No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

DALE W. EATON,

***Petitioner*,**

vs.

MIKE PACHECO, Wyoming State Penitentiary,

***Respondent*.**

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Respectfully submitted,

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QUESTIONS PRESENTED

Dale Eaton's Wyoming appellate lawyers alleged that trial counsel was ineffective for failing to assert that Mr. Eaton was incompetent to proceed, pointing to evidence that he never participated in his defense, acted out during trial, and he suffers brain dysfunction and depression. Wyoming courts relied on a competency finding by pretrial examiner Kenneth Ash, M.D., to absolve trial counsel of any duty.

Federal habeas counsel investigated and uncovered Mr. Eaton's personal and family history of severe mental illness. When informed of this new evidence, Dr. Ash revised his diagnosis to bipolar disorder with psychosis, post trauma stress disorder, and repudiated his pretrial competency finding. Mr. Eaton's federal petition for writ of habeas corpus alleged trial counsel was ineffective for failing to "*investigate* and assert" Mr. Eaton's incompetence to proceed. Although Mr. Eaton's federal habeas claim alleged different performance deficiencies and rested on a body of evidence that fundamentally altered the claim from the one presented in state court, the courts below ruled that the Wyoming Supreme Court adjudicated Mr. Eaton's ineffective assistance claim on the merits, and declined to consider evidence outside the state court record, citing, *Cullen v. Pinholster*, 563 U.S. 170 (2010). Further, they declined to consider Mr. Eaton's argument that his *Strickland* claim is a "new claim" as envisioned in *Pinholster*, at 186, n. 10, because the issue was more extensively briefed in Petitioner's Reply Brief.

Therefore, this case presents the following questions:

1. **WHETHER A STATE COURT HAS ADJUDICATED THE PERFORMANCE PRONG OF A STRICKLAND V. WASHINGTON CLAIM ON THE MERITS WITHIN THE MEANING OF 28 U.S.C. § 2254(d) WHEN THE HABEAS PETITIONER ALLEGES DIFFERENT PERFORMANCE DEFICIENCIES SUPPORTED BY NEW EVIDENCE THAT FUNDAMENTALLY ALTERS THE CLAIM THAT WAS PRESENTED TO THE STATE COURT?**
2. **WHETHER 28 U.S.C. § 2254(d) (2) IS TRIGGERED BY UNFAIR STATE COURT FACT-FINDING PROCEDURES?**
3. **WHETHER THE APPROPRIATE STANDARD OF REVIEW FOR A FEDERAL HABEAS PETITION IS WAIVABLE BY THE PETITIONER.**

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dale W. Eaton prays that a writ of certiorari will issue to review the judgment of the United States Court of Appeals for the Tenth Circuit which affirmed an order of the Wyoming district court that granted summary judgment against Mr. Eaton on his claim that his trial attorney was ineffective for failing to investigate and assert his incompetence to proceed. The district court felt that *Cullen v. Pinholster,* 563 U.S. 170 (2010), and 28 U.S.C. § 2254(d) prohibited it from considering new evidence that Dr. Kenneth Ash, the pretrial psychiatric examiner, recanted his competency finding in light of petitioner's new and much more complete life history evidence, even though the district court ultimately found trial and appellate counsel ineffective for failing to investigate the very same evidence that prompted Dr. Ash to repudiate his pretrial competency findings.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published as *Eaton v. Pacheco,* 931 F.3d 1009 (10th Cir. 2019), and in the Appendix at App.1. The Order of the Court of Appeals denying Eaton's Petition for Rehearing or Rehearing *en banc* is published in the Appendix at App. 312. The unpublished 2014 decision of the United States District Court for the District of Wyoming, *Eaton v. Murphy*, No. 09-CV-261-J (D.Wyo. Nov. 20, 2014) granting in part habeas corpus relief is published in the Appendix at App.107. The unpublished order of the United States District Court for the District of Wyoming granting in part Wyoming's motion for summary judgment against Petitioner, *Eaton v. Murphy*, No. 09-CV-261-J (May 12, 2012), is published in the Appendix at App. 16.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was issued on July 23, 2019. App. 1. A timely Petition for Rehearing or Rehearing *en banc* was denied on September 27, 2019. App. 312. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions involved in this case are set out here and in the Appendix at 313. This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 28 U.S.C. § 2254(a), which provides:

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

This case also involves 28 U.S.C. § 2254(d), which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

The decision below affirmed the district court's order granting in part summary judgment against Mr. Eaton and in favor of Respondent on Mr. Eaton's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. The district court granted habeas corpus relief from Mr. Eaton's sentence of death, App. 237-38, and Respondent did not appeal that decision. Mr. Eaton appealed the district court's summary judgment decision denying relief on his claim that he is entitled to a new trial of all issues in his case because trial counsel was ineffective for failing to investigate and present evidence that he was incompetent to proceed. Mr. Eaton's Wyoming public defenders alleged in state court only that trial counsel failed to assert that Mr. Eaton was incompetent based on the existing record. App. 241, 244, 251-52. Wyoming courts were never asked to decide whether trial counsel's investigation into competency was deficient. The issues herein arise from the decisions of the courts below to apply 28 U.S.C. § 2254(d) to a decision that the Wyoming Supreme Court never made—that counsel's investigation into Mr. Eaton's mental fitness was adequate.

The Wyoming Court Proceedings

Lisa Marie Kimmell disappeared March 25, 1988, as she was traveling from Denver, Colorado, to Billings, Montana, with a planned stop in Cody, Wyoming. She never arrived in Cody. A fisherman found her body in the North Platte River April 2, 1988. App. 243. She had been stabbed multiple times, and she suffered a blow to the head that would have killed her had she not bled to death. *Id.* The crime went unsolved until 2002, when Mr. Eaton's DNA was matched to semen recovered from Ms. Kimmell's body. *Id.* Mr. Eaton was charged with the murder, kidnapping and rape of Ms. Kimmell.

Wyoming Public Defender Wyatt Skaggs was appointed to represent Mr. Eaton. Prior to trial, Skaggs retained psychiatrist Kenneth Ash to evaluate Mr. Eaton. Although Dr. Ash found that Mr. Eaton suffers from depression and brain dysfunction, which was verified with neuropsychological testing, he found Mr. Eaton competent to proceed. App. 251, 284. The jury convicted Mr. Eaton, and in the penalty phase of trial sentenced him to death. App. 244.

Mr. Eaton's appellate counsel alleged that trial counsel was ineffective and moved for a hearing pursuant to *Calene v. State,* 846 P.2d 679 (Wyo. 1993). App. 253. They alleged in State court, "Eaton was unable to assist in his defense and thus not competent to be tried. Counsel's *failure to address* this fundamental problem and *election to allow the case to proceed* under these circumstances rendered trial patently unfair." App. 241 (emphasis added). Appellate counsel also alleged in a separate claim that "Eaton was unable to assist in his own defense and thus was not competent to be tried." App. 242. Trial counsel's failure to investigate competency was never alleged in state court. In support of their failure-to-assert-incompetence claim, appellate counsel introduced evidence that Mr. Eaton refused to cooperate with trial counsel, and pointed to passages in the trial record reflecting that Mr. Eaton acted out and used profanity in the presence of the jury. No investigation was undertaken, and the only new mental health evidence offered during Mr. Eaton's state court evidentiary hearing was a one-page form from the Lincoln County Mental Health Association showing that Mr. Eaton sought counseling in 1986. App. 279.

