No. 17-6459

In the Supreme Court of the United States

JAMES TIMOTHY SAMPLES,

Petitioner,

v.

DAVID BALLARD, Warden,
Mount Olive Correctional Complex,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Appeals
Of West Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Constitution require a United States District Court to engage in *de novo* review of claims advanced by a federal habeas petitioner when those claims are raised for the first time during objections to the proposed findings and recommendation of a United States Magistrate Judge?

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The United States Magistrate Judge's Proposed Findings and Recommendation ("PF&R") is unpublished. It is available on CM/ECF, *Samples v. Ballard*, Case No. 2:14-cv-15413 (ECF 25), and has been reproduced in Petitioner's Appendix.

The Memorandum Opinion and Order of the United States District Court for the Southern District of West Virginia, which adopted the Magistrate Judge's PF&R, is also unpublished. It has been informally reported at 2016 WL 1271508 and a copy has been reproduced in Petitioner's Appendix.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the District Court's decision, is published in the Federal Reporter at 860 F.3d. 266. It has also been reproduced in Petitioner's Appendix.

STATEMENT

This case involves a straightforward application of the federal statutory scheme governing post-conviction relief. It is well-established that United States Magistrate Judges may make an initial recommendation on any matter concerning postconviction relief referred to them by a district court so long as the district court retains "the ultimate authority to issue an appropriate order." *United States v. Raddatz*, 447 U.S. 667, 682 (1980); see also *Thomas v. Arn*, 474 U.S. 140, 153-54 (1985). As the Federal Magistrate's Act explains, "a [district] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court except [certain specifically enumerated matters] . . . [and] may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to [the district court] proposed findings of fact and recommendations for disposition, by the judge of the [district] court, of any motion excepted . . . [filed in connection with an] application[] for posttrial relief made by [an] individual[] convicted of [a] criminal offense[] . . . ." 28 U.S.C. § 636(b)(1). Once the magistrate judge has made a recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* Petitioner would have this Court go further, by adopting a rule that would require district courts to consider new legal *claims*—not simply *arguments* supporting properly raised bases for relief—that are raised for the first time in objections to a magistrate's recommendation. No court has adopted this atextual approach, and for good reason. This Court should deny the Petition.

1. On Monday, August 15, 1995, the lifeless body of 23-year old Joanna Sigmon was discovered in her Charleston, West Virginia apartment. See *Prior District Court Record*,[1] ECF 9-4 at 14, ECF 9-12 at 80; see also generally *Record Below*, ECF 10-3, 10-4, 10-5, 10-6, 10-7, 10-8, 10-9. Circumstantial evidence

[1] Petitioner's repeated efforts to obtain post-conviction relief have resulted in an extensive record spanning a number of related state and federal filings. As the decision below does not outline the factual basis for the convictions Petitioner challenges here, this statement of the case is drawn largely from the record of Petitioner's direct appeal in state court, which was also included in the record for Petitioner's first federal habeas filing ("Prior District Court Record"). See *Samples v. Ballard*, No. 2:13-CV-11638, 2014 WL 1338562 (S.D.W. Va. Jan. 21, 2014), *report and recommendation adopted in part, rejected in part*, 2014 WL 1342312 (S.D.W. Va. Mar. 31, 2014). This brief also cites to the transcript of Petitioner's state court criminal trial, which is also part of the record below ("Record Below"). See *Samples v. Ballard*, No. 2:14-CV-15413, 2016 WL 1271508 (S.D.W. Va. Mar. 31, 2016).

indicated that Joanna had been killed sometime in the early morning hours of Sunday, August 14, 1995, when she returned home after spending Saturday night out with friends in downtown Charleston. See *Prior District Court Record*, ECF 9-4 at 11-14, ECF 9-12 at 84; see also *Record Below*, ECF 10-4 at 90-93, 98-100, 143-46, 155, ECF 10-3 at 6-9. She was apparently robbed (the contents of her purse were found "sprawled all over [her] bed"), and her attacker had both stabbed and strangled her. *Prior District Court Record*, ECF 9-4 at 11-14, ECF 9-12 at 84 ("Joanna had two ligatures marks on her neck . . . [and] two large, gaping wounds to the right side of her neck where she had been stabbed"); *Record Below,* ECF 10-5 at 186-88, 191, ECF 10-7 at 178-81, ECF 10-3 at 28-31.

