the institution, or lack thereof, with which a lawyer appointed to a case may be affiliated may not be controllable by the federal judiciary, the extreme disparity of investigative services between those appointed federal defenders and solo practitioners is within its control, and it should not promote such an arbitrary system of representation by depriving the latter of all auxiliary services that may be reasonably necessary to assist effective representation.

II. THE DIRECTOR'S ARGUMENTS ON THE MERITS ARE PREMATURE AND UNPERSUASIVE

The Director argues that investigative services to assist his § 3599 counsel cannot be reasonably necessary to Mr. Robertson's representation in this case because the claim his counsel sought to pursue was "plainly meritless." Opp. at 22–30. These arguments are misguided.[2]

Preliminarily, the Director, who is Mr. Robertson's party opponent below, insists that Mr. Robertson has no need of representation to investigate whether Texas deprived him of his Sixth Amendment right to effective assistance of counsel at his capital trial. As it is always to the advantage of a party in a lawsuit to deprive her opposing party of representation, the Director's contentions that Mr. Robertson should not receive certain representation services should not be given any weight. It is unclear to Mr. Robertson why the Director should have any say in what representation he receives to litigate against her. In this Court and below, the Director has simply tried to win a lawsuit by thwarting her party opponent's ability to discover and present all material allegations. Nevertheless, Mr. Robertson will explain why the Director's contention that a Sixth Amendment violation could not have even plausibly occurred in this case is wrong.

First, the Director continues to muddy the procedural waters with frivolous arguments that the claim Mr. Robertson sought to pursue may have been raised and adjudicated on the merits by the state court. The state court itself held otherwise. The district court held otherwise. Mr. Robertson's state habeas counsel said otherwise. The Director, herself, said otherwise in the

[2] The Director suggests that Mr. Robertson has "waived" an "argument" that the Fifth Circuit has "broadly misapplied" *Ayestas, supra*, based on the 2017 Ad Hoc Committee's findings. Opp. at 19–21. The Director misunderstands the nature of the instant proceeding. Mr. Robertson has filed a petition for a writ of certiorari. In that petition, he is not tasked with proving that the court of appeals erred or that he is entitled to any substantive relief, but instead with explaining why the Court should decide to review the lower court decision in the first place. Although the 2017 Report of the Ad Hoc Committee is not part of the record below, the Court can certainly take judicial notice of the content of it for deciding whether review is warranted. *See New York Indians v. United States*, 170 U.S. 1, 32 (1898) ("While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records, or public documents which were not called to its attention, or other similar matters of judicial cognizance.").

district court. Doc. 50 at 51-52. While pursuing investigative services in the district court, Mr. Robertson anticipated, correctly, that the Director would raise procedural default as a defense to the claim. Simply, there is no credible legal argument that the Sixth Amendment claim Mr. Robertson sought to pursue in federal court was presented to or adjudicated by the state court in collateral proceedings.[3]

[3] In his federal habeas corpus proceeding, Mr. Robertson's § 3599 counsel sought to pursue allegations that Mr. Robertson's trial counsel's pre-trial preparation was deficient, specifically that they failed to conduct a thorough background investigation of their client. In state collateral proceedings, Mr. Robertson's state habeas counsel decided not even to investigate such a claim based on an untested belief that the state court would not provide the resources necessary to identify and develop material allegations to support it. Instead, Mr. Robertson's state habeas counsel presented a claim that Mr. Robertson's trial counsel were deficient for failing to present certain mitigating evidence of which they were already aware, i.e., a challenge to their strategic trial decisions. Tacked on to this was an allegation that they failed to obtain a prior clemency application filed for Mr. Robertson which it was alleged contained helpful information.

The Director cites a state court conclusion that "'even if even if trial counsel were considered deficient for failing to *adequately investigate*,' Robertson does not demonstrate prejudice." Opp. at 22 n.8 (emphasis in original). The Director misleadingly quotes only part of the state court's sentence. What the state court wrote was, "[E]ven if trial counsel were considered deficient for failing to adequately investigate *former counsel's file,* Robertson was not prejudiced by the alleged deficient performance." S.H.Tr. at 1185. The Director fails to quote the state court's holding that "The Court finds that with the exception of the complaint trial counsel failed to obtain the 2001 clemency petition from Randy Schaffer, Robertson's claims are trial-performance claims not failure-to-investigate, or Wiggins, claims." S.H.Tr. at 1150. Mr. Robertson's allegation in federal court concerned trial counsel's failure to conduct a thorough background investigation of the client, not their strategic trial decisions or their failure to obtain a prior clemency filing. It was for this reason that the Director, in her Answer, asserted, "Because none of the claims presented to this Court [in Mr. Robertson's federal habeas corpus application] have been presented to the state-court system, the state court system did not have a fair opportunity to review his Sixth Amendment claims and, if necessary, to correct any error." Doc. 50 at 51.