The Wyoming Supreme Court (WSC) rejected Mr. Eaton's ineffective assistance of counsel/competency claim, reasoning that since there was no evidence contradicting Dr. Ash's competency finding, Mr. Skaggs could not be ineffective for failing to raise the issue. The State

court denied requests for time to develop evidence supporting Mr. Eaton's ineffective assistance of counsel claims.[1]

Federal Habeas Corpus Proceedings Pursuant to 28 U.S.C. § 2254

Mr. Eaton's Petition for Writ of Habeas Corpus alleged, *inter alia*, that his trial lawyer was ineffective "for failing to *investigate* and assert the issue of Mr. Eaton's lack of mental competence to proceed." App. 26, 123 (emphasis added). The petition alleged, "Mr. Skaggs was on notice of many factors that should have alerted him that *further investigation* into Mr. Eaton's competence to proceed was necessary," but that he failed to investigate. ROA Vol. 1, p. 287 (emphasis added).[2] Mr. Eaton further claimed that trial counsel's "*deficient investigation* failed to uncover a long history of significant symptoms of mental disease that has a direct bearing on the ability to correctly diagnose Mr. Eaton." ROA Vol. 1, p. 185 (emphasis added). Because of the close interrelationship between trial counsel's failure to conduct a reasonable investigation into Mr. Eaton's background, character and mental health, made the subject of Mr. Eaton's Claim 2 ineffective assistance of counsel claim in the petition, petitioner incorporated into his Claim 3 those factual allegations made in Claim 2 of his petition. ROA Vol. 1, p. 285.

In support of his ineffective assistance of counsel claims, Mr. Eaton's submitted an affidavit of Dr. Kenneth Ash, whose opinion was the lynchpin of the Wyoming Supreme Court's rejection of Mr. Eaton's competency/ineffectiveness claim. Upon reviewing information produced

[1] After the *Calene* remand hearing, appellate counsel asked the Wyoming Supreme Court to remand the matter for a competency hearing, submitting the report of Dr. William Logan, M.D., finding that Skaggs' *Calene* hearing testimony that Mr. Eaton did not cooperate in his defense, coupled with Dr. Logan's evaluation and Mr. Eaton's behavior during trial, indicated that Mr. Eaton was not competent to proceed. ROA Vol. 2, pp. 9-20, App. 308-10. Dr. Logan's report quoted Dr. Ash saying that he would have to reconsider his competency opinion if he had known that Mr. Eaton refused to cooperate with counsel and acted out during his trial. Appellate counsel gave Dr. Logan no new life history investigation. The WSC denied the hearing. App. 310.

[2] Pursuant to Rule 12(7), Mr. Eaton cites herein to the voluminous record on appeal (ROA) maintained by the clerk of the Tenth Circuit Court of Appeals.

by habeas counsel's investigation, Dr. Ash declared that "[w]ithout knowledge of these factors, I could not accurately assess Mr. Eaton's competence to proceed." ROA Vol. 1, p. 290. The "more complete history" requires "an evaluation to confirm or rule out a number of possible mental diseases suggested by this history, including, but not limited to, bipolar disorder, schizophrenia, schizo-affective disorder, dementia, and post-traumatic stress disorder." ROA Vol. 1, p. 290. Dr. Ash doubts his competency finding in light of the new history. *Id.*

The district court agreed with Mr. Eaton that a thorough bio-psychosocial history "is critical to an accurate [psychiatric] assessment," and that pretrial examiners "did not receive such an assessment from Petitioner's trial team prior to trial." App. 195; ROA Vol. 18, p. 836. The district court further found that pretrial examiners "could have, with adequate preparation, explained how Petitioner's choices were significantly undermined by his impairments." App. 182. Based partly on this finding, the district court granted habeas corpus relief on Claim 2, that Mr. Eaton's death sentence should be vacated because trial counsel was ineffective for failing to investigate and present evidence of Mr. Eaton's significant mental health impairments and related trauma, and Claim 4, that appellate counsel were ineffective for failing to undertake this same investigation. App. 237.

The district court conducted a hearing and granted habeas corpus relief on three of Mr. Eaton's sentencing claims relating to trial and appellate counsel's failure to develop mitigation mental health evidence notwithstanding 28 U.S.C. § 2254(d) (2), finding that it was "arbitrary and unreasonable for the state courts to acknowledge the critical importance of facts supporting a constitutional claim while simultaneously denying the necessary means of discovering them." App. 50. Therefore, the district court found that Mr. Eaton "has surmounted a tall hurdle and shown that the state courts' decisions were based on an unreasonable determination of the facts in light

of the evidence presented in the state court proceeding." App. 50-51. Respondent did not appeal this judgment.

Curiously, even though Mr. Eaton's ineffective assistance of counsel/competence to proceed claim rested on the same evidence as the claims on which the district court granted relief, the district court granted summary judgment on Mr. Eaton's Claim 3, that trial counsel was ineffective for failing to "investigate and assert" Petitioner's incompetence to proceed. App. 29, 44, 47-48. Relying on *Cullen v. Pinholster,* the district court refused to consider the pretrial examiner's affidavit repudiating his competency finding. App. 47, 58.

Mr. Eaton appealed the district court's order granting summary judgment on his ineffective assistance of counsel/competency to proceed claim. Respondent did not appeal the judgment granting sentencing phase relief.

The Ruling Below

On appeal below, Petitioner alleged that "the district court erred in reviewing the performance-prong aspect of this claim under § 2254(d)" because the Wyoming Supreme Court "never addressed *Strickland's* performance prong." App. 7. The court below noted that in denying Mr. Eaton's failure-to-allege-incompetence claim, the Wyoming Supreme Court stated, "We have concluded that the record on appeal does not indicate that Eaton was not competent to be tried. Hence, we also conclude that [trial] counsel w[as] not ineffective for permitting the trial to go forward." App. 7. Ignoring Mr. Eaton's allegation that trial counsel performed deficiently by not *investigating* his lack of competence to proceed, the court below concluded that "the WSC's finding that Eaton wasn't actually incompetent was dispositive of both the performance prong and the prejudice prong—not just one or the other." App. 8. In so ruling, the Court of Appeals disregarded the difference between Mr. Eaton's failure-to-investigate ineffectiveness claim presented in federal court and his failure-to-allege ineffectiveness claim in Wyoming courts.

Neither the State nor the federal courts ruled on Mr. Eaton's claim that trial counsel's investigation of his mental competence to proceed was deficient.[3]

Mr. Eaton also alleged that the district court's finding that appellate counsel was ineffective in failing to develop and present evidence of his impaired mental health to support his sentencing phase IAC claim satisfied the cause-and-prejudice test and allowed the district court to consider his guilt-or-innocence phase IAC claim. App. 9. Although faulting petitioner's briefing of the issue, the Court of Appeals ultimately concluded that the cause-and-prejudice safety valve created by *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992) did not survive *Cullen v. Pinholster.* "We therefore reject Eaton's argument that appellate counsel's ineffectiveness provided the district court with an avenue for considering Eaton's new evidence in determining whether he was entitled to relief on the guilt-phase IAC claim." App. 10.

Mr. Eaton requested and was granted an extension of time until September 3, 2019, in which to file his Motion for Rehearing or Rehearing *en banc*. App. 311. His timely Motion for Rehearing or Rehearing *en banc* was denied September 27, 2019. App. 312.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve an apparent division among lower courts over when a claim is "adjudicated on the merits" by a state court within the meaning of 28 U.S.C. § 2254(d), and to decide whether a claim that is new or different from the claim adjudicated in

[3] Both parties agreed that "'[i]f nothing in the record established that Eaton was not competent, then . . . Eaton could not have been prejudiced' by trial counsel's failure to challenge his competency." App. 8. Petitioner made clear below that his federal claim turned on trial counsel's deficient investigation of Mr. Eaton's competence, and that his claim was different than the one rejected by the State court. Indeed, the difference between the State claim and the federal claim is evident from the court's statement that its conclusion "renders it unnecessary for us to address Eaton's related assertion that, when § 2254(d) doesn't 'apply to the *performance* prong' of a petitioner's IAC claim, *Pinholster* doesn't bar a federal habeas court from considering new evidence in evaluating *prejudice*—even if that evidence wasn't before the state court that adjudicated the petitioner's IAC claim." App. 7 (emphasis in original).

state court is nevertheless subject to this Court's holding in *Cullen v. Pinholster,* 563 U.S. 170 (2011).

