No. 19-7810

In the Supreme Court of the United States

♦

DALE WAYNE EATON,

Petitioner,

v.

MIKE PACHECO, Wyoming State Penitentiary Warden,

Respondent.

♦

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

♦

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

♦

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*****CAPITAL CASE*****

QUESTIONS PRESENTED

I. 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?

II. Whether 28 U.S.C. § 2254(d)(2) is triggered by unfair state court fact-finding procedures?

III. Whether the appropriate standard of review for a federal habeas petition is waivable by the petitioner?

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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). This opinion is before the Court in the Appendix to the *Petition for Certiorari* at Appendix 1. The order of the Court of Appeals denying Eaton's *Petition for Rehearing or Rehearing en banc* is in the Appendix to the *Petition for Certiorari* at Appendix 312. The unpublished decision of the United States District Court for the District of Wyoming, *Eaton v. Wilson*, 2014 U.S. Dist. LEXIS 163567 (D. Wyo. Nov. 20, 2014) granting in part habeas corpus relief is in the Appendix to the *Petition for Certiorari* at Appendix 107. The unpublished order of the United States District Court for the District of Wyoming, *Eaton v. Murphy*, No. 09-CV-261-J (May 12, 2012) granting in part Murphy's motion for summary judgment is in the Appendix to the *Petition for Certiorari* at Appendix 16. The Wyoming Supreme Court opinion affirming Eaton's convictions and sentence, *Eaton v. State*, 192 P.3d 36 (Wyo. 2008), is in the Appendix to the *Petition for Certiorari* at Appendix 239.

JURISDICTION

Eaton seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari, through the authority of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Eaton seeks to invoke the following constitutional provisions:

United States Constitution, Amendment VI, Rights of the Accused

> 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 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 defence.

United States Constitution, Amendment XIV, Due Process – Equal Protection

Section 1. Citizenship Rights Not to Be Abridged by States.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

STATUTORY PROVISIONS INVOLVED

Eaton seeks to invoke the following statutory provisions:

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

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

28 U.S.C. 2254(d). State Custody; remedies in Federal courts.

> (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 proceedings.

STATEMENT OF THE CASE

In 2004, a jury found Dale Wayne Eaton guilty of several crimes related to the 1988 kidnapping, sexual assault, and murder of Lisa Marie Kimmel. (App. 241). The jury recommended he receive the death penalty. (*Id.*). Through counsel, Eaton appealed his convictions and sentence to the Wyoming Supreme Court. (*See generally* App. 239-310). Eaton raised twenty-one issues (including discreet subparts). (*Id.*). Of significance to this proceeding, Eaton argued the State of Wyoming violated his right to due process when he was tried while incompetent. (App. 242, 244-52). He also raised a separate claim of ineffective assistance of trial counsel. (App. 241-42). He argued that his counsel was ineffective in ten different ways, including that he "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).

The Wyoming Supreme Court affirmed Eaton's convictions and sentence. (App. 310). The first issue the court addressed was Eaton's trial competency, and it determined the record did not suggest Eaton was incompetent. (App. 244, 252). The court began its overall discussion regarding the ineffective assistance of counsel claims with the applicable standard of review and relevant two-part test provided by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). (App. 253-54). The court's discussion of Eaton's ineffective assistance of counsel claim was brief but to the point:

> We considered this issue as a substantive matter in Part I A, above []. 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).

On August 13, 2010, Eaton filed a petition for writ of habeas corpus in the United States District Court for the District of Wyoming. Eaton raised eleven claims for relief, including: "Trial counsel Wyatt Skaggs was ineffective for failing to investigate and assert the issue of Mr. Eaton's lack of mental competence to proceed. As a result, there is a reasonable probability that Mr. Eaton was brought to trial while mentally incompetent." (App. 26-27).

In support of this claim, Eaton focused heavily on an affidavit prepared by Dr. Kenneth Ash. In the penalty phase of Eaton's trial, Dr. Ash testified that he had met with and evaluated Eaton, and that Eaton was competent to stand trial. (App. 63, 251) In his affidavit, Dr. Ash claimed trial counsel had not informed him that Eaton

was uncooperative, angry, and the defense team was afraid of him, all facts that were relevant for an accurate assessment of Eaton's competence. (ROA Vol. 1 at 495). Eaton also asserted that the district court should not give deference to the Wyoming Supreme Court's decision on this claim because it "was based on an incomplete view of the record[.] (*Id.* at 294) (quoting pre-AEDPA case *Williamson v. Ward*, 110 F.3d 1508, 1521 (10th Cir. 1997)).