At the time of the murder, Petitioner was Joanna's neighbor—they lived in Apartment C and Apartment A, respectively, of the same building. *Prior District Court Record*, ECF 9-4 at 10, ECF 9-12 at 81; see also *Record Below*, ECF 10-3 at 23, ECF 10-6 at 8-9. Evidence introduced at trial indicated that Petitioner returned to the apartment building around the time of the murder after a night of "fun, alcohol, and crack cocaine." *Prior District Court Record*, ECF 9-4 at 10, ECF 9-12 at 81; see also *Record Below*, ECF 10-6 at 75-76, 120-121, 216-17, 243. Several pieces of circumstantial evidence linked Petitioner to Joanna's robbery and murder: a cigarette butt containing his DNA was found inside her apartment, Petitioner's girlfriend pawned a necklace later that belonged to the victim the same day the body was discovered, and a knife consistent with the one used in the crime was recovered from the home of a relative Petitioner had visited two days after the murder. *Prior District Court Record*, ECF 9-12 at 83-86; see also *Record Below*, ECF 10-6 at 9-16, 27-32, 42-44, 53-62, 221-22. Moreover, several witnesses—including Petitioner's girlfriend—testified that Petitioner had confessed to the murder. *Prior District Court Record*, ECF 9-12 at 85-86 (explaining that Petitioner spoke with his girlfriend after his initial arrest and "indicated he was aware that [she] knew he had murdered Joanna," and that later, while Petitioner was incarcerated on a parole violation, he "admitted to another inmate . . . that he 'killed [the victim] by [stabbing] her in the neck' and '[strangling] her with an electrical cord").

The Kanawha County Grand Jury indicted Petitioner on June 4, 1996. *Prior District Court Record*, ECF 9-12 at 86. The indictment contained four counts: one count each of first-degree murder and aggravated robbery, and two counts of burglary. *Id.* Petitioner was tried in January 1998 and the jury convicted him of first-degree felony-murder. See *id.* at 86-87; see also Pet. App. at 62-63. He was sentenced to life in prison without the possibility of parole. *Id.* Petitioner subsequently sought direct appellate review of his conviction in the Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals"), but his petition was refused. *Prior District Record*, ECF 9-12 at 87; see also Pet. App. at 63.

2. On October 15, 1999, Petitioner filed a *pro se* habeas petition in the Circuit Court of Kanawha County ("circuit court"). Pet. App. at 64. On March 3, 2001, that petition was summarily dismissed. *Id.* at 64-65. Petitioner appealed

that denial to the Supreme Court of Appeals, which ordered the circuit court to appoint counsel and conduct an evidentiary hearing. *Id.* at 67.

With the assistance of counsel, Petitioner filed an amended habeas petition. *Id.* at 68. Petitioner also had an opportunity to present evidence and further develop his claims at an evidentiary hearing. *Id.* at 69. On October 31, 2011, the circuit court denied the amended petition on the merits. *Id.* Petitioner appealed that denial to the Supreme Court of Appeals, which affirmed the circuit court's decision on April 12, 2013. *Id.* at 70.

On June 13, 2013, Petitioner filed a new state habeas petition in circuit court. *Id.* That petition was summarily denied on Jul 19, 2013. *Id.* at 71. Petitioner appealed again, and the Supreme Court of Appeals again affirmed the circuit court. *Id.*

3. Petitioner initially sought federal habeas relief in 2013, raising claims substantially similar to those alleged here. That petition was dismissed without prejudice because he had not yet exhausted his available state court remedies. Pet. App at 71. On April 28, 2014, Petitioner filed the underlying Petition in the United States District Court for the Southern District of West Virginia. *Id.* In that petition, Petitioner raised seven distinct grounds, including a four-part claim of ineffective assistance of counsel:

1) Petitioner's right to a fair and impartial jury and fair sentencing process were abridged because defense counsel failed to *voir dire* prospective jurors about their willingness to make a mercy recommendation;
2) Petitioner received ineffective assistance of trial counsel because his attorneys:

A. Did not ask prospective jurors about their willingness to consider or make a recommendation of mercy;
B. Informed the jury that Petitioner was a convicted felon and was attempting to evade his parole officer at the time the murder took place;
C. Failed to propose a limiting instruction regarding Petitioner's prior conviction and his parole status; and
D. Failed to ensure that two defense witnesses, who were incarcerated at the time of trial, would testify in street clothes so as not engender prejudice in the mind of the jury;

3) The underlying indictment was deficient and therefore void;

4) The prosecution failed to prove all required elements of the crime of robbery or burglary;

5) The state court abridged Petitioner's Fifth and Fourteenth Amendment rights to Due Process when it denied his Motion for Acquittal;

6) Petitioner's right to a fair and impartial trial was abridged when two of his witnesses testified in distinctive prison garb and restraints; and

7) Cumulative error.

Id. at 71-72.

The district court, pursuant to a standing order, referred the case to a United States Magistrate Judge. *Id.* at 73. On February 6, 2015, the magistrate judge issued his Proposed Findings and Recommendation ("PF&R") in which he determined that Petitioner's claims were meritless and therefore recommended that the district court grant summary judgment for Respondent and dismiss the Petition. *Id.* at 127.