The procedural history of claims relating to Mr. Eaton's substantial mental health impairments illustrate the confusion that exists with regard to the application of § 2254(d). The district court granted Mr. Eaton relief from his sentence of death because his Wyoming public defenders at trial and on appeal did not adequately investigate his history of severe mental and cognitive impairment. App. 237-38. In doing so, the district court relied on evidence that Mr. Eaton's public defenders never presented to the State courts, including voluminous mental health treatment records of Mr. Eaton and his family, and expert and lay witness testimony establishing Mr. Eaton's severe, life-long impairments. App. 161-184-417. The district court heard this evidence, notwithstanding *Cullen v. Pinholster*, because Mr. Eaton "sets forth a compelling argument" that it was "arbitrary and unreasonable for the state courts to acknowledge the critical importance of facts supporting a constitutional claim while simultaneously denying the necessary means of discovering them." App. 50. In essence, the district court found appellate counsel ineffective, but without fault, in their failure to investigate Mr. Eaton's mental condition. *Id.* As a result, Mr. Eaton "surmounted a tall hurdle and [has] shown that the state courts' decisions were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." App. 51.

Related to Mr. Eaton's successful habeas claim that trial counsel failed to develop evidence of his extreme mental impairments is his claim that this same deficient investigation caused him to be tried while incompetent to proceed. App. 51. Focusing only on the Wyoming Supreme Court's discussion of the information developed by trial counsel's deficient investigation, the district court concluded the state decision "was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on

an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." App. 59-60. The district court concluded, in spite of its uncontested findings that Mr. Eaton's trial and appellate counsel were ineffective for failing to develop mitigating evidence of Mr. Eaton's severe mental impairments, that its review of Mr. Eaton's competency-to-proceed claim "is restricted to the record in existence before the Wyoming Supreme Court." App. 62, citing *Pinholster*, *supra,* at 181. Therefore, the district court rejected Mr. Eaton's guilt-innocence phase ineffective assistance of counsel claim without considering Dr. Ash's repudiation of his pretrial competency finding on which the state courts had relied, and without considering extensive additional evidence of Mr. Eaton's severe mental and cognitive deficits. App. 58.

The Tenth Circuit's decision affirming the district court's summary disposition is inconsistent with decisions reached by other circuits in similar circumstances and raises important questions regarding the proper and consistent application of 28 U.S.C. § 2254(d).

1. BECAUSE THE WYOMING SUPREME COURT DID NOT ADJUDICATE THE PERFORMANCE PRONG OF MR. EATON'S FEDERAL HABEAS CLAIM THAT TRIAL COUNSEL FAILED TO INVESTIGATE HIS MENTAL CONDITION, AND MR. EATON'S EVIDENCE FUNDAMENTALLY ALTERED THE CLAIM PRESENTED TO THE STATE COURT, THE COURTS BELOW SHOULD NOT HAVE APPLIED § 2254(d).

The crux of Mr. Eaton's argument in the court below was that the State of Wyoming did not adjudicate his claim that trial counsel's investigation into his mental health and competence was deficient. He argued that adjudication of the performance prong of his *Strickland* claim "requires examination of mental health investigation Skaggs failed to conduct, and related information he failed to give Dr. Ash." Appellant's Brief (hereafter Appn't Br.), p. 47. Mr. Eaton's argument focused on the fact that "that trial counsel's deficient investigation resulted in faulty psychiatric findings that permitted him to be tried while mentally incompetent," *Id.,* p. 69, an issue that the state courts never addressed. Petitioner's brief discussed the "red flags" known to trial counsel that should have prompted him to investigate the issue, *Id.,* pp. 80-83, and discussed the substantial evidence that a competent investigation would have produced. Appn't Br., pp. 90-109. Petitioner argued in his Opening Brief that without a reliable social history, pretrial examiner Kenneth Ash, M.D., could not properly assess Mr. Eaton. Dr. Ash found that the new information uncovered by habeas counsel "was consistent with a number of major mental illnesses." Appn't Br., p. 111. Further, Mr. Eaton pointed out that Dr. Ash repudiated his pretrial competency finding in light of the fruits of habeas counsel's investigation. Appn't Br., p. 112.

Because the Wyoming Supreme Court never addressed trial counsel's deficient investigation into Mr. Eaton's competence, Petitioner challenged the application of § 2254(d), which "do[es] not apply to issues not decided on the merits." Appn't Br., p. 69, citing *Bland v. Sirmons*, 459 F.3d 999, 1010 (10th Cir. 2006). Mr. Eaton pointed out that the Wyoming Supreme

Court described Mr. Eaton's ineffectiveness claim without reference to trial counsel's deficient investigation of his competence to proceed; the Wyoming Supreme Court described the issue as "[c]ounsel's *failure to address* this fundamental problem and *election to allow the case to proceed*." App. 241, quoted at Appn't Br., pp. 78-79 (emphasis added). At other times, the Wyoming Supreme Court used terms such as "did not contend" that Mr. Eaton was incompetent, and "Eaton's competency was not further pursued by the defense." App. 247, 251. That court never used the word "investigate" or its equivalent in its discussion of trial counsel's performance regarding competency.

The Court below rejected Mr. Eaton's argument, insisting that the Wyoming Supreme Court's discussion of the "failure to address" claim presented in state court constituted an adjudication of the performance prong of Mr. Eaton's failure-to-investigate claim. App. 7-8.[4] The lower court's reasoning conflicts with decisions of other circuit courts on the question of what constitutes an adjudication that must be given deference under § 2254(d).

The courts below applied § 2254(d) to Mr. Eaton's failure-to-investigate-competency claim, even though the Wyoming Supreme Court itself said unequivocally that it did not adjudicate Mr. Eaton's the performance prong of Eaton's ineffective assistance of counsel/competency claim. The Wyoming Supreme Court expressly disavowed any intention to address the performance prong of Mr. Eaton's *Strickland* claim, stating, "The discussion of this issue ranges far and wide in the briefs, but at this juncture *we intend only to address the initial premise, i.e., that Eaton was*

[4] Petitioner's extensive argument that the Wyoming Supreme Court failed to adjudicate his "failure-to-investigate-competency" claim explicitly and implicitly invoked this Court's discussion in *Cullen v. Pinholster, supra,* about the quantum of evidence that might constitute a new claim different than the one adjudicated in state court, so that § 2254(d) would not apply. *See* Appellant's Opening Brief, pp. 89-111. The Court of Appeals chided Petitioner for also addressing the "different claim" argument in his Reply Brief. App.13. Petitioner respectfully suggests that this Court can readily see from the record that in his Opening Brief Mr. Eaton clearly spelled out the fact that the Wyoming Supreme Court did not adjudicate Mr. Eaton's deficient investigation claim. See Part III, below.

not competent to stand trial." App. 244 (emphasis added). In rejecting Mr. Eaton's *Strickland* claim, the state court said, "We have concluded that the record on appeal does not indicate that Eaton was not competent to be tried. Hence, we also conclude that defense counsel were not ineffective for permitting the trial to go forward." App. 262. If there were any doubt of the Wyoming Supreme Court's intention to avoid the performance prong of Mr. Eaton's *Strickland* claim, it is removed by its statement that *State v. Keats,* 115 P.3d 1110 (Wyo. 2005), finding ineffective assistance of counsel for failing to investigate mental health and competency, "has no pertinence in the context of whether or not Eaton was competent to stand trial." App. 251.