The federal district court granted summary judgment in favor of Warden Pacheco on this claim. The court concluded the claim had been considered on its merits by the Wyoming Supreme Court and limited itself to the state court record as required by *Cullen v. Pinholster*, 563 U.S. 170 (2011). (App. 58). While the record showed communication difficulties between Eaton and Skaggs, it also showed that Eaton effectively communicated with the other defense attorney, Vaughn Neubauer. (App. 59). Based on the trial team's interactions and communication with Eaton, in conjunction with Dr. Ash's report and testimony indicating Eaton was competent to stand trial, the court determined it was reasonable for defense counsel to forego a competency hearing. (App. 60). The court also found that the record supported the Wyoming Supreme Court's conclusion that Eaton was competent to stand trial. (App. 63). For these reasons, the district court concluded that the Wyoming Supreme Court's 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. 60).

The district court ultimately granted Eaton a conditional writ and reversed his death sentence after concluding Eaton received ineffective assistance of appellate and trial counsel in the penalty phase of the trial. (App. 185-86; 226-27; 236). Warden Pacheco did not appeal the district court's order. However, Eaton appealed the district court's award of summary judgment in Warden Pacheco's favor, which included the finding that trial counsel was not ineffective with respect to Eaton's competency. (*See generally* Opening Br.).

In his opening brief to the United States Court of Appeals for the Tenth Circuit, Eaton argued the Wyoming Supreme Court did not adjudicate the performance part of the *Strickland* analysis when it considered whether counsel rendered ineffective assistance with respect to his competency. (Opening Br. at 74). He asserted that because there was not an adjudication, the federal district court was required to conduct a *de novo* review of counsels' performance under *Strickland*. (*Id*. at 87-90). Eaton then spent a significant portion of his brief referencing the facts the district court would have considered had it conducted a *de novo* review. (*Id*. at 90-112).

Warden Pacheco pointed out that the Wyoming Supreme Court did not explicitly state it was determining the ineffective assistance of counsel claim on only the prejudice part of *Strickland*. (Appellee's Br. at 84). Instead, the Wyoming Supreme Court's brief discussion on the matter was determinative of both parts of the *Strickland* analysis. (*Id*. at 85-88). Therefore, the district court appropriately limited itself to the record presented in the state court, as required by *Pinholster*, and

afforded the Wyoming Supreme Court's decision on this claim deference under 28 U.S.C. § 2254(d). (*Id*. at 77-89).

In his reply brief, Eaton addressed Warden Pacheco's arguments and, for the first time in state or federal court, argued that the ineffective assistance of counsel claim raised in federal court is a "new or different" claim than the one considered by the state courts and, therefore, the district court was not limited by the holding of *Pinholster*. (Reply Br. at 28). Eaton argued his state court issue focused on trial counsel's failure to *challenge* Eaton's competency to stand trial, while his habeas corpus claim focused on trial counsel's failure to *investigate* Eaton's competency. (*Id.* at 28-29). In his one paragraph argument on this issue, Eaton argued that, because these are two different claims, § 2254(d) should not apply. (*Id*. at 29).

The court of appeals affirmed the district court's order. In doing so, the court engaged in a thorough and thoughtful analysis of established United States Supreme Court case law and recognized the limitations of federal habeas corpus relief after Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). The court determined that, while the Wyoming Supreme Court's opinion did not expressly say so, its determination that Eaton was indeed competent to proceed to trial resolved both parts of the *Strickland* test. (App. 8). Therefore, Eaton was not entitled to *de novo* review of whether counsel was deficient, and the district court appropriately limited its determination to the record before the state courts. (*Id*.). Of significance, the court recognized that Eaton attempted to change his argument in his reply brief by

asserting his habeas corpus claim was a new or different claim from the one considered by the Wyoming Supreme Court. (*Id.* at 10 n.15). However, the court refused to consider the merits of the argument as it was being raised for the first time in his reply brief. (*Id.*).