On March 10, 2015, Petitioner filed objections to the PF&R. *Id.* 4. In those objections, Petitioner presented additional allegations of ineffective assistance of trial counsel predicated on "six errors of omission," and what the court below characterized as a "freestanding" claim of ineffective assistance against his postconviction counsel. *Id.*; see also *id.* at 54. The six "errors of omission" were "mention[ed], but . . . not specifically describe[d]" in Petitioner's objections to the PF&R, *id.* at 54, and developed further in Petitioner's briefing below. Those six new "errors" flowed from trial counsels' purported failure to:

1) Request a bifurcated trial;
2) Secure a jury free of all disqualifications;
3) Seek sequestration of the jury;
4) Obtain testing, recommended by a forensic expert, to facilitate exclusion of certain prosecution exhibits;
5) Submit the curriculum vitae of defense experts;
6) Locate or interview a specifically named alternate perpetrator of the crime.

Id. at 4 n.3; see also *id.* at 54 n. 19.

The District Court did not address these new claims, explaining that it "declin[ed] to review habeas claims that should have been raised in [Petitioner's] § 2254 Petition" itself. *Id.* at 55 (citing *United States v. Humphreys*, 194 F.3d 1306 (4th Cir. 1999) (unpublished table disposition)). The court noted that the Fourth Circuit had not yet "definitively resolved th[e] question" whether a district court is required to review claims raised for the first time in objections to a Magistrate Judge's PF&R in a habeas case. The court did, however, consider the Fourth Circuit's decision in *United States v. George*, 971 F.2d 1113 (4th Cir. 1992), in which the court held that "as part of its obligation to determine *de novo* any issue to which proper objection is made, a district court is required to consider all arguments directed to that issue" when reviewing a magistrate judge's PF&R, "regardless of whether they were raised before the magistrate." *Id.* at 56.

Nevertheless, the district court ultimately determined that *George* did not control where "a habeas petitioner uses his objections to plead new claims that should have been raised in the habeas petition." *Id.* at 56. The court reasoned that a contrary holding—permitting Petitioner to raise a novel claim via objection to a PF&R—would "show disregard for [the Antiterrorism and Effective Death Penalty Act of 1996]'s timing requirements, defeat the purpose of the Magistrate's Act, and unfairly prejudice the Respondent," and further that it would be "imprudent . . . to allow a habeas petitioner to elude AEDPA's filing deadlines by changing course after receiving an unfavorable ruling from the magistrate judge." *Id.* at 57, 58. Yet, recognizing this decision as "debatable," the district court granted a certificate of appealability on whether *George* governed the case's outcome. *Id.* at 58; see also *id.* at 2.

4. Petitioner appealed to the Fourth Circuit. The court below addressed "whether *George* applies, how it applies, and whether it was appropriately applied" to Petitioner's objections to the PF&R. *Id.* at 8. The court reemphasized its position in *George* that the Federal Magistrates Act imposes a duty on district courts to "'determine *de novo* any *issue* to which proper objection is made," *id.* at 9-10 (quoting *George*, 971 F.2d at 1118), and held that this duty extends to the habeas context no less than any other where a magistrate makes a recommendation to the district court, *id.* at 11. The court also explained that "*George* envisions a hierarchical scheme, wherein a *legal case* is divided into *issues*, and *issues* are further subdivided into *arguments*." *Id.* at 10 (emphasis in original). Consistent

with this hierarchy, a district court must "consider all *arguments* directed to [an objected-to] *issue*, regardless of whether they were raised before the magistrate." *Id.* at 9-10 (quoting *George*, 971 F.2d at 1118).

In the habeas context, the court below reasoned that the habeas petition is the equivalent of *George*'s "legal case," the grounds for relief articulated in the petition are the "issues," and the legal positions "related to the grounds for relief" are the "arguments." *Id.* at 14. Applying this framework to the new assertions in Petitioner's objections to the PF&R, it concluded that they constituted "new grounds for relief"—and thus "that makes them new 'issues' and not new 'arguments related to issues contained within [Petitioner's] 2014 [federal] Petition." *Id.* at 16. The court accordingly held that the district court had no duty to review—*de novo* or otherwise—these newly-asserted claims. *Id.* at 17.

Petitioner filed his Petition for a Writ of Certiorari on October 23, 2017. On November 14, 2017, the Court granted Respondent's motion for an extension of the deadline to file this response to January 8, 2018.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant review to resolve two separate questions regarding district courts' responsibility to conduct *de novo* review of issues referred to a magistrate judge: Whether district courts must consider new *claims* raised for the first time in objections to a magistrate's recommendation, and whether district courts must consider new *arguments* in such objections. The Court should decline Petitioner's invitation on both fronts.