Moreover, it is ultimately of little relevance to the question of Mr. Robertson's entitlement to any investigative assistance for his § 3599 counsel. Adjudication of a marginal allegation related to trial counsel's failure to obtain a clemency filing would not be an adjudication of the merits of a far broader allegation that trial counsel failed to conduct a thorough background investigation of their client. The work needed to identify the material allegations in support of this claim was still not conducted by state habeas counsel. Mr. Robertson's § 3599 counsel, therefore, would be in no different position. She would have identified a plausible claim in need of investigation for which a credible chance of overcoming any procedural obstacles existed.

Second, the Director mischaracterizes the issue Mr. Robertson seeks to pursue. The Director insists that the plausible Sixth Amendment claim Mr. Robertson's counsel sought to investigate "at its core[] is an assertion that Robertson's trial counsel chose not to investigate mitigating evidence that Robertson's counsel, in hindsight, would have investigated." Opp. at 24. Mr. Robertson's claim is not that. Based on § 3599 counsel's record review, review of prior legal teams' files, interviews with prior legal teams, and the input of an independent mitigation specialist, § 3599 counsel concluded that Mr. Robertson's trial counsel may have failed to conduct a *thorough* background investigation. *See* Pet. for a Writ of Cert. at 4–11, 27–29 (hereinafter "Pet."). In view of this Court's cases that recognize such a duty by trial counsel, *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)), § 3599 counsel formed the opinion that a plausible claim exists that Mr. Robertson's counsel performed deficiently. Accordingly, Mr. Robertson sought investigative services to discover and develop all the material allegations that might support such a claim. That investigation could be directed to both the deficient performance and prejudice prongs of the claim, which Mr. Robertson has a burden to adequately plead and (ultimately, if necessary) prove by a preponderance of the evidence.[4]

Third, whatever the lower courts decided, it was not on the merits of any claim Mr. Robertson alleged with representation informed by meaningful investigation. What he pleaded was deficient, and he repeatedly conceded as much. Mr. Robertson explained to the courts below that adjudicating the merits of what he pleaded was premature in the absence of affording him

[4] To be sure, investigation could reveal that any deficient performance did not prejudice Mr. Robertson, in which case § 3599 counsel would have to decide whether to abandon it. But the decision to abandon a claim cannot be made before it is investigated, and investigative services, in turn, cannot be deemed needless to representation simply by virtue of that possibility.

meaningful representation to discover material allegations first. Doc. 51 at 7. The Director quotes the district court's observation that "this is not a case where trial counsel completely failed to investigate and present mitigating evidence." Opp. at 25. This is also not a case where such an allegation was made. This Court has not held that the Sixth Amendment is never violated so long as counsel conduct any amount of investigation or present any evidence. Likewise, that Mr. Robertson's trial counsel retained "a team of punishment phase experts," Opp. at 25–26, is interesting, but it is also not related to the allegations Mr. Robertson sought to pursue, which concerned the thoroughness of trial counsel's investigation into their client's *background*. Retaining an expert, even a team of them, does not obviate the need to conduct a thorough background investigation nor does it provide immunity from such deficient performance.[5] None of these observations establish that § 3599 counsel's identification of a plausible Sixth Amendment claim in this case was unreasonable.

The Director relies on the district court's "exhaustively detailed" exposition of trial counsel's mitigation investigation. Opp. at 26. Mr. Robertson has done the same in his petition and in his § 3599 requests below, and this detail supports § 3599 counsel's judgment that investigative services were "sufficiently important" to request to pursue a plausible Sixth Amendment claim she identified. Moreover, as Mr. Robertson explained in his petition, Pet. at 31–35, a district court's