The court of appeals also considered whether the Wyoming Supreme Court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding under § 2254(d)(2). (*Id.* at 11). Relying on *Brumfield v. Cain*, — U.S. —, 135 S. Ct. 2269 (2015), Eaton argued the Wyoming Supreme Court "whipsawed" him when it would not grant him more time to develop the facts of his claims and then determined he failed to demonstrate prejudice. (*Id.*).

The court agreed that the procedural facts of Eaton's case were not entirely dissimilar to those this Court considered in *Brumfield*, but determined Eaton's reliance on *Brumfield* was misplaced. (*Id.*). The court pointed out that, in *Brumfield*, this Court expressly declined to consider whether the petitioner satisfied § 2254(d)(1) when he demonstrated that the state court had denied the petitioner's request for funding to investigate his intellectual disabilities and subsequently denied relief on the basis that he failed to make a threshold showing of those same disabilities. (*Id.*). Instead, this Court determined that Brumfield satisfied § 2254(d)(2) because two specific state court findings were unreasonable in light of the state court record. (*Id.*). The court explained that Eaton did not specify which factual findings were unreasonable, instead simply relying on conclusory allegations that his case is the

same as *Brumfield*. (*Id*.). Therefore, Eaton failed to demonstrate that the Wyoming Supreme Court's decision satisfied § 2254(d)(2) in light of the state-court record. (*Id*. at 12).

Eaton sought rehearing and rehearing *en banc*, and the court of appeals denied his request. (App. 312). Eaton timely filed a petition for writ of certiorari with this Court.

REASONS FOR DENYING THE WRIT

Eaton seeks a writ of certiorari from this Court on three issues: whether the Wyoming Supreme Court actually adjudicated on the merits Eaton's guilt-phase ineffective assistance of counsel claim; whether § 2254(d)(2) is satisfied by "unfair state court proceedings" and; whether a petitioner can waive the appropriate standard of review. Each of these issues is flawed because Eaton has characterized his habeas corpus claims and arguments differently from the way he presented them in the federal district court and court of appeals. When reviewing Eaton's claims in the proper context, there is not a split among the circuits regarding the application of § 2254(d) under this Court's precedent. Additionally, the outcome of Eaton's case would not be affected by the resolution of these issues. Therefore, Warden Pacheco respectfully submits that certiorari be denied.

ARGUMENT

I. Eaton's guilt-phase ineffective assistance of counsel claim was adjudicated on the merits. And, until his reply brief in the court of appeals, Eaton never asserted this was a new claim not considered by the state courts.

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court will grant a petition for writ of certiorari "only for compelling reasons." A compelling reason may be found when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." *Id*. Eaton argues that there is a split among the circuits of "when a claim is adjudicated on the merits by a state court within the meaning of 28 U.S.C. § 2254(d)" and questions whether "a claim that is new or different from the claim adjudicated in state court is nevertheless subject to this Court's holding in *Cullen v. Pinholster*, 563 U.S. 170 (2011)." (Pet. at 8-9). The cases Eaton relies upon, however, do not support his arguments.

A. The Wyoming Supreme Court adjudicated Eaton's ineffective assistance of counsel claim on the merits under § 2254(d).

Eaton argues the Wyoming Supreme Court did not adjudicate on its merits the performance part of the *Strickland* analysis and, therefore, the district court was at liberty to consider evidence outside of the state court record. (Pet. at 11-17). The court of appeals disagreed, concluding "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). Instead of providing any analysis of why the court of appeals' decision was legally incorrect, Eaton steams full-bore ahead with the same inaccurate characterization of the Wyoming Supreme Court opinion that the court of appeals explicitly rejected. His argument in this regard has two distinct paths. First, he argues the Wyoming Supreme Court did not consider the performance part of *Strickland* at all. (Pet. at 11-13, 15-17). Second, he argues that even if the Wyoming Supreme Court considered the entirety of his claim, it was still not adjudicated on the merits because the state courts denied Eaton the opportunity to fully develop the facts underlying the claim. (Pet. at 14-15).

1. The Wyoming Supreme Court opinion addressed the entirety of the *Strickland* analysis.

Eaton claims the Wyoming Supreme Court "unequivocally" stated it was not adjudicating the performance part of the *Strickland* analysis. (Pet. at 12). In support of that conclusion, Eaton states:

> 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 not competent to stand trial*."