In spite of the Wyoming Supreme Court's implicit and explicit avoidance of the performance prong of Mr. Eaton's ineffective assistance of counsel claim, the court below reasoned that "the WSC's finding that Eaton wasn't actually incompetent was dispositive of both the performance prong and the prejudice prong—not just one or the other." App. 8. This conflicts with the Eight Circuit's holding that "when a state specifically disclaims addressing the constitutional arguments, at the very least, § 2254(d) does not apply… [and] we review…the claim *de novo*." *Nance v. Norris*, 392 F.3d 284, 289 (8th Cir. 2004).

Decisions of other circuits in similar circumstances reflect a different approach to what constitutes a "new" or "different" claim for purposes of applying *Cullen v. Pinholster's* evidentiary restrictions on § 2254(d) than that applied below. For example, in *Gonzales v. Wong,* 667 F.3d 965, 972 (9th Cir. 2011), the court was faced with new, previously concealed evidence supporting petitioner's claim under *Brady v. Maryland* that the prosecutor had withheld exculpatory evidence. Because evidence impeaching the state's informant was not obtained by the defense counsel until after the state court had rendered its decision, the evidence was not part of the state court record. *Id.* The court noted that *Pinholster* precluded consideration of the new evidence. However, the court nevertheless concluded, "Because it appears to us that those materials strengthen Gonzales's

Brady claim to the point that his argument would be potentially meritorious — that is, that a reasonable state court might be persuaded to grant relief on that claim — it is not appropriate for us to ignore those materials." *Id.,* 972. The court remanded the case to the district court with instructions to stay proceedings in order to allow Gonzales an opportunity to return to state court and present his claim with the benefit of the new evidence, in effect treating the new quantum of similar evidence as a "new claim," while respecting principles of comity embodied in *Pinholster*.

The Fourth Circuit's decision in *Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012), is even closer to Mr. Eaton's circumstances. Winston alleged that trial counsel was ineffective for failing to investigate and present evidence that his intellectual disability exempted him from capital punishment under *Atkins v. Virginia,* 536 U.S. 304 (2002). As in Mr. Eaton's case, *see* App. 52-54, the state court denied Winston the opportunity to develop his claim, and therefore "the Supreme Court of Virginia had not adjudicated his *Atkins* ineffectiveness claim on the merits." *Winston v. Pearson, supra,* at 497. The court pointed out that the Virginia Supreme Court "had its opportunity to consider a more complete record, but chose to deny Winston's request for an evidentiary hearing," and further denied discovery, resulting in an adjudication of a claim "that was materially incomplete." *Id.*

The *Winston* court noted Justice Sotomayor's assumption in *Pinholster* "that the majority does not intend to suggest that review is limited to the state-court record when a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself." *Pinholster,* at 214, n. 5 (Sotomayor, J., dissenting). The *Winston* court found a direct relationship between the state court's failure to provide a full procedure for litigating a claim and the application of § 2254(d)'s "adjudicated on the merits" clause. Like Mr. Eaton, "Winston was hindered from producing critical evidence to buttress his *Atkins* ineffectiveness claim—such as the 66 IQ score—

by the state court's unreasonable denial of discovery and an evidentiary hearing." *Id.,* at 501.[5] Therefore, "[l]ike the hypothetical petitioner posited by Justice Sotomayor in Pinholster, Winston's inability to produce potentially dispositive evidence in state habeas proceedings came about through no fault of his own." *Id.* Therefore, the court concluded that Winston's circumstances fell within *Pinholster's* "tacit acknowledgment that the hypothetical petitioner would be free to present new, material evidence—because his claim had not been adjudicated on the merits in state court." *Id.,* at 501. The Fourth Circuit's analysis in *Winston* fits Mr. Eaton's case like a glove.[6] The Third Circuit also follows this approach. In *Thomas v. Varner,* 418 F.3d 491, 498 (3rd Cir. 2005), the state court denied petitioner's motion for evidentiary hearing to probe counsel's strategy behind his allegedly deficient conduct. The court held that neither § 2254(d) nor (e) precluded *de novo* review of the claim because Thomas' ineffectiveness claim was not adjudicated, and petitioner was not "at fault" for failing to develop the record in state court.

Mr. Eaton's case is also similar to *Dickens v. Ryan,* 740 F.3d 1302, 1319 (9th Cir. 2014), where habeas counsel's investigation into Dickens' mental health produced evidence that "fundamentally altered Dickens's previously exhausted IAC claim. Indeed, the new evidence creates a mitigation case that bears little resemblance to the naked *Strickland* claim raised before the state courts." These circumstances gave rise to a "new" claim of ineffective assistance of counsel, which had not been "adjudicated on the merits" by the state court. *Id.* Accord, *Wolfe v.*

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[5] In Mr. Eaton's case, Dr. Ash testified extensively in the federal district court hearing that trial counsel's deficient investigation precluded him from diagnosing Mr. Eaton's bipolar disorder, compounded by comorbid factors that include significant brain dysfunction and post trauma stress disorder. See App. 163-64, 182-83. The district court heard this evidence because of the state court's refusal to allow adequate time and resources to investigate Mr. Eaton's background and mental health. *See* App. 53-54.

[6] Also see *Gordon v. Braxton,* 780 F.3d 196, 202-04 (4th Cir. 2015), holding that the state court "did not adjudicate Gordon's claim on the merits because it (1) unreasonably truncated further factual development on Gordon's contention that [trial counsel] failed to file an appeal and (2) said nothing at all about Gordon's assertion that Said had failed to consult with him."

Clarke, 691 F.3d 410, 423 (4th Cir. 21012) ("Because we focus on an aspect of th[e] [*Brady v. Maryland*] claim—the long-concealed Newsome report—that was not adjudicated in the state court proceedings, we owe no 28 U.S.C. § 2254(d) deference to any state decisions.")

As in *Dickens* and *Wolfe,* Mr. Eaton virtually conceded that the claim adjudicated in state court, *i.e*., that trial counsel should have alleged Mr. Eaton's incompetence to proceed based on the existing evidence, could not prevail, particularly in light of Dr. Ash's now-repudiated opinion that Mr. Eaton was competent. ("The state agrees with Eaton that '[i]f nothing in the record established that Eaton was not competent, then . . . Eaton could not have been prejudiced' by trial counsel's failure to challenge his competency." App. 8.) It is a much different claim that trial and appellate counsel failed to investigate and uncover evidence of mental and cognitive impairment so severe that Dr. Ash would not have found Mr. Eaton competent. At best, the Wyoming Supreme Court decided a "related, but distinct, issue," which was not adjudicated on the merits, and to which § 2254(d) does not apply. *Warren v. Baenen,* 712 F.3d 1090, 1098 & n. 1 (7th Cir. 2013).