First, there is no division or confusion in the lower courts regarding the appropriate response to new claims. To the contrary, every court to consider the issue has held—like the court below—that district courts' duty to conduct *de novo* review of properly objected-to issues in a magistrate's recommendation does not extend to entirely new issues that a litigant failed to raise before the magistrate. The decision below simply applied this principle to the specific context of federal habeas cases. Petitioner identifies no division in the lower courts on this question, and there is no reason to disturb courts' uniform application of this well-worn rule.

Second, the division of authority Petitioner does identify relates to the independent question whether district courts must consider new *arguments* that were not presented to the magistrate judge. Yet this admitted division is shallow: The vast majority of circuits to address the question hold that courts may—but need not—entertain new arguments raised at the objections stage; only the court below differs by *requiring* district courts to consider such arguments. And significantly, Petitioner has already benefited from the approach *most favorable to his case*. The mandatory rule the court below adopted benefits Petitioner; his true objection is to the Fourth Circuit's application of that rule (in classifying his new, purported "errors" as new claims), not to the rule itself. As a result, this Court's review would not afford Petitioner any meaningful relief, making this case a poor vehicle for review.

I. The Lower Courts Are United That District Courts Have No Duty To Consider New Claims Raised For The First Time In Objections To The Recommendation Of A Magistrate Judge.

It is undisputed that the "six errors of omission," advanced by Petitioner for the first time in this case during his objections to the PF&R, see Pet. App. at 15, represent purported constitutional violations which, if substantiated, could entitle him to habeas relief.[2] See 28 U.S.C § 2254 (providing that federal courts shall entertain "an application for a writ of habeas corpus . . . only on the ground that [the incarcerated applicant] is in custody in violation of the Constitution or laws . . . of the United States."); see also Rule 2(c)(1), Rules Governing Section 2254 Cases in the United States District Courts (federal petition must "specify all the grounds for relief available to the petitioner"); cf. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (affirming lower court's determination that trial counsel who slept repeatedly during defendant's capital murder trial rendered ineffective assistance). To be sure, Petitioner previously raised "at least some" of these claims in his 2013 federal habeas petition, though he did not "plead facts to excuse [his] procedural default." Pet. App. at 55; see also *Samples v. Ballard*, WL 1342312, at *3. That procedural default arose from the fact that after initially pursuing these claims in state court in his *pro se* 1999 state habeas petition, he did not seek appellate review of the

[2] Petitioner's "freestanding claim" of ineffective assistance of state post-conviction counsel is not a new ground for relief but rather an argument offered in support of the newly raised grounds represented by the six "errors of omission." That is, Petitioner "freestanding claim" is an invocation of the exception to the preclusive effect of procedural default articulated by this Court in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), intended to allow the district court to address those novel claims. Yet, because the six claims themselves were not properly raised before the magistrate judge, the district court had no duty to entertain either those claims or any arguments supporting them.

denial of those claims and therefore failed to fully exhaust his available state court remedies. *Id.* at 54, n. 19. The failure to pursue a then-available state court remedy precludes a federal court (with limited exception) from addressing such claims during federal habeas review. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 853 (1999); *Gray v. Netherland*, 518 U.S. 152, 161 (1996). Petitioner would thus have faced an uphill procedural battle to have these claims heard in his second federal petition no matter how or when he raised them.[3] In any event, it is undisputed that he did not include them in the Petition at issue in *this* proceeding—or at any point when litigating before the magistrate judge prior to the filing of objections to the PR&R.

Thus, the six "errors of omission" discussed in Petitioner's objections to the PF&R are properly understood under the *George* framework to be newly asserted "grounds for relief"—or "claims"—and not new "arguments" supporting a previously raised claim. Pet. App. at 12-13. Petitioner contends that this Court's review is necessary to resolve a purported division in the lower courts about whether district courts must consider such claims when raised for the first time in objections to a PF&R. But there is no split over this question: None of the cases Petitioner invokes—and no court, to our knowledge—requires a district court to consider new claims not raised in a habeas petition or litigated before the magistrate judge.

[3] Were this Court to grant the Petition and reverse the court below, Petitioner's new claims would almost certainly be dismissed on remand based on these procedural-default concerns. The unrealistic prospect of any relief based on the claims Petitioner seeks to force the district court to consider further underscores that this case is a poor vehicle for review.