[5] The Director also relies upon a state habeas court finding that "trial counsel utilized these experts to conduct a thorough mitigation investigation that included the review of a wide variety of documents, interviews with numerous individuals, and a time line of Robertson's life." But as the state habeas court was never adjudicating a claim about the thoroughness of trial counsel's background investigation, these findings are dicta—and arbitrary—and carry no weight in determining what federal representation services are reasonably necessary. Contrary to the Director's opposition, § 2254(e)(1) does not bind a federal court making decisions about representation services under § 3599. Moreover, Mr. Robertson was never afforded a hearing during which he could present evidence to rebut the application of any evidentiary presumption against him. It would violate due process to apply a rebuttable evidentiary presumption in the absence of any opportunity to present evidence to rebut it. Moreover, if § 2254(e)(1) were to bind a federal court making decisions under § 3599, then, because Mr. Robertson would be entitled to a hearing to overcome the presumption, investigative services would be reasonably necessary for Mr. Robertson to obtain evidence to present at a hearing to rebut the presumption.

response to a § 3599 request for investigative services should never produce an exhaustive detailing of anything. A district court need not begin the arduous task of adjudicating the merits of a proposed claim just because appointed counsel has made a request to investigate and develop facts.

Finally, the Director argues that the plausible claim Mr. Robertson's § 3599 counsel identified "amount[s] to nothing more than mere disagreement with the *degree* to which trial counsel investigated." Opp. at 28 (emphasis in original). Of course, this is what every Sixth Amendment claim predicated on unreasonable investigation is. Trial counsel always conduct *some* investigation, and the issue is always the reasonableness of the scope of the investigation they undertook. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). In capital cases where the defendant has a right to individualized sentencing, a reasonable background investigation is a *thorough* background investigation. *Porter, supra*; *Williams, supra*. In this case, contrary to the district court's strained ruling, trial counsel's investigation was not extensive—a psychologist undertook "collateral interviews" of only a handful of witnesses in her office and they did not complete even half of their own investigation plan—and § 3599 counsel did not exercise "inane" judgment that a plausible Sixth Amendment claim existed that merited investigation by her. Opp. at 29.

III. THE QUALIFIED BAR PROHIBITING ARTICLE III COURTS FROM HEARING EVIDENCE IS NOT A PROCEDURAL OBSTACLE TO RELIEF IN THIS CASE

The Director argues that providing the representation sought "would be pointless since it would not allow Robertson to circumvent th[e] procedural hurdle" contained in 28 U.S.C. § 2254(e)(2). Opp. at 35. No court below held this bar is a procedural obstacle to merits adjudication, so reviewing the judgment below does not require the Court to consider it. Regardless, §2254(e)(2) does not ever bar merits review, nor would it apply to prohibit evidentiary hearings where cause

for procedural default has been established, which Mr. Robertson would be required to do to obtain review. Thus, it is no obstacle at all.

Section 2254(e)(2) provides, "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" certain circumstances are present. *Id*. An "evidentiary hearing," in the habeas context, does not require oral testimony by witnesses, as the statutes afford courts flexibility in the form of evidence it receives. Section 2246, entitled "Evidence; Depositions; Affidavits," provides, "On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit." Section 2247 provides, "On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence." *See also Holland v. Jackson*, 542 U.S. 649, 653 (2004) (interpreting "evidentiary hearing" to include receipt of evidence via expansion of the record). Thus, an "evidentiary hearing" is the mechanism by which a court formally admits "evidence," be it testimonial or documentary, to decide disputed factual matters.

Section 2254(e)(2) governs evidentiary hearings. It does not operate to preclude a habeas applicant from discovering and alleging facts in a habeas corpus application. If the allegations raised in an application are undisputed, it is possible Mr. Robertson could obtain relief without any need for an evidentiary hearing. Moreover, should cause for procedural default of the claim exist, § 2254(e)(2) would not prohibit a court from hearing evidence to decide any disputed facts necessary to adjudicate the claim's merit. Finally, any interpretation of § 2254(e)(2) that operated to preclude a district court from hearing, or to preclude Mr. Robertson from presenting, any evidence to prove disputed factual allegations made in support of his claim is unconstitutional.