The reasoning of the court below also conflicts with circuit cases in which the state court decided claims without reaching a key issue upon which the petitioner's federal claim turns. In Mr. Eaton's case, the key issue in his federal habeas petition is trial counsel's failure to investigate, which was never presented or adjudicated in state court. Most circuits in similar circumstances would hold that Mr. Eaton's failure-to-investigate claim was not "adjudicated on the merits" for purposes of § 2254(d). For example, the Third Circuit in *Thomas v. Varner, supra,* found that the state court's decision limited to trial counsel's strategy did not adjudicate the issue of trial counsel's allegedly deficient conduct. Similarly, the Wyoming Supreme Court decision was silent on the adequacy of trial counsel's investigation. In most circuits, this would compel a conclusion that the issue was not "adjudicated on the merits" by the state court. *See*, *e.g*., *Miller v. Stovall,* 698 F. 3d 913, 921-22 (6th Cir. 2010), holding that a state court did not adjudicate Miller's Sixth

Amendment Confrontation clause claim when it failed to analyze or discuss whether the note in question was testimonial. "It would disserve comity should we be required to label the state court's decision an unreasonable application of law it never had occasion to apply." *Id*., at 922. *Also see Canaan v. McBride,* 395 F.3d 376, 382 (7th Cir. 2005) ("When a state court is silent with respect to a habeas petitioner's claim, that claim is not 'adjudicated on the merits' for purposes of § 2254(d)."); *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir. 2004) (the state court's rejection of petitioner's conflict of interest claim did not discuss whether Lewis had waived the conflict; therefore "we do not apply AEDPA deference to its discussion of Lewis' waiver.); *Davis v. Sec'y for the Dep't of Corr.,* 341 F.3d 1310, 1313 (11th Cir. 2003) (state court's decision that trial counsel did not fail to raise a *Batson v. Kentucky* claim "falls outside of § 2254(d)(1)'s requirement that we defer to state court decisions" because petitioner's actual claim was that trial counsel "failed to preserve his *Batson* claim.")

The foregoing discussion and the record of Mr. Eaton's case establish a powerful likelihood that under the standards in place in the Third, Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, the Wyoming Supreme Court's decision would not constitute an "adjudication of the merits" of his habeas claim that trial counsel failed to investigate competently the issue of Mr. Eaton's competence to proceed, and that his claim would therefore not be subject to the stringent standard of 28 U.S.C. 2254(d). Mr. Eaton's case presents an opportunity to answer the question this Court left open in *Cullen v. Pinholster, supra,* at 186, n. 10, when it said, "Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, see n. 11, *infra*, Justice Sotomayor's hypothetical involving new evidence of withheld exculpatory witness statements, see post, at 214-215, may well present a new claim." Likewise, Mr. Eaton's federal habeas claim that counsel failed to investigate Mr. Eaton's mental condition, supported by

significant new evidence, presented a new claim that was different from the one adjudicated by Wyoming courts.

2. THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER 2254(d)(2) IS TRIGGERED BY UNFAIR STATE COURT FACT-FINDING PROCEDURES.

This case also presents the important question that troubled Justice Sotomayor in *Cullen v. Pinholster*: What becomes of the petitioner who diligently attempts, but fails, to develop evidence supporting a claim presented to the State court? *Pinholster,* at 218 (Sotomayor, J., dissenting). Counsel for Mr. Eaton argued in the district court that he "was not afforded an adequate opportunity to present his claims of ineffective assistance of counsel before the state courts given the sixty-day window to prepare and present his claims at the *Calene* remand hearing." App. 50. Noting that Mr. Eaton's appellate counsel were also burdened with the denial of requested resources, the mid-stream resignation of their investigator, and other pressures relating to perceived conflicts of interest, the district court found "that Eaton has surmounted a tall hurdle and shown that the state courts' decisions were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." App. 51. Based on this finding, the district court permitted Mr. Eaton to develop and present evidence supporting his claim that trial counsel was ineffective for failing to investigate adequately mitigating evidence flowing from his tragic upbringing and significant mental and cognitive impairments. App. 186-225.

Mr. Eaton raised the same concerns regarding his habeas claim that trial counsel's deficient mental health investigation undermined pretrial assessment of his competence to proceed. In the state court, Mr. Eaton presented testimony of capital defense litigation expert Richard Burr, advising that the appellate team should interview family members and other witnesses, acquire additional documents, and then confer with the pretrial examiners to determine the impact of the new evidence on their competency assessment. App. 46. Appellate counsel "objected to the

'speedy schedule,' and moved for a continuance in order to investigate his claims for relief." App. 119-120. Nevertheless, with respect to Mr. Eaton's habeas claim that trial counsel failed to investigate competently the issue of Mr. Eaton's competence to proceed, the district court felt compelled by 2254(d) to conclude, "Review under AEDPA is limited to the record that was before the Wyoming Supreme Court when it adjudicated the claim on the merits. *See Pinholster*, 131 S.Ct. at 1398. Therefore, the Court will not consider the declaration from Dr. Ash submitted with the habeas petition." App. 58.[7]

Mr. Eaton argued that just as in *Brumfield v. Cain,* 135 S. Ct. 2269 (2015), the state court's procedures that denied appellate counsel adequate time and resources to develop Mr. Eaton's competency claim triggered 2254(d)(2)'s exception to AEDPA's deference requirement.[8] Although the court below observed that "the procedural facts of this case are not entirely dissimilar

[7] Dr. Ash's affidavit stated, in relevant part:
Mr. Skaggs did ask me to assess Mr. Eaton's competence to proceed, but he did not advise me that his assistant, Priscilla Moree, refused to see him because she was intimidated by a display of anger during her very first visit with him. I also did not know that Mr. Skaggs, too, feared Mr. Eaton to the point that he asked a deputy sheriff to sit right behind Mr. Eaton at the counsel table. Mr. Skaggs also did not inform me of Mr. Eaton's repeated outbursts during the trial, or that Mr. Eaton did not trust his defense team. This information would have been relevant to my assessment of his competence to stand trial, including his ability to assist counsel. All of these behaviors and concerns—impulsiveness, irritability, inappropriate anger, paranoia--can be indications of mental illness, and can certainly undermine the defendant's ability to understand proceedings against him or assist counsel in his defense. Without knowledge of these factors, I could not accurately assess Mr. Eaton's competence to proceed.
ROA Vol. 1, p. 495 (emphasis added). Further, Dr. Ash testified at the habeas hearing on Mr. Eaton's penalty claims that trial counsel's deficient investigation prevented him from making an accurate diagnosis. "Dr. Ash stated identifying two first-degree relatives with bipolar disorder, plus a maternal aunt, 'tremendously' alters his view of Petitioner's genetic vulnerability to bipolar disorder from the view he held at the time of trial. Other family history added to the likelihood of Petitioner suffered from a major psychosis." App. 199.

[8] The court below suggested that Mr. Eaton's § 2254(d)(2) argument was made first in his reply brief, App. 11, n. 16, but that is incorrect. He argued that "Wyoming's failure to afford Mr. Eaton an adequate opportunity to develop his *Strickland*/competence claim also establishes that its denial of Mr. Eaton's claim 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Appn't Br., p. 118, quoting 28 U.S.C. § 2254(d) (2). *See also* Appn't Br., pp. 72, 120, citing *Brumfield v. Cain, supra,* at 2275.

to those before the Court in *Brumfield*," it nevertheless distinguished *Brumfield* because the state court concluded, unreasonably, that the record, which included Brumfield's IQ of 75, foreclosed the possibility that he was intellectually disabled within the meaning of *Atkins,* and that the record failed to raise questions about Brumfield's adaptive behavior skills. App. 11.