A. Contrary to Petitioner's claim, *see* Pet. at 12, lower courts have routinely and universally held that district courts are under no obligation to address claims or grounds for relief presented for the first time in objections to a magistrate judge's PF&R. The underlying rationale may differ—some courts apply the doctrine of waiver to this context, see, *e.g.*, *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996), while others rely on the intent and structure of the Federal Magistrate's Act, see, *e.g.*, *Borden v. Sec'y of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987)—but no court has endorsed the position Petitioner seeks to have enshrined as federal law. At most, some courts recognize district courts' *discretion* to consider a new claim—such as the court below, which considered whether the district court abused its discretion by declining to review the new claims, Pet. App. At 17—but the circuits are united that neither the Magistrate's Act nor the Constitution imposes a *duty* to do so. Indeed, every circuit to have addressed the issue agrees that a "claimant must present all his claims squarely to the magistrate judge, that is, the first adversarial forum, to preserve them for review [by the district court]." *Roberts v. Apfel*, 222 F.3d 466, 470 (8th Cir. 2000).[4]

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[4] See also, *e.g.*, *United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir.2001) ("theories raised for the first time in objections to the magistrate judge's report are deemed waived") (citing *Chater*, 75 F.3d at 1426); *Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000) ("Courts have held that while the Magistrate Judge Act . . . permits *de novo* review by the district court if timely objections are filed, absent compelling reasons, it does not allow parties to raise at the district court stage new arguments or issues that were not presented to the magistrate."); *Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985, 991 (1st Cir. 1988) (holding "categorically" that the Magistrate's Act "does not permit a litigant to present new initiatives to the district judge" because "[a]t most, the party aggrieved is entitled to a review of the bidding rather than to a fresh deal");

Petitioner presents no contrary authority, and, significantly, the only such case appears to be an unpublished Fourth Circuit decision that the court below expressly rejected. See *St. John v. Moore*. 135 F.3d 770, 1998 WL 71516 (4th Cir. 1998) (unreported table decision). Unpublished decisions in the Fourth Circuit—especially those, like *St. John*, issued before 2007—have limited precedential value. See *United States v. Hayes*, 482 F.3d 749, 752 n.7 (4th Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 415 (2009) (dismissing an unpublished decision as not "controlling precedent" and citing a circuit rule that "citations to unpublished decisions issued prior to January 1, 2007, are disfavored"); see also *United States v. Foster*, 674 F.3d 391, 402 (4th Cir. 2012) (Davis, J., dissenting from denial of rehearing *en banc*) ("[B]y rule we deem unpublished opinions 'nonprecedential' for several very good reasons.") (citing 4th Cir. R. 32.1). Further, the court below specifically distanced itself from *St. John*'s holding, explained that, "as an unpublished case, *St. John* does not bind us." Pet. App. at 15. There is no question that the decision below—and not *St. John*—represents the Fourth Circuit's precedential view.

Unsurprisingly, given the uniform approach of the federal courts of appeals, a host of district courts have reached the same conclusion. In *Aikens v. Shalala*, for instance, the court reasoned that "[t]he purpose of the Federal Magistrate's Act is to relieve courts of unnecessary work"; it "would defeat this purpose if the district

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Williams v. McNeil, 557 F.3d 1287, 1292 (11th Cir. 2009); *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994); *Greenhow v. Sec'y of Health & Human Servs.*, 863 F.2d 633, 638 (9th Cir. 1988), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992).

court was required to hear matters anew on issues never presented to the magistrate" and both "[c]ommon sense and efficient judicial administration dictate that a party should not be encouraged to make a partial presentation before the magistrate on a major motion, and then make another attempt entirely when the district judge reviews objections to an adverse recommendation issued by a magistrate." 956 F. Supp. 14, 22–23 (D.D.C. 1997) (collecting cases) (internal citations and quotation marks omitted); see also *Ramos v. Kyler*, 2004 WL 828363, at *4 (E.D. Pa. Apr. 12, 2004) (explaining that although the Third Circuit had not yet answered the question, "[t]he majority of district courts in our circuit, as well as other circuit courts, that have addressed this issue have concluded that [issues raised for the first time in objections to a PF&R] are not properly before the court, and thus are not to be addressed."). District Courts also routinely apply this principle in the specific context of federal habeas cases. See, *e.g.*, *Gwin v. Martel*, 2017 WL 517759, at *1 (C.D. Cal. Feb. 6, 2017) ("habeas claims must be raised in the Petition and before the Magistrate Judge in the first instance, and they are not properly brought before the Court in objections to a Magistrate Judge's report and recommendation.").[5]

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[5] See also *Williams v. High Desert State Prison*, 2008 WL 5099733, at *1 (E.D. Cal. Dec. 1, 2008) ("a district court has discretion, but is not required, to consider evidence and claims raised for the first time in the objection to a magistrate judge's report.") (internal citation and quotation marks omitted); *Sanchez v. Keller*, 2008 WL 461593, at *1 (S.D.N.Y. Feb. 15, 2008) ("Sanchez did not raise this claim in his original [habeas] petition, and so he is precluded from raising it for the first time in his objections to the Magistrate Judge's Report."); see also *Williams v. Bd. of Prison Terms*, 255 F. App'x 276, 277 (9th Cir. 2007) (unpublished) (declining to consider certain habeas claims because the petitioner "did not raise them in his § 2254

B. Petitioner argues that *George* represented a lone dissent to the rule that district courts need not consider new claims in objections to a PF&R—and that the Fourth Circuit wrongly retreated from that position in the decision below. See Pet. at 12 (arguing that *George* places upon district courts "an 'obligation to determine de novo any issue to which proper objection is made . . . [and] to consider all arguments direct to that issue, regardless of whether they were raised before the magistrate.'") (quoting *George*, 971 F.2d at 1118). But neither George nor the decision below adopted such an anomalous rule.