A. Mr. Robertson Sought Representation to Discover and Plead Factual Allegations, not to Present Evidence at a Hearing

Mr. Robertson sought investigative services not to present evidence to a court—this case has never moved past the pleading stage as no court has ever ordered a hearing to adjudicate facts—but to learn facts that he may plead in a habeas corpus application. A habeas corpus application is a pleading that alleges facts and claims of unlawful custody; it is not a vehicle for hearing evidence. The distinction is important. A federal court (in any context) need hold an evidentiary hearing only if necessary to adjudicate disputed factual allegations. *See, e.g., Tijerina v. Estelle*, 692 F.2d 3, 5 (5th Cir. 1982) (evidentiary hearing is unnecessary when the habeas corpus applicant raises only questions of law or questions concerning the legal implications to be drawn from undisputed facts); *Janecka v. Cockrell*, 301 F.3d 316, 322 (5th Cir. 2002) (evidentiary hearing on habeas corpus application not required where facts are not disputed). If Mr. Robertson's factual allegations are not materially disputed by the Director, then there is no need for the court to hold a hearing. Mr. Robertson may in that event be granted relief based on his undisputed allegations alone, *i.e.*, without an evidentiary hearing.

B. Section 2254(e)(2) Would Not Operate to Bar an Evidentiary Hearing on Claims in Which Cause for Procedural Default Exists

Additionally, § 2254(e)(2) does not operate to preclude a federal court from holding an evidentiary hearing—i.e., adjudicating facts—on claims for which cause for procedural default exists. Fifth Circuit case law already establishes that where cause for procedural default exists, a habeas applicant has not "failed" to develop the factual basis of the claim in state court within the meaning of § 2254(e)(2). In *Barrientes v. Johnson*, 221 F.3d 741 (5th Cir. 2000), the Fifth Circuit held that a state prisoner who "establishes cause for overcoming his procedural default" may introduce new evidence to support his claim for relief because the applicant "did not 'fail to develop' the record" under § 2254(e)(2). *Id*. at 771. Under *Barrientes*, if a "district court

determines that [the habeas applicant] has established cause and prejudice for his procedural default, it should proceed to conduct an evidentiary hearing on any claim for which cause and prejudice exists [and] then revisit the merits of any such claim anew." *Id*.; *see also Canales v. Stephens*, 765 F.3d 551, 571 n.2 (5th Cir. 2014) ("Texas argues that if we decide to remand any claims to the district court, we should deny Canales the opportunity to have an evidentiary hearing. We decline to take this step . . . .").

Barrientes reflected the decades-old rule that habeas applicants "fail to develop" facts within the meaning of § 2254(e)(2) only when they are at fault for the failure. The history of § 2254(e)(2) demonstrates that, when enacting the provision, Congress intended attribution of fault in the evidentiary hearing context to work as it had before the Antiterrorism and Effective Death Penalty Act ("AEDPA"): to mirror how it worked in the procedural default context. Both *Martinez* and *Trevino*, in turn, recognize that a habeas applicant who has never had adequate state representation is not "at fault" for any failure to develop the factual basis of his claim within the meaning of § 2254(e)(2).

Moreover, § 2254(e)(2) is unconstitutional if it operates to prohibit an Article III court from receiving, or a party from presenting, any evidence in support of a claim for which a remedy exists. For prisoners challenging confinement pursuant to state court judgments, 28 U.S.C. § 2254(e)(2) purports to bar a federal court from "hold an evidentiary hearing" on the claim "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings," unless certain exceptions are present.[6] The provision operates at the level of the "claim" to bar receipt, and therefore presentation and consideration, of any evidence related to the claim if the condition

[6] The only exceptions are for claims based on a new rule of constitutional law that is retroactive and was previously unavailable and where the applicant can show, *inter alia*, that he is innocent by clear and convincing evidence. 28 U.S.C. § 2254(e)(2)(A)-(B).

precedent—failure to develop it in state court—is satisfied. The provision therefore operates both as a rule of procedure—regulating a court's power to hold an evidentiary hearing—as well as a rule of evidence—precluding admissibility of any evidence via its prohibition on evidentiary hearings. But a Congressional directive precluding an Article III court from hearing, or a litigant from presenting, any evidence to support a claim for which relief is not otherwise foreclosed violates due process as well as separation of powers.