(Pet. at 12-13 (emphasis in original)). The court of appeals correctly recognized that the Wyoming Supreme Court did not make this statement in its discussion of whether Eaton's trial counsel was ineffective for failing to challenge Eaton's competency to stand trial. (App. 7-8). Instead, the court made that statement while considering

Eaton's stand-alone due process claim of whether he was actually competent to proceed. (*Id*.). Therefore, that statement does not "unequivocally" show anything as it pertains to the Wyoming Supreme Court's discussion regarding ineffective assistance of counsel.

Eaton's petition also relies on a second statement made by the Wyoming Supreme Court. Eaton asserts:

> 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*, 1115 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."

(Pet. at 13). Again, Eaton gives the impression the court made this statement during its ineffective assistance of counsel discussion. It did not. The court made this statement during its discussion of whether Eaton was actually competent to stand trial. (App. 251).

Eaton also has not given the entire context of the statement. The court actually stated:

> Eaton's reliance on *Keats v. State*, [] 115 P.3d 1110 (Wyo. 2005), is misplaced. Although it may have some tangential pertinence to the effective assistance of counsel issue we will discuss later, it has no pertinence in the context of whether or not Eaton was competent to stand trial.

(*Id*.). This statement is completely reasonable considering the only issue discussed in *Keats* was whether the petitioner received ineffective assistance of counsel. As the court clearly recognized, while *Keats* could be relevant to Eaton's ineffective

assistance of counsel claim, it was not relevant to whether Eaton was competent to proceed to trial. Therefore, this statement has no bearing on the Wyoming Supreme Court's intent to address the performance part of the *Strickland* analysis.

Eaton has not provided this Court with any authority that demonstrates the court of appeals' conclusion that the Wyoming Supreme Court opinion addressed both parts of the *Strickland* analysis is legally or factually incorrect. Instead, he provides citations to cases that are so distinct from the situation at hand they are irrelevant. (Pet. at 13, 16-17 (citations omitted)).

Eaton argues the court of appeals decision conflicts with *Nance v. Norris*, 392 F.3d 284 (8th Cir. 2004). In *Nance*, a jury convicted Nance of capital felony murder and sentenced him to death. *Id.* at 286. Nance appealed his conviction to the Arkansas Supreme Court. *Id.* at 288. The Arkansas Supreme Court noted that "[throughout] his brief, [Nance] asserts the denial of his constitutional rights by means of merely conclusory allegations without supporting authority. In such circumstances, [the court] decline[s] to consider his constitutional arguments." *Nance v. State*, 918 S.W.2d 114, 117 (Ark. 1996); *Nance*, 392 F.3d at 288.

The United States Court of Appeals for the Eighth Circuit determined that the Arkansas Supreme Court specifically disclaimed considering Nance's constitutional claims; therefore, § 2254(d) did not apply and his federal habeas corpus claims could be considered *de novo*. *Nance*, 392 F.3d at 289. However, any state court determinations of material fact were presumed correct unless rebutted by clear and convincing evidence. *Id.* at 289 (citing 28 U.S.C. § 2254(e)(1)).

Unlike the Arkansas Supreme Court, the Wyoming Supreme Court did not disclaim Eaton's constitutional claim. The court considered the claim and determined he received constitutionally effective assistance of counsel. Therefore, the court of appeals addressed an entirely different situation than what the Eighth Circuit addressed in *Nance*. The decisions do not conflict with one another.

At worst, the district court was presented with a situation where the Wyoming Supreme Court did not explain which part of *Strickland* it found insufficient to afford relief. In such a circumstance, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011); *see also Premo v. Moore*, 562 U.S. 115, 123 (2011) (concluding that where state courts do not specify under which part of the *Strickland* analysis a petitioner's claims fails, the federal courts must conclude the state court decision was an unreasonable application of clearly established federal law under both parts of *Strickland* in order to grant relief under § 2254(d)). Section 2254(d) applies when a claim—not the components of a claim—has been adjudicated. *Harrington*, 562 U.S. at 98. Thus, even if the Wyoming Supreme Court decision is summary in nature, the district court and the court of appeals properly concluded that Eaton's claim had been adjudicated on the merits for purposes of § 2254(d).