Contrary to the conclusion of the Court of Appeals, petitioner pointed out to the court below numerous red flags suggesting Eaton's incompetence to proceed, which trial counsel, the Wyoming Supreme Court, and the court below ignored. After Mr. Eaton testified at a pretrial hearing, the trial court noted that Mr. Eaton "has troubles with his memory." App. 250. Appellate defenders told the Wyoming Supreme Court that Mr. Eaton "was depressed, uncooperative, and a difficult client to manage." App. 264. Mr. Eaton acted out multiple times during trial. App. 251-52. Although unable to evaluate Mr. Eaton in time for the hastily scheduled *Calene* hearing, appellate counsel retained Dr. William Logan to evaluate Mr. Eaton's competence to proceed. Dr. Logan found that Mr. Eaton "lacked sufficient emotional control to cooperate with counsel in preparing his defense." App. 59. The state court credited Dr. Ash's pretrial evaluation over Dr. Logan's, even though Dr. Logan told the Wyoming Supreme Court, "Dr. Ash noted . . . that if Mr. Eaton was not cooperating with counsel it would warrant further investigation." ROA Vol. 2, pp. 9-20. Just as the Louisiana court unreasonably found, without a hearing or evaluation, that the record foreclosed Brumfield's intellectual disability, the Wyoming Supreme Court precluded further fact development, "conclud[ing] that those materials do not suggest that Eaton was incompetent as contemplated by § 7-11-302." App. 252.

The procedural history of Mr. Eaton's ineffective assistance of counsel/competency issue is identical to the procedural history of Kevan Brumfield's intellectual disability claim. Just as in *Brumfield,* "[w]ithout affording him an evidentiary hearing or granting him time or funding to secure expert evidence, the state court rejected petitioner's claim." *Brumfield,* at 2273. The state

court's failure to conduct a hearing "resulted in an unreasonable determination of the facts." *Id.,* at 2282. The district court here made the same mistake when it found no expert who "clearly opined in the state court record that Eaton was incompetent at the time of trial." App. 58. Mr. Eaton had still not received an opportunity for a mental evaluation and hearing.

As noted in Subpart I, above, some circuit courts have found that inadequate state court procedures implicate AEDPA's threshold "adjudicated on the merits" inquiry, *e.g.*, *Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012). "A claim is not 'adjudicated on the merits' when the state court makes its decision 'on a materially incomplete record.' A record may be materially incomplete 'when a state court unreasonably refuses to permit 'further development of the facts' of a claim.'" *Gordon v. Braxton,* 780 F.3d 196, 202 (4th Cir. 2015), quoting *Winston v. Kelly* (*Winston I*), 592 F.3d 535, 555 (4th Cir. 2010), and *Winston v. Pearson* (*Winston II*), 683 F.3d 489, 496 (4th Cir. 2012). Other cases, such as the district court and this Court in *Brumfield,* have found that state procedures that frustrate adequate fact development implicate § 2254(d)(2).[9] The Court of Appeals rejected both principles, holding that the § 2254(d)(1) & (2) inquiry must be restricted to the state court record, regardless of the procedures employed by the state, and that Mr. Eaton would have to demonstrate that the state court competency finding itself was objectively unreasonable. App. 10-11. This approach is inconsistent with *Brumfield,* where this Court held, "It is critical to remember, however, that in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather,

[9] In *Brumfield,* the district court found "that denying Brumfield an evidentiary hearing without first granting him funding to develop his *Atkins* claim 'represented an unreasonable application of then-existing due process law,' thus satisfying §2254(d)(1). Second, and in the alternative, the District Court found that the state court's decision denying Brumfield a hearing "suffered from an unreasonable determination of the facts in light of the evidence presented in the state habeas proceeding in violation of § 2254(d)(2)." 135 S. Ct. at 2275.

Brumfield needed only to raise a 'reasonable doubt' as to his intellectual disability to be entitled to an evidentiary hearing." *Id.,* at 2280.

Mr. Eaton argued below that Wyoming refused him a fair opportunity to investigate and prove that his lawyer's investigation into his competence to proceed was deficient. Regardless of whether this failure is expressed as a failure to adjudicate the merits of his claim under 2254(d), or an unreasonable determination of the facts in light of the state court record under 2254(d)(2), the result is the same; the assertion of a constitutional right was denied without a fair process. This Court has always held that that comity is a two-way street; to deserve respect in Federal court, State courts must comply with certain minimum norms of constitutional adjudication. Whether State courts applied reasonable fact-finding procedures to a prisoner's Federal claims "is itself a Federal question, in the decision of which this Court, on writ of error, is not concluded by the view taken by the highest court of the State." *Carter v. Texas*, 177 U.S. 442, 447 (1900), citing *Neal v. Delaware*, 103 U.S. 370 (1881. At a minimum, the State must provide a prisoner a full and fair opportunity to prove his facially adequate allegations; "where a denial of these constitutional protections is alleged in an appropriate proceeding by factual allegations not patently frivolous or false on a consideration of the whole record, the proceeding should not be summarily dismissed merely because a state prosecuting officer files an answer denying some or all of the allegations." *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 118-19 (1956), citing *Smith v. O'Grady*, 312 U.S. 329 (1941).

Wyoming denied Mr. Eaton's ineffective assistance of trial counsel claim by relying solely on the record developed by the allegedly deficient lawyer. Appellate counsel was denied an adequate opportunity to investigate and develop evidence probative of Mr. Eaton's claim that trial counsel failed to investigate adequately his competence to proceed. The decision below conflicts with decisions of this Court and with other circuit courts of appeals holdings that require fair

adjudication of constitutional claims. *See*, *e.g.*, *Townsend v. Sain,* 372 U.S. 293 (1963). Section 2254(d)(2) provides that only those state courts that employ reasonable fact-finding procedures will enjoy the deference provided by AEDPA. One circuit court recently explained:

The first provision -- the "unreasonable determination" clause -- applies most readily to situations where petitioner challenges the state court's findings based entirely on the state record. Such a challenge may be based on the claim that the finding is unsupported by sufficient evidence, see, e.g., *Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *Ward v. Sternes*, 334 F.3d 696, 705-08 (7th Cir. 2003), that the process employed by the state court is defective, see, e.g., *Nunes v. Mueller*, 350 F.3d 1045, 1055-56 (9th Cir. 2003); *Valdez v. Cockrell*, 274 F.3d 941, 961- 68 (5th Cir. 2001) (Dennis, J., dissenting), or that no finding was made by the state court at all, see, e.g., *Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999); *cf. Wiggins*, 123 S. Ct. at 2539-41.

Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004). In Mr. Eaton's case, the district court found that the State of Wyoming denied Mr. Eaton a fair opportunity to investigate his background and mental health, App. 51, which prevented Mr. Eaton from alleging or proving that trial counsel's performance was prejudicially deficient. The Tenth Circuit panel's decision rejecting Mr. Eaton's claim without even addressing the deficiencies in that process is out of step with the decisions of this Court and other circuit courts of appeals.

3. THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER THE APPROPRIATE STANDARD OF REVIEW FOR A FEDERAL HABEAS PETITION IS WAIVABLE BY THE PETITIONER.

The decision below turned on the standard of review; the court below refused to consider relevant portions of this Court's decision in *Cullen v. Pinholster, supra,* because it was not satisfied with Petitioner's Opening Brief on the issue, App. 10, at n. 15, thereby rejecting, without considering, this Court's authority weighing in favor of *de novo* review of the performance prong of Mr. Eaton's *Strickland* claim. This holding conflicts with decisions of other circuits that "the

court, not the parties, must determine the standard of review, and therefore, it cannot be waived." *Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008) (overruled on other grounds), quoting *Worth v. Tyer,* 276 F.3d 249, 262 n.4 (7th Cir. 2001). *Cf.*, *McBride v. Superintendent, SCI Houtzdale,* 687 F.3d 92, 100 n. 10 (3rd Cir. 2012), suggesting that a habeas petitioner can waive his right to *de novo* review by failing to argue that 2254(d) is inapplicable to his case. Thus, as discussed below, this Court's guidance is needed to determine whether a court that perceives a fault in a habeas petitioner's brief can avoid its obligation to conduct *de novo* review.