First, § 2254(e)(2) violates due process if it precludes a court from hearing any evidence to adjudicate disputed facts material to a habeas corpus claim for which relief is available. As a rule of evidence, if § 2254(e)(2) is applied to preclude a party from presenting evidence to prove disputed facts relevant to a claim (1) whose merits a federal court is adjudicating and (2) for which relief is not otherwise foreclosed, then it violates the due process clause of the Fifth Amendment. Congress undoubtedly "has power to prescribe what evidence is to be received in the courts of the United States." *Tot v. United States*, 319 U.S. 463, 467 (1943). The due process clause, however, sets limits on Congress's exercise of that power. *Id*. Specifically, due process is violated where Congress, via a legislative provision prescribing a rule of evidence, "shut[s] out from the party affected a reasonable opportunity to submit to the [fact-finder] . . . all of the facts bearing upon the issue" being adjudicated. *Mobile, J. & KCR Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). *See also Heiner v. Donnan*, 285 U.S. 312, 329 (1932) (a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case); *Bailey v. Alabama*, 219 U.S. 219, 238 (1911) (due process violated where rule deprives party of a proper opportunity to submit all the facts bearing upon the issue).[7]

[7] Historically, Congress has created rebuttable presumptions in federal habeas corpus. In 1966, Congress amended § 2254 to include for the first time an evidentiary presumption governing how a federal district court deciding a habeas application must decide facts. Specifically, the amendment directed federal courts to presume correct "a [written] determination after a hearing on the merits of a factual issue" made by a state court unless one of eight

When Congress amended § 2254 in the Antiterrorism and Effective Death Penalty Act, it retained an existing rebuttable presumption of correctness for state court factual determinations, although it eliminated all the exceptions to its applicability that ensured reliability.[8] 28 U.S.C. § 2254(e)(1). It also added a new provision prohibiting federal courts from "holding" an "evidentiary hearing" in certain circumstances. *Id*. § 2254(e)(2). Although § 2254(e)(2) is a rule prescribing evidence, it does not create an evidentiary presumption, because it does not make proof of one fact establish the existence of a second fact. No fact is presumed from any other. Instead, where the legal condition precedent—failure to develop the factual basis of a claim in state court—exists, the provision simply bars the applicant from presenting any evidence to prove any disputed fact related to the lawfulness of his custody, notwithstanding that a remedy is available for it. And although the bar against evidence only applies when a condition precedent is present, this cannot save the rule, because the condition precedent does not affect the availability of substantive relief. Such a rule violates due process, because it deprives the habeas applicant *for whom a remedy is available* of any opportunity to meet his burden of proof on disputed facts material to the ultimate legal issue—the lawfulness of the individual's custody—that the court is adjudicating.[9]

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circumstances was present. Those circumstances were: (1) that the merits of the factual dispute were not resolved in the state court hearing; (2) that the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the state court hearing; (4) that the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding; (5) that the applicant was an indigent and the state court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or (7) that the applicant was otherwise denied due process of law in the state court proceeding; and (8) the federal court on a consideration of the state court record concludes that such factual determination is not fairly supported by the record. If none of these circumstances was present, the habeas applicant had the burden to prove by convincing evidence that the state court's factual determination was "erroneous."

[8] Mr. Robertson does not challenge the rebuttable presumption contained in § 2254(e)(1), but he does assert that the due process clause limits how it may be applied in this and any case. Where an applicant contests a factual finding made by a state court, the presumption may not be applied without affording the applicant an opportunity to rebut it with evidence. Otherwise, the rebuttable presumption is converted into an unrebuttable presumption.

[9] Mr. Robertson does not contend that Congress could not make a failure to develop the factual basis of a claim in state court a limitation on the availability of a *remedy* in federal court notwithstanding a claim's merit. Congress has created and may create such limitations as to remedies. *See* 28 U.S.C. § 2254(b) (limiting availability of

Second, if § 2254(e)(2) extends to claims for which relief is available—*i.e.*, claims that are not barred by the exhaustion doctrine (§ 2254(b)), prior-adjudication preclusion (§ 2254(d)), or procedural default—then it violates separation of powers, both because it intrudes too far into the province of the judiciary and also because it requires federal courts to act arbitrarily. Article III establishes an independent Judiciary with the "province and duty . . . to say what the law is" in particular cases and controversies. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322, 194 L. Ed. 2d 463 (2016) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). This grant of power prohibits Congress from "requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). Although Congress "has the undoubted authority to regulate the practice and procedure of federal courts," *Sibbash v. Wilson & Co.*, 312 U.S. 1, 9 (1941), Congress "may not exercise [its authority] in a way that requires a federal court to act unconstitutionally." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 n.19 (2016) (brackets in original) (quoting Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2549 (1998)).

Applied to claims for which relief is available—for example, where cause and prejudice have excused a procedural default—the procedural rule contained in § 2254(e)(2) goes too far. Prohibiting a federal court from receiving evidence to adjudicate a factual issue requires the court to act unconstitutionally. Specifically, when confronted with the bar as to a claim whose merit it must adjudicate and for which disputed factual issues exist, it requires that the federal court arbitrarily decide those factual disputes that are material to the adjudication.