Eaton also argues the court of appeals' decision conflicts with decisions from the United States Courts of Appeal for the Sixth, Seventh, Ninth, and Eleventh Circuits. (Pet. at 16-17 (citations omitted)). However, these cases do not apply to the circumstance Eaton presents. In each of the cases he cites, the state courts were

squarely presented with the claims the petitioners raised in their federal habeas corpus petitions but chose not to address them. Consequently, those claims were not "adjudicated on the merits" for the purposes of § 2254(d). *Canaan v. McBride*, 395 F.3d 376 (7th Cir. 2005)(concluding that although the issue was presented on appeal, the Indiana Supreme Court did not consider petitioner's claim and, therefore, the claim was not adjudicated on its merits); *Lewis v. Mayle*, 391 F.3d 989 (9th Cir. 2004) (finding that where the state court refused to base its decision on the waiver claim, the waiver claim was not adjudicated on the merits and not entitled to AEDPA's deferential standard); *Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310 (11th Cir. 2003) (determining that petitioner's failure to preserve *Batson* claim fell outside of § 2254(d) review when state court only addressed the actual failure to raise *Batson* claim, despite a claim for ineffective assistance of counsel for failure to preserve also being raised).

Eaton's reliance on the United States Court of Appeals for the Sixth Circuit's decision in *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010) is particularly misguided. *Miller* involved a confrontation clause claim, and the state court of appeals determined the claim on its merits utilizing the rule from *Ohio v. Roberts*, 448 U.S. 56 (1980). *Miller*, 608 F.3d at 919. After the state court of appeals issued its decision, but before the petitioner's conviction became final, this Court issued its decision in *Crawford v. Washington*, 541 U.S. 36, 69-70 (2004), which revised the rule from *Roberts*. *Id.* Miller then filed a federal habeas corpus petition raising a violation of the Confrontation Clause. *Id.* at 917.

The Sixth Circuit determined that the state courts had not adjudicated the petitioner's *Crawford* claim on the merits because they did not determine whether the evidence at issue was testimonial, an issue that was not relevant under *Roberts*. *Id*. at 921. Consequently, the Sixth Circuit did not afford deference, reviewed the claim *de novo*, and affirmed the district court's grant of the writ. *Id*. at 922, 928.

This Court vacated the Sixth Circuit's decision in *Miller*, relying on its decision in *Greene v. Fisher*, 565 U.S. 34, 40 (2011), which held that the "clearly established federal law" for § 2254(d) purposes is the rule of law that existed at the time the state court determined the claim on its merits, not when the conviction became final. *Stovall v. Miller*, 565 U.S. 1031 (2011). Accordingly, *Miller* does not support Eaton's position, as the Sixth Circuit's decision is not good law on this matter.

The cases cited by Eaton do not establish that the court of appeals deviated from the other circuits when it concluded that the Wyoming Supreme Court determined the ineffective assistance of counsel claim on the merits. The decision, while brief, addressed both parts of the *Strickland* analysis. Therefore, the district court and the court of appeals appropriately afforded the decision deference under § 2254 and, as provided by *Pinholster*, limited the record to the materials before the state court.

2. Eaton has not previously asserted that the state court fact finding process resulted in the state court failing to adjudicate his ineffective assistance of counsel claim on the merits for purposes of § 2254(d).

Eaton also argues that his claim was not adjudicated on its merits because the state courts denied him the opportunity to fully develop the facts underlying his claim. (Pet. at 14-15). This Court should not consider this argument because he did not fairly present it to the district court or the court of appeals.

While Eaton has always maintained that the state court proceedings were insufficient, he has consistently asserted that this resulted in a decision based on an unreasonable application of the facts presented in the state court proceedings under § 2254(d)(2). (*See* Opening Br. at 117-21). Only in his reply brief before the court of appeals did Eaton suggest there was "arguably" no adjudication entitled to deference where a state court unreasonably limited factual development of a claim. (Reply Br. at 25). The court of appeals did not specifically address this argument but was critical of Eaton raising other issues for the first time in his reply brief. (App. 10 n.15, 11 n.16). Therefore, Eaton cannot show the court of appeals rendered a decision that was contrary to the decision of another circuit on this matter because the court of appeals did not address this issue in its decision. *See* Sup. Ct. R. 10.