Mr. Eaton argued for *de novo* review of the performance prong of his claim that trial counsel was ineffective "for failing to investigate and assert the issue of Mr. Eaton's lack of mental competence to proceed." ROA Vol. 1, pp. 159, 283 (Mr. Eaton's habeas petition) (emphasis added). Relying on this Court's decisions in *Porter v. McCollum*, 558 U.S. 30, 39 (2009), *Rompilla v. Beard,* 545 U.S. 374, 390 (2005), and *Wiggins v. Smith,* 539 U.S. 510, 534 (2003), Mr. Eaton argued that the Wyoming Supreme Court did not adjudicate the performance prong of the *Strickland* claim that he asserted in his federal habeas corpus petition, and therefore he was entitled to *de novo* review of that portion of his claim.[10] Respondent admitted in the district court that the Wyoming Supreme Court "disposed of this issue using the prejudice portion of the *Strickland* test," ROA Vol. 13, p. 287 (Respondent's Suggestions in Support of Motion for Summary Judgment), and relied on *Strickland's* holding that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged

[10] As noted above, counsel representing Mr. Eaton in state court alleged only that trial counsel was ineffective for failing to "address" Mr. Eaton's incompetent to proceed, and for "elect[ing] to allow the case to proceed under these circumstances." App. 241. Thus, the state court claim alleged that trial counsel failed to raise the issue based on the existing state court record, while Mr. Eaton's federal claim focused on trial counsel's failure to investigate evidence critical to the reliability of psychiatric findings.

deficiencies." *Id.,* quoting *Strickland,* 466 U.S. at 697.[11] In the court below, Respondent reversed its position, arguing that "the WSC implicitly adjudicated both *Strickland* prongs, even if it didn't expressly explain that it was doing so." App., p. 10, and that therefore the Wyoming Supreme Court's rejection performance prong must be reviewed under 28 U.S.C. § 2254(d). The Court below observed that "our resolution of these arguments turns on the applicable standard of review" App., p. 7.

After noting that the standard of review is dispositive of Mr. Eaton's *Strickland* claim, the court below held:

> [O]ur resolution of the parties' deference disagreement turns on whether the WSC adjudicated the guilt-phase IAC claim on the merits. If so, then Eaton must not only "overcome the limitation[s] of §2254(d)[]"; he must do so based solely "on the record that was before" the WSC when it adjudicated the guilt-phase IAC claim. [*Cullen v.*] *Pinholster*, 563 U.S. [170, 185 (2011); *see also Hooks* [*v. Workman*], 689 F.3d [1148, 1163 (10th Cir. 2012). If not, then § 2254(d) deference doesn't apply; review is *de novo*; and *Pinholster* doesn't preclude Eaton from relying on evidence he presented for the first time during the federal habeas proceedings.

App., pp. 7-8. More to the point, on *de novo* review, the federal district court could have considered the testimony of psychiatrist Kenneth Ash, repudiating his pretrial competency finding because trial counsel's deficient investigation produced incomplete and misleading information that was material to his assessment of Mr. Eaton. Under *Pinholster,* the district court's decision

[11] Respondent's concession that the state court did not decide the performance prong of Mr. Eaton's *Strickland* claim is understandable in light of the Wyoming Supreme Court's language explicitly avoiding it. When it took up the competency-to-proceed issue, that court said, "The discussion of this issue ranges far and wide in the briefs, but at this juncture we intend only to address the initial premise, i.e., that Eaton was not competent to stand trial." App. 244. The court then discussed the record, including Dr. Ash's competency finding, and found Mr. Eaton was competent. Later, it addressed Mr. Eaton's *Strickland* claim, and this is the entirety of its ruling on that claim: "We considered this issue as a substantive matter in Part I A, above (PP 13-30, supra). We have concluded that the record on appeal does not indicate that Eaton was not competent to be tried. Hence, we also conclude that defense counsel were not ineffective for permitting the trial to go forward." App., p. 262.

would be limited to the state court record, which included Dr. Ash's now-repudiated conclusion that Mr. Eaton was competent to proceed.

As noted above, Respondent in his Brief in Response below changed his position on whether the Wyoming Supreme Court had adjudicated the performance prong of Mr. Eaton's *Strickland* claim, arguing that the state court adjudicated the merits of both prongs of *Strickland.* App'ee Br., p. 88. In his Reply Brief, Mr. Eaton reiterated an argument he had made in his Opening Brief, that "*Pinholster* should not have prevented the district court from considering evidence that a competent performance would have produced," App'nt Br. p. 90. Petitioner explained in his Opening Brief:

> This is compatible with the discussion in *Cullen v. Pinholster*, *supra* at 213, n. 5, that "There may be situations in which new evidence supporting a claim adjudicated on the merits gives rise to an altogether different claim." It is also consistent with Justice Alito's view, shared by Justices Breyer and Sotomayor, that "when an evidentiary hearing is properly held in federal court, review under 28 U.S.C. § 2254(d) (1) must take into account the evidence admitted at that hearing." Cullen v. *Pinholster, supra* at 203 (Alito, J., concurring).

Id., n. 15. Mr. Eaton spent the next twenty-one pages of his Opening Brief summarizing the evidence that fundamentally altered his *Strickland* claim. In his Reply Brief, Mr. Eaton again cited to the "new evidence/new claim" discussion between Justice Thomas and Justice Sotomayor in *Cullen v. Pinholster, supra,* and pointed the court below to passages in the state court record that illustrated the differences between the performance deficiencies alleged in state court (failure to challenge, failure to address) and those alleged in Mr. Eaton's federal habeas petition, which focused on trial and appellate counsel's failure to *investigate* Mr. Eaton's mental health. App'nt Reply Brief, pp. 27-30.

The panel below rejected Mr. Eaton's argument that because of different allegations regarding trial counsel's performance, and because of the dramatically different quantum and quality of evidence, his federal claim was a "different claim" than the one raised in state court. The

panel stated, incorrectly, "Notably, Eaton doesn't argue in his opening brief that the new evidence of his incompetence renders the guilt-phase IAC claim a "new claim" that the WSC never adjudicated." App., p. 10. The panel also asserted, incorrectly, that "Eaton attempts to make a new-claim argument for the first time in his reply brief. But arguments advanced for the first time in a reply brief are waived." App., p. 10, n. 15, citing *United States v. Beckstead*, 500 F.3d 1154, 1162 (10th Cir. 2007). The record calls this finding into question. However, even assuming that it is correct, the lower court's decision rests squarely on the premise that Mr. Eaton waived his right to *de novo* review of the performance prong of his *Strickland* claim.

The ruling below, that a court can refuse *de novo* review to which a habeas petitioner may be entitled because of perceived imperfections in briefing, conflicts with decisions of other circuits holding that standards of review are mandatory and cannot be waived.

Circuits to address the issue have consistently concluded that the *respondent* to a federal habeas petition cannot waive the AEDPA deferential standard of review when applicable. "Every court of appeals to consider the question–including ours–has held a State's lawyer cannot waive or forfeit § 2254(d)'s standard." *Langley v. Prince*, 926 F.3d 145, 162 (5th Cir. 2019). Similarly, the Seventh Circuit described case law among the circuits as "almost universally finding that the [AEDPA] standard cannot be waived." *Winfield v. Dorethy*, 871 F.3d 555, 565 (7th Cir. 2017). Courts reason that:

> "AEDPA's standard of review … is not a procedural defense, but a standard of general applicability … The statute contains unequivocally mandatory language. … Therefore, if the Appellate Division adjudicated Eze's federal ineffective assistance claim on the merits, we must apply AEDPA deference."