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remedy to exhausted claims, with some exceptions); *id*. § 2254(d) (limiting availability of a remedy to claims that were not adjudicated on the merits by the state court, with some exceptions). But § 2254(e)(2) as enacted by Congress does not limit the availability of a *remedy*. It implements a rule governing procedure and the admissibility of evidence for adjudicating a claim in a federal habeas corpus proceeding. As such, it must be judged based on the limits imposed by the due process clause to evidentiary rules enacted by Congress. By that measure, it must be judged unconstitutional when applied to claims for which a remedy exists and whose merits are being adjudicated.

A Sixth Amendment *Strickland* claim that was never presented to by the state court, and for which *Martinez* cause exists, is a claim that will not incur preclusion under § 2254(d).[10] Confronted with such a claim, a federal court would be required to adjudicate the claim's merit, and to adjudicate any disputed factual issues necessary to do so, in the first instance. If it applies to bar a hearing, § 2254(e)(2) presents a problem for a federal court: under the Constitution and statutes passed by Congress, it must decide the merits of the claim, but it cannot receive evidence to decide disputed fact issues. A court in this predicament, if it follows § 2254(e)(2), must act arbitrarily by deciding these disputed factual issues without evidence. Congress may not force an Article III court to so act. *Bank Markazi v. Peterson*, 136 S. Ct. at 1324 n.19.

IV. THE COURT SHOULD DECIDE WHETHER FILING AN AMENDED HABEAS APPLICATION IN THIS POSTURE WAS PROHIBITED BY 28 U.S.C. § 2244(B)

The Director argues the Court should not answer whether Mr. Robertson's filing of an amended habeas application after the Fifth Circuit reversed the district court and remanded the case back to it would have constituted a successive habeas corpus application. The Director responds that Mr. Robertson's interpretation of the appellate court's actions and the law is incorrect. If Mr. Robertson is incorrect, then the Court should explain to the Fifth Circuit that it should stop wasting judicial resources by remanding cases back to the district court for no purpose. If the Director is incorrect, the Court should explain to the Fifth Circuit why in remanding the case back to the district court for further proceedings related to the Sixth Amendment claim, it necessarily vacated the district court's judgment and, consequently, why an attempt to amend a habeas corpus application in that posture is not an attempt to file a successive habeas application.

[10] Such a claim also will not be controlled by state court factual determinations, which, in any event, an application has a right to rebut with evidence before § 2254(e)(1)'s presumption of correctness is applied.

The Director insists the Fifth Circuit's reversal of the district court was "expressly for a limited purpose: the district court had 'not had the opportunity to consider how *Ayestas* might apply to Robertson's requests—and the district court's subsequent denials—for funding,' and the court therefore 'believe[d] the issue is best considered by the district court in the first instance.'" But the remand was not an interlocutory remand for the district court to take further action relevant to a pending appeal. The Fifth Circuit reversed, remanded, and issued a mandate, terminating the appeal.[11] If the Director's interpretation is correct, then if Mr. Robertson had obtained investigative services from the district court on this "limited purpose" remand, that would have been the end of the case. Mr. Robertson would have received everything he was entitled to: investigative services. But since, per the Director's interpretation, the district court judgment had not been vacated, those services could be put to no judicial use. In this posture, it is not even arguable that the services were reasonably necessary to his representation, and Mr. Robertson would have conceded that. Per the Director's interpretation, Mr. Robertson won the appeal (at least obtaining reconsideration), but the Director got all the relief.

Although Mr. Robertson explained the nonsensical consequences of the district court's and Director's interpretation of the procedural posture to the court of appeals, it preferred not to think about it: "We decline Robertson's invitation to consider what avenues for relief might have been available had his request for funding succeeded."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

[11] The Director analogizes what the Fifth Circuit did to what this Court does when it grants certiorari, vacates the judgment below, and remands the case (GVR). Opp. at 38 n.18. Mr. Robertson agrees. This Court *vacates the judgement* below when it GVR's a case, and the Fifth Circuit vacated the district court's judgment when it did the same. Mr. Robertson has not contended that the Fifth Circuit ruled on the merits of his § 3599 issue or ruled that he was entitled to relief. He contends it vacated the district court's judgment when it remanded the case back to it for reconsideration.

Respectfully submitted on this 18th day of November, 2019,

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