No. 19-7810

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

DALE W. EATON,

***Petitioner*,**

vs.

MIKE PACHECO, Wyoming State Penitentiary,

***Respondent*.**

REPLY TO BRIEF IN OPPOSITION

TO PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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STATEMENT OF THE CASE

Respondent's Statement of the Case requires clarification on several matters.

Respondent correctly acknowledges that the issues herein involve Mr. Eaton's federal habeas claim that "[t]rial counsel . . . was ineffective for *failing to investigate* and assert the issue of Mr. Eaton's lack of competence to proceed." Brief in Opposition, p. 4 (hereafter BIO __) (emphasis added), quoting App. 26-27. Respondent also accurately states Mr. Eaton's obviously different state court allegation that trial counsel "*fail[ed] to address* this fundamental problem and *elect[ed] to allow the case to proceed.*" BIO 3, quoting App. 241. Petitioner argued this distinction between his federal habeas and the state court claims, focusing on the deficient investigation allegation that is exclusive to his federal habeas claim.

Respondent's allegation that Mr. Eaton's Reply Brief below raised *Cullen v. Pinholster*'s "new or different claim" exception "for the first time in state or federal court," BIO 7, misstates the record. Mr. Eaton's Opening Brief argued that the new allegations and evidence developed by federal habeas counsel "give[] rise to an altogether different claim.'" Appellant's Brief 90, n. 15, quoting *Cullen v. Pinholster,* 563 U.S. 170, 213, n. 5 (2011). Mr. Eaton discussed the evidence of mental illness discovered by habeas counsel, and noted that the state court did not address trial counsel's failure to investigate. Appellant's Brief 92, quoting *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Respondent then argued, for the first time ever, that the Wyoming Supreme Court determined "both parts of the *Strickland* analysis." BIO 6, citing Appellee's Brief at 85-88. In the district court, Respondent had conceded in his Motion for Summary Judgment that the Wyoming Supreme Court decided Mr. Eaton's guilt-phase ineffectiveness claim "using the prejudice portion of the *Strickland* test," and argued that *Strickland* allows court to decide only one prong of *Strickland*'s standard. ROA Vol. 13, p. 267. Respondent's new position prompted Mr. Eaton to

respond that the Wyoming Supreme Court was never presented with a claim that trial counsel failed to investigate Mr. Eaton's competence to proceed was deficient. Reply Br., pp. 28-29.

Contrary to Respondent's statement, BIO 8, Mr. Eaton argued below, and the district court found pursuant to § 2254(d)(1) & (2), that the state court decisions regarding trial counsel's deficient investigation into Mr. Eaton's mental health were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Appellant's Brief, pp. 71-74, and ROA Vol. 13, pp. 901-02. Further, Mr. Eaton showed that trial counsel's deficient performance undercut the state court findings regarding competence and mental health, and that the Wyoming Supreme Court either ignored or precluded further development of essential facts. *See* Appellant's Brief, pp. 81-84.

Other matters that need correction or clarification will be discussed in the Argument portion of Mr. Eaton's Reply.

REASONS FOR GRANTING THE WRIT

All material elements of Mr. Eaton's guilt-phase ineffective assistance of counsel were found credible the district court. After a hearing, the district court found Mr. Eaton is severely mentally impaired, that his trial attorney's investigation of Mr. Eaton's mental health history was deficient, App. 236-37, and that a reasonable investigation would have fundamentally changed the conclusions of pretrial examiner Kenneth Ash, M.D. App. 203-216. Further, the district judge reached these facts through the cause-and-prejudice gateway opened by the constitutionally ineffective assistance of appellate counsel, App. 49-51, 228-236, and these findings were not appealed. Mr. Eaton would have been granted relief from his conviction under the rule advocated by Justice Alito, 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,* 563 U.S. 170, 203 (2011) (Alito, J., concurring). Certiorari should be granted because

the decision below exemplifies the very confusion that Justice Sotomayor predicted in her dissenting opinion in *