B. Until filing his reply brief in the court of appeals, Eaton never asserted his guilt-phase ineffective assistance of counsel claim was new or different from the claim considered by the Wyoming Supreme Court.

In a stark change of direction, Eaton asserts the district court and the court of appeals wholly failed to appreciate that the claim he raised in his habeas corpus petition was a new or different claim from the one raised before the Wyoming Supreme Court. (Pet. at 16). However, Eaton never asserted this was a new or different claim until he filed his reply brief in the court of appeals.

Claim 3 in Eaton's petition stated: "Trial counsel Wyatt Skaggs was ineffective for failing to investigate and assert the issue of Mr. Eaton's lack of mental competence to proceed. As a result, there is a reasonable probability that Mr. Eaton was brought to trial while mentally incompetent." (ROA Vol. 1 at 159). While the investigation is mentioned in the issue statement, it is phrased as part of counsel's overall performance when it came to Eaton's competency to stand trial. (*Id.*). In his response to Warden Pacheco's motion for summary judgment, Eaton did not argue that this was a new claim that had not been considered by the state courts. (*See generally* ROA Vol. 13 at 2527-37). To the contrary, Eaton argued the Wyoming Supreme Court's decision on this claim was not entitled to deference because it disposed of the claim using the prejudice part of the *Strickland* test and did not consider the deficient performance aspect of the test. (*Id.* at 527-29). Eaton also argued the Wyoming Supreme Court's decision was based on an unreasonable determination of the facts.

(*Id*. at 530-35). Logic dictates that Eaton would make that argument only if the Wyoming Supreme Court had considered the claim.

The federal district court similarly analyzed the Wyoming Supreme Court's decision. The district court phrased the issue as: "In his third claim for relief, Eaton alleges that his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment Due Process rights were violated when he was brought to trial without an adequate investigation of his mental competence by trial counsel [], and without adequate inquiry into the issue by the trial court [], resulting in his being tried while incompetent." (App. 51). The district court then thoroughly analyzed the issue, recognizing that "[r]eview under AEDPA is limited to the record that was before the Wyoming Supreme Court when it adjudicated the claim on the merits." (*Id*. at 58 (citing *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011))). After considering the facts and applicable law, the district court concluded that the state court 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." (*Id*. at 59-60).

If, in fact, the district court failed to recognize that Eaton's federal habeas claim was different from the issue raised in the Wyoming Supreme Court, Eaton did not bring that fact to the court of appeals' attention in his opening brief. To the contrary, Eaton double downed on the position he took in the district court. In summarizing his argument, Eaton stated:

> Mr. Eaton will first demonstrate that the district court's reasoning went off course when it failed to note that the Wyoming Supreme Court did not adjudicate the performance prong of Mr. Eaton's *Strickland*/competence claim. Appellant then will discuss the impact that *de novo* review should have had on the district court's analysis of Mr. Eaton's claim. Finally, Mr. Eaton will make the case that the State court's decision is unreasonable under applicable standards.

(Opening Br. at 74). The substance of Eaton's brief stayed true to that summary and never asserted that the issue in his federal habeas petition had not been considered by the Wyoming Supreme Court. (*See id*. at 69-120).

Eaton first suggested that this claim is new or different from the claim decided by the Wyoming Supreme Court in the last two paragraphs discussing this claim in his reply brief. (Reply Br. of Appellant at 28-29). The court of appeals correctly decided that "arguments advanced for the first time in a reply brief are waived." (App. 10).

Eaton presents this claim in the petition as if the court of appeals determined that he did not raise a different claim in his habeas petition and that this determination is contrary to the decisions of other circuits. (*See* Pet. at 13). That assertion is plainly not the case. The district court and the court of appeals never considered whether this was a new claim because they were never properly presented with that question. Therefore, the court of appeals' decision cannot be contrary to the decisions of other circuits.

Eaton's reliance on the cases he cites in his petition does not bring him to the resolution he seeks. He seems to believe that, because this is a new claim, the district

court was not bound by the state court record and could consider any evidence it wished. However, he appears to ignore other straightforward habeas corpus principles that would apply if this is a new claim, such as exhaustion and procedural defaults. 28 U.S.C. § 2254(b); *see also Davila v. Davis*, — U.S. —, 137 S. Ct. 2058, 2065 (2017); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982).