In *George*, the Fourth Circuit reviewed the legal sufficiency of a search warrant that led to the discovery of evidence the State sought to use in a federal racketeering prosecution. 971 F.2d at 1116. George filed motions to suppress; the motions were referred to a federal magistrate judge who recommended that the motions be granted. *Id.* The magistrate judge rejected the government's argument that the motions to suppress should be denied under the "good faith" reliance exception to the exclusionary rule. *Id.* In the government's objections to that recommendation, however, the government advanced for the first time two additional arguments refuting the suppression-of-evidence claim: the defendant's lack of any reasonable expectation of privacy, and inevitable discovery. *Id.* at 1116-17. The district court declined to address these new arguments on the basis that they had not been raised before the magistrate judge. *Id.* at 1117.

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petition, and the district court did not address them because Williams raised them for the first time in his objections to the magistrate judge's report and recommendation.").

On appeal, the Fourth Circuit agreed with the government's argument that the district court's failure to consider the new arguments "violated the Federal Magistrate's Act." *George*, 971 F.2d at 1117. The court explained that district courts have an obligation to "determine *de novo* any issue to which proper objection is made" and, in service of that obligation, are "required to consider *all arguments directed to that issue*, regardless of whether they were raised before the magistrate." *Id.* at 1118 (emphasis added). The court further explained that a "party entitled to *de novo* review must be permitted to raise before the [district] court *any argument as to that issue* that it could have raised before the magistrate," provided "that proper objection to the magistrate's proposed finding or conclusion has been made," and emphasized that this obligation is "'both statutorily and constitutionally required.'" *Id.* (emphasis added) (quoting *United States v. Shami*, 754 F.2d 670, 672 (6th Cir. 1985)).

George thus imposed on district courts an obligation to consider any *argument* supporting an issue or claim advanced during litigation before a magistrate judge, even if that argument was raised for the first time in an objection to the magistrate judge's recommendation. *George* did not, however, extend that principle to new *issues* not properly raised before the magistrate judge.[6] The

[6] For most intents and purposes, "not properly before the magistrate judge" is equivalent to "not contained in the relevant original pleading," which in a federal habeas case is the habeas petition. However, because the Federal Rules of Civil Procedure apply in federal habeas cases to the extent they are not inconsistent with the Rules Governing Section 2254 Cases in the United States District Courts, *Mayle v. Felix*, 545 U.S. 644, 654 (2005), it is at least plausible that a claim not included in

decision below retained this framework; rather than retreating from a position that could have salvaged Petitioner's new claims as Petitioner suggests, the decision below confirms that *George*'s framework applies to federal habeas cases. Pet. App. at 12 ("Having determined that *George* does apply to habeas cases, we must now resolve exactly how it is to be applied."). The decision below simply extended the Fourth Circuit's preexisting position—consistent with other federal courts—that new *claims* raised in objections to a PF&R need not be considered by the district court.

Without any judicial division on this issue, there is thus no confusion in the lower courts for this Court to resolve about whether the Magistrate's Act requires district courts to consider new claims a habeas petition raises for the first time in objections to a magistrate's recommendation. Neither is there any reason to suggest that every court to consider the issue has misconstrued the Magistrate's Act or the constitutional due-process guarantee. To the contrary, there is nothing suspect about courts' near-universal agreement that "[p]arties must take before the magistrate, not only their 'best shot' but all of their shots." *Borden*, 836 F.2d at 6 (internal citation and quotation marks omitted).

II. This Case Is The Wrong Vehicle To Resolve The Scope Of District Courts' Discretion To Consider New Arguments Raised In Objections To A Magistrate's Recommendation.

Petitioner's central complaint is that the court below did not require the district court to consider new *claims* he raised for the first time in objections to the

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the petition but otherwise advanced during litigation before the magistrate judge could be encompassed by this rule.

magistrate judge's PF&R. As explained above, that holding is both correct and consistent with that of other federal courts nationwide. Petitioner also appears to argue that this Court should grant certiorari review to resolve a second question: Whether district courts must consider *de novo* new *arguments* not presented to the magistrate judge. Review is unwarranted on this question, either. Apart from not being squarely presented in the Petition, there is only a shallow circuit split on this issue. More importantly, Petitioner has already received the benefit of the most petitioner-friendly rule. Review by this Court would thus not provide Petitioner any meaningful relief, making this the wrong case to address this question.