Eze v. Senkowski, 321 F.3d 110, 121 (2nd Cir. 2003). Even the court below, when the state errs in arguing for § 2254(d) review, would *sua sponte* seek out and apply the appropriate standard, regardless of the arguments of the parties:

> "[T]he correct standard of review under AEDPA is not waivable. It is … an unavoidable legal question we must ask, and answer, in every case. … Congress set forth the standard in 'unequivocally mandatory language.' … It is one thing to allow parties to forfeit claims, defenses, or lines of argument; It would be quite another to allow parties to stipulate or bind us to application of an incorrect legal standard, contrary to the congressional purpose."

Gardner v. Galetka, 568 F.3d 862, 879 (10th Cir. 2009). Accord, *see Winfield v. Dorethy*, 871 F.3d 555, 565 (7th Cir. 2017); *Langley v. Prince*, 926 F.3d 145, 163 (5th Cir. 2019); *Busby v. Davis*, 925 F.3d 699, 714 (5th Cir. 2019); *Hernandez v. Holland*, 750 F.3d 843, 856 (9th Cir. 2014); *Amado v. Gonzalez*, 758 F.3d 1119, 1133 n.9 (9th Cir. 2014) ("we have the obligation to apply the correct standard, for the issue is non-waivable"); *Moritz v. Lafler*, 525 Fed. Appx. 277, 285 (6th Cir. 2013); *Rambaran v. Secretary, Dept. of Corrections*, 821 F.3d 1325, 1331-2 (11th Cir. 2016). If Respondent had committed the briefing faux pas of which the court below accused Petitioner, the court would nevertheless seek out and apply, *sua sponte,* the correct standard.

The circuits are split, however, on whether a *petitioner* can waive *de novo* review when the AEDPA deferential standard is either inapplicable or overcome by satisfaction of § 2254(d)(1) or (2).

The Sixth Circuit has held that a petitioner cannot waive *de novo* review when applicable; whether it be because AEDPA deference is inapplicable or overcome. *Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008) (overruled on other grounds). Petitioner Brown failed to argue in the lower court that AEDPA deference did not apply to his claim. *Id*. Despite Brown's failure, the Court applied *de novo* review to his claim. *Id*. The Court determined that *de novo* review was the proper standard of review because, even though the state courts did adjudicate Brown's claim on the merits, they did not consider certain evidence in their adjudications through no fault of Brown. *Id*., at 429.

Although the grounds relied upon for *de novo* review in *Brown* were overruled by *Pinholster*, *Brown*'s ruling that petitioners cannot waive the proper standard of review remains

good law. *Moritz v. Lafler*, 525 Fed. Appx. 277, 285 n.5 (6th Cir. 2013) (unpublished); *Amado v. Gonzalez*, 758 F.3d 1119, 1133 n.9 (9th Cir. 2014); *Winfield v. Dorethy*, 871 F.3d 555, 565 (7th Cir. 2017). *See also Ray v. Maclaren*, 655 Fed. Appx. 301 (6th Cir. 2016), a case very similar to Mr. Eaton's situation. In *Ray,* the Sixth Circuit held that the District Court for the Eastern District of Michigan erred when it failed to determine whether the state court adjudicated petitioner's claim on the merits before applying AEDPA deference to the state court decision. When the State objected that Ray waived his argument for *de novo* review by first raising it in his reply brief, the Sixth Circuit responded:

> "'As a general rule, this Court does not entertain issues raised for the first time in an appellant's brief.' There are exceptions to this rule. '[A] party cannot "waive" the proper standard of review by failing to argue it. … Ray's belatedly raised argument, in part, discourages the Court from applying the deferential standard of review under AEDPA, and, as such, is not waived."

Ray, 655 Fed. Appx. 301, at 308 n.5. The court remanded the case to the district court, and on remand, the District Court held that Ray's *Cronic* claim was not adjudicated on the merits and granted relief. Applying *de novo* review, the district court granted Ray a new trial based on his *Cronic* claim. *Ray v. Bauman,* 326 F.Supp.3d 445, 459 (E.D. Mich. 2018).

Like the Sixth Circuit, the Fourth Circuit has also held that a petitioner cannot waive *de novo* review. *Moss v. Ballard*, 537 Fed. Appx. 191, 194-5 n.2 (6th Cir. 2013). In *Moss*, the Fourth Circuit rejected the State's argument that petitioner Moss waived appellate review of the proper standard by failing to seek *de novo* review before the district court. *Id.,* at 194-5 n.2.The Court affirmatively stated that the correct standard of review under AEDPA is not waivable by petitioner, *Id*. at 195 n.2, but ultimately held that Moss would not in any event be entitled to relief and denied his claim under *de novo* review. *Id*.

Other circuits have held or implied that habeas petitioners can waive *de novo* review. The Eleventh Circuit ruled in *Mendoza v. Secretary, Florida Dept. of Corrections*, 761 F.3d 1213,

1236-7 (11th Cir. 2014), that a petitioner could waive *de novo* review by conceding to AEDPA deference and entirely failing to argue for *de novo* review before the district court. The Third Circuit has relied upon a petitioner's admission that his claim was governed by § 2254(d), but did not affirmatively hold that the proper standard of review is waivable. *McBride v. Superintendent, SCI Houtzdale*, 687 F.3d 92 (3rd Cir. 2012). The First Circuit has held that a petitioner can waive *de novo* review by raising the issue for the first time in oral argument on appeal. *Young v. Murphy*, 615 F.3d 59 (1st Cir. 2010).

The current split among circuits on the waivability of the standard of review for a habeas petition has resulted in a mixed application of federal law. This Court has previously held that such mixed application warranted certiorari. *See Hughey v. United States*, 495 U.S. 411, 415 (1990); see also *Williams v. Taylor*, 529 U.S. 362, 389-90 (2000) (discussing the "well-recognized interest in ensuring that federal courts interpret federal law in a uniform way"); *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983). Furthermore, this unresolved issue compromises the principles of "evenhanded justice" and consistency in application the law. *See Teague v. Lane*, 489 U.S. 288, 300; 302-3 (1989) (modifying standard for retroactive application of new rules to ensure equitable treatment of similarly situated defendants on direct review). Mr. Eaton's claim that his trial attorney incompetently investigated mental health evidence relevant to his competence to proceed has never been adjudicated in any court. Similarly situated petitioners would be entitled to have their federal claim adjudicated under a *de novo* standard of review based simply upon whether their circuit *sua sponte* determines the correct standard to apply or relies on the arguments of parties.

Therefore, this Court should grant Petitioner's Petition for a Writ of Certiorari to resolve the issue of whether and in what circumstances a petitioner can waive the proper standard of review for their federal habeas petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

Miles Reed, a student at UMKC School of Law, assisted with the researching and drafting of this petition.

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that two true and correct copies of petitioner's "Petition for a Writ of Certiorari" on petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit and one copy of petitioner's "Motion to Proceed In Forma Pauperis" in the case of *Eaton v. Pacheco*, No._____, were forwarded pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 24th day of February, 2020, to:

BRIDGET HILL
Wyoming Attorney General
JENNY L. CRAIG
Deputy Attorney General
2320 Capitol Ave.
Cheyenne, WY 82002
Counsel for Respondent

Ten copies of petitioner's "Petition for a Writ of Certiorari" and two copies of petitioner's "Motion to Proceed In Forma Pauperis" were forwarded to:

Scott S. Harris, Clerk
United States Supreme Court
One First Street N.E.
Washington, DC 20543

pursuant to Supreme Court Rule 39.5, this 24th day of February, 2020.

_____
Counsel for Petitioner