Each of the cases cited by Eaton demonstrate these principles. (Pet. at 13, 15-16 (citations omitted)). In *Gonzalez v. Wong*, the United States Court of Appeals for the Ninth Circuit determined a *Brady* claim needed to be reconsidered by the state court in light of new evidence the petitioner had discovered after the state court proceedings. 667 F.3d 965, 979-80 (9th Cir. 2011). The court reached this determination after recognizing established habeas corpus principles under *Pinholster* and that the "new claim" had not yet been exhausted in the state courts. *Id*. at 979.

In *Dickens v. Ryan*, the Ninth Circuit acknowledged that new evidence may "fundamentally alter[] [a] previously exhausted [ineffective assistance of counsel claim]" and that *Pinholster* would not confine the federal court to the state court record in that circumstance. 740 F.3d 1302, (1318, 1320 (9th Cir. 2014). However, the *Dickens* court also recognized this meant that because the state court did not have a fair opportunity to evaluate the claim, it was now procedurally defaulted in federal proceedings. *Id*. at 1319. It found that the question of whether the federal court would consider the claim at all would only come into play if the petitioner successfully demonstrated cause to overcome the procedural default. *Id*. at 1320.

Eaton also cites *Warren v. Baenen*, 712 F.3d 1090 (7th Cir. 2013), to support his assertion that § 2254(d) does not apply to a "related, but distinct issue" that was not considered in the state court. (Pet. at 16). In *Warren*, the court considered *de novo* the petitioner's "related, though distinct" claim that had not been raised in state court. *Id*. at 1099-1100. The court explained it would not normally consider a claim that had not been raised in the state courts. *Id*. However, it nonetheless considered the claim because the petitioner was *pro se* and the state had forfeited its argument that this new claim was procedurally barred. *Id*. Thus, *Warren* is not applicable to Eaton's situation.

Even if this issue was properly preserved in these proceedings, Eaton has not shown a split among the circuits on this issue. He does not address the fact that at best, his claim would now be procedurally barred and he would be required to demonstrate cause to remove the bar to have his claim considered. Consequently, this Court should deny his request for review.

II. Eaton has not cited any legal authority to show that the court of appeals erred in determining that Eaton did not satisfy § 2254(d)(2) based on the state-court record.

Eaton argues the state court thwarted his attempts to develop the facts supporting his claims and then denied him relief for not providing evidence to support those claims. (Pet. at 18-22). He claims the Wyoming courts "whipsawed" him just as the state court whipsawed the petitioner in *Brumfield*, 135 S. Ct. at 2273. In *Brumfield*, the state court denied petitioner funding to investigate his intellectual

disabilities and then denied relief because he failed to make a threshold showing of those same disabilities. *Id.* The court of appeals rejected this argument, concluding this Court granted relief in *Brumfield* under § 2254(d)(2) due to two specific factual findings that were unreasonable in light of the record. (App. 11). Eaton, however, did not explain which of the Wyoming Supreme Court's factual findings were unreasonable based upon the state court record. (*Id.*). Instead, he argued solely that the court did not allow him sufficient time to develop the facts, a circumstance this Court opted not to consider in *Brumfield.* (*Id.*).

Even a cursory review of Eaton's claim shows that he simply disagrees with the court of appeals' decision. He reasserts the facts and arguments he made to the court of appeals and is hoping for a different decision from this Court. (Pet. at 18-20). However, this is not a compelling reason for this Court to grant Eaton's petition. *See* Sup. Ct. R. 10.

A review of Eaton's petition further demonstrates that he cannot show the court of appeals' decision conflicts with other circuits because he does not cite to any other circuit court decisions that have considered this Court's decision in *Brumfield*. Two of the cases he cites from other circuits address whether the complete denial of an evidentiary hearing renders a claim "adjudicated on the merits" for purposes of § 2254(d), thereby triggering *de novo* review, an issue that was not fairly presented to the district court or the court of appeals. *See Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015); *Winston v. Pearson*, 683 F.3d 489, 496 (4th Cir. 2012). (Pet. at 21). The third case he cites, which he actually discusses in his first claim, addresses

whether an evidentiary hearing was prohibited under § 2254(e)(2). *See Thomas v. Varner*, 428 F.3d 491, 498 (3rd Cir. 2005) (Pet. at 15). Eaton did not question whether a hearing was appropriate under § 2254(e)(2) before the court of appeals. Accordingly, this Court should not consider whether Eaton's state court proceedings rendered the Wyoming Supreme Court decision unreasonable under § 2254(d)(2).