As an initial matter, this question is not squarely presented by this case. In the Question Presented, Petitioner asks the Court to decide whether "new *matters* presented for the first time in objections to the [PF&R] of a magistrate judge" are entitled to *de novo* review. Pet. at i (emphasis added). Although somewhat murky, in the context of this case Petitioner's reference to "matters" most likely reflects his hope that this Court will address the issue of new *claims*. See *id.* at 18, 19 (arguing that this case "presents [an] ideal vehicle" to "announce a framework" favorable to "pro se petitioners . . . who unwittingly omit potentially viable claims from their original petition . . . [and subsequently] raise them . . . in the guise of objections to a PF&R"); *id.* at 18, 20 (relying on procedural doctrine of relation-back as reason to consider claims raised for the first time at the objection stage). Indeed, this is the only interpretation that could potentially aid Petitioner. The Fourth Circuit *already agrees with Petitioner* that new arguments must be considered; it ruled against him because the purported errors he raised were not arguments, but entirely new claims.

This Court ordinarily "do[es] not consider questions outside those presented in the petition for certiorari." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992); *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984) ("Absent unusual circumstances, we are chary of considering issues not presented in petitions for certiorari."); see also Supreme Court Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). And despite the Petition's imprecise language, the question of whether district courts must consider new arguments is not "fairly included" in the Petition. As this Court has explained, where "the resolution of [a] case does not turn" on a particular question, "we leave [its resolution] for another day." *Wood v. Allen*, 558 U.S. 290, 304-05 (2010). Here, the resolution of the case turns only on whether late-raised *claims* must be considered. That question does not warrant review, *see supra* Part I, and because the outcome would be the same regardless whether the Fourth Circuit's approach to new *arguments* is correct, review on that question is beyond the Petition's scope.

In any event, there is no need for the Court to wade into this separate question.

A. The cases Petitioner identifies are focused entirely on the issue of district courts' discretion or obligation to consider new arguments raised in objections to a PF&R (as explained above, courts agree that district courts are never required to consider new claims). The majority position—followed by the First, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits—maintains that district courts have no duty to address new arguments. See *Paterson-Leitch Co.*, 840 F.2d at 990-91 (1st Cir.); *Freeman v. County of Bexar*, 142 F.3d 848, 852 (5th Cir. 1998); *Murr*, 200 F.3d at 902 (6th Cir.); *Hylla v. Transportation Commc'ns Int'l Union*, 536 F.3d 911, 921-22 (8th Cir. 2008); *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); *Chater*, 75 F.3d at 1426 (10th Cir.); *McNeil*, 557 F.3d at 1292 (11th Cir.). Although most of these majority-position circuits hold that district courts may entertain new arguments as a matter of discretion, the Eighth and Tenth Circuits take the stricter view that district courts may exercise this discretion in only relatively narrow circumstances. See, *e.g.*, *Collins v. Colvin*, 640 F. App'x 698, 700 (10th Cir. 2016) (explaining that the Tenth Circuit adheres to the "firm waiver rule" except "when the interests of justice so dictate"). The hallmark of these circuits' approach, however (and as Petitioner explains), is a rejection of the idea "that 'de novo' must include every single argument"; instead, these courts hold "that a district judge *may* consider new arguments, but by no means is required to do so." Pet. App. at 11-12 n.7.

The Fourth Circuit's position is an outlier. In both *George* and the decision below, the court held that a district court is *required* to consider new arguments raised at the objections stage. Perhaps unsurprisingly, no other court has joined the Fourth Circuit in mandating this strict approach.[7] See Pet. App. at 11-12 n.7 ("Our approach in *George* is a minority position, and one that has been criticized and rejected by our sister circuits."). The disagreement between the court below and every other circuit to address the issue constitutes the shallowest of splits. At least at this time, there is no need for the Court to resolve this disagreement—and particularly where, far from undercutting litigants' due-process rights, the decision below adopted an arguably *over*-protective approach.

B. Even if the Court believes that this question is poised for review, this would still not be the right case because Petitioner has already received the benefit of the most petitioner-friendly approach. Specifically, the Fourth Circuit held that district courts are required to consider new arguments raised at the objections stage, and *still* determined that Petitioner was not entitled to relief. Thus, the only way Petitioner could benefit from this Court's review of the new argument question is if the Court were to first agree with the Fourth Circuit's minority position, and then hold that the court below *misapplied* that rule by classifying the new "errors" in his objections as claims, not arguments. However, as this Court has oft stated, its "institutional role properly is focused on ensuring clarity and uniformity of legal doctrine, and not on the case-specific process of reviewing the application of law to the particularized facts of individual disputes . . . ." *United States v. Young*, 470 U.S. 1, 34 (1985).

[7] Respondent takes no position in this brief on the correctness of either the majority or minority position.

Further, the court below was correct to deem Petitioner's purported errors to be new claims, not new arguments. Petitioner argued below that "his entire § 2254 petition" should be considered as one "issue" in the case—or in other words, that the single claim or issue in a habeas case is whether the petitioner is "in custody in violation of the Constitution or laws . . . of the United States." Pet. App. at 12. Petitioner further argued that "each alleged ground for relief" in a habeas petition is simply an "'argument' to demonstrate why his claim"—that is, his petition—"is correct." *Id.* The court below, however, found that this conception of the claim/argument distinction was "belied by habeas corpus jurisprudence, including statutes and case law." *Id.* at 12, 13. Instead, the court concluded that in habeas cases, "the *legal case* is the habeas petition[,] the *issues or claims* are the asserted grounds for relief[,] and the *arguments* are whatever position is taken in support of or against each asserted ground for relief." *Id.* The court explained that this understanding is consistent with the statutory provisions governing federal habeas, which "refer to each basis for [why] the petitioner's custody may be illegal as a separate 'claim.'" *Id.* at 13 (citing 28 U.S.C. § 2254(d), 28 U.S.C. § 2244(b)(4), 28 U.S.C § 2244(d)(1)(D)). Moreover, this Court "considers each ground for relief an independent claim." *Id.* (citing *Rose v. Lundy*, 455 U.S. 509, 510 (1982), *Martinez v. Ryan*, 566 U.S. 1, 7, 17 (2012)).

To hold otherwise, as the court below explained, would permit "a habeas petitioner [to] merely [assert] that he is in illegal custody" in his petition and throughout the litigation before the magistrate judge, as he would be permitted to present "all [his] arguments later." *Id.* at 15. Such a result, the court explained, would represent "an end run around AEDPA, and is not what our case law intends." *Id.* at 15. AEDPA imposes a one-year statute of limitations on federal habeas petitions that begins to run from one of four triggering dates. See 28 U.S.C. § 2244(d)(1). Notably, the pendency of a federal habeas petition does not toll this limitation period. *Duncan v. Walker*, 533 U.S. 167 (2001). It is thus not uncommon for AEDPA's limitation period to expire while a federal petition is being litigated before a magistrate judge—which means that habeas petitioners may no longer freely amend a petition to add additional grounds for relief after that point. *Mayle v. Felix*, 545 U.S. 644, 657 (2005) (explaining that amendments after the limitations period runs are limited to issues that "arise from the same core facts as the timely filed claims").

Requiring *de novo* review of new *claims* raised upon objection to the magistrate judge's PF&R would thus allow petitioners who are otherwise barred from amending their petition to escape the preclusive effect of AEDPA's limitations period. The decision below correctly rejected Petitioner's request to upend the settled claim-argument distinction in federal habeas law. Cf. *Dailey v. Berryhill*, 2017 WL 2691421, at *3 (S.D.W. Va. June 22, 2017) ("The weight of authority . . . counsel[s] the use of discretion by the district court to consider new claims . . . not presented to the magistrate. A discretionary standard preserves the function and purpose of the magistrate system. It avoids reducing the magistrate's role to 'a mere dress rehearsal,' and alleviates the constitutional concerns that animated the *George* decision.") (quoting *Paterson-Leitch Co.*, 840 F.2d at 991).

C. Finally, because the Fourth Circuit evaluated Petitioners' claims under the most petitioner-friendly position regarding district courts' duty to consider new arguments, he is not the right litigant to press this issue. In short, Petitioner wants the Court to *affirm* the holding of the court below on this score, and thus extend the Fourth Circuit's minority, mandatory view to benefit *other* federal habeas petitioners in circuits where the majority, permissive view governs. Yet because Petitioner does not have a vested interest in reversal, this case lacks sufficient adversarial incentive to warrant review.

The backbone of the American legal system is its adversarial nature. "The lawyer as advocate plays a key part, along with judges and scholars, in assisting the sound development of the law and of legal rules that further justice." *Mount Hope Church v. Bash Back!*, 705 F.3d 418, 426 (9th Cir. 2012). A properly functioning adversarial system requires opposing parties with divergent interests; when only one side is properly represented, the system does not function optimally and the reliability of the outcomes it produces is significantly diminished. See *JumpSport, Inc. v. Jumpking, Inc.*, 213 F.R.D. 329, 334 (N.D. Cal. 2003) ("for th[e] [adversarial] system to function as intended, each party must be motivated to work hard"); cf. *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (zealous representation on both sides of a dispute is "critical to the ability of the adversarial system to function").

From Petitioner's perspective, the question of district court's response to new arguments—as opposed to his primary concern regarding new claims—is nothing more than an abstract question of law. Just as courts dismiss as moot cases that are "no longer 'live'" or where "the parties lack a legally cognizable interest in the outcome," *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013), there is no need for the Court to grant review to resolve a shallow split on an issue where even the Petitioner has no interest in reversal.

CONCLUSION

The Petition for Certiorari should be denied.

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