III. The Court of Appeals' decision did not result in a waiver of the applicable standard of review. The parties extensively litigated the question of whether § 2254(d) review or *de novo* review applied was extensively litigated and the federal courts determined the question on its merits.

Eaton's final issue revolves around the court of appeals' refusal to consider an argument Eaton made for the first time in his appellate reply brief. In that brief, Eaton argued for the first time that his guilt-phase ineffective assistance of counsel claim addressed the lack of an *investigation* into Eaton's competency, whereas the issue before the state court focused on counsel's failure to *raise* Eaton's competency to proceed before trial. (Reply Br. at 28-29). The court of appeals declined to consider the argument, citing its general rule that arguments advanced for the first time in a reply brief are waived. (App. 10 n.15).

Eaton argues this decision equated to the court of appeals determining that Eaton waived the application of the *de novo* standard of review to this claim. (Pet. at 23). He asserts this decision implies a party can waive the appropriate standard of review and conflicts with decisions from the Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh circuits that have determined that a party cannot waive the standard of

review. (Pet. at 24, 28 (citations omitted)). The majority of the cited cases focus on whether the state can waive application of § 2241(d) by failing to assert it. *See Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009); *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); *Rambaran v. Sec'y, Dep't of Corr.*, 821 F.3d 1325, 1331-32 (11th Cir. 2016). In some instances, courts have stated that neither party can waive the appropriate standard of review. *Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008); *Moritz v. Lafler*, 525 F. App'x 277, 285 (6th Cir. 2013); *Ray v. Maclaren*, 655 F. App'x 301, 308 n.5 (6th Cir. 2016); *Moss v. Ballard*, 537 F. App'x 191, 194-95 n.2 (4th Cir. 2013).

Eaton also notes that other circuits have reached the conclusion that a petitioner can waive *de novo* review by failing to address it in the district court. *Mendoza v. Sec'y, Florida Dep't of Corr.*, 761 F.3d 1213, 1236-37 (11th Cir. 2014); *Young v. Murphy*, 615 F.3d 59, 65 (1st Cir. 2010).

While there are differences among the circuits about whether the standard of review can be waived in a habeas proceeding, Eaton's case is factually and legally distinguishable from the cited cases and, therefore, is not the vehicle this Court should use to consider this issue. In each of the cases cited by Eaton, the parties did not address the appropriate standard of review at all or one party did not advocate that a particular standard of review applied until the case was before the appellate court.

The standard of review was not ignored in Eaton's case. He always claimed the *de novo* standard of review applied to his ineffective assistance of counsel claim. Conversely, Warden Pacheco always asserted § 2254(d) applied. The parties significantly litigated the issue through a motion for summary judgment, and Eaton appealed the issue to the court of appeals after the district court determined that § 2254(d) was the proper standard of review. At that point, he still maintained the *de novo* standard of review applied. Therefore, Eaton did not waive his argument that the district court should have reviewed his claim *de novo*, and his circumstance is markedly different from the cases he relies upon.

There is no question that the Wyoming Supreme Court adjudicated Eaton's guilt-phase ineffective assistance of counsel claim on its merits. (App. 262). As the court of appeals determined, the Wyoming Supreme Court's decision adjudicated both parts of the *Strickland* analysis and, therefore, it was subject to § 2254(d) and the district court was limited to the state court record. (App. 8). Therefore, even if this Court were to consider this claim as Eaton requests, the outcome of Eaton's case would not be affected by this Court's decision.

CONCLUSION

Much of Eaton's petition rests upon an inaccurate representation of the Wyoming Supreme Court's opinion and the issues Eaton raised in his habeas corpus petition. When all of the facts and circumstances are viewed from the appropriate lens, it is clear he is not entitled to relief. Further, Eaton has not shown that the court

of appeals' decision establishes a split in authority among the circuits or that the outcome of his case would be affected if this Court considered his claims. Therefore, his petition for writ of certiorari should be denied.

Respectfully submitted this 30th day of March 2020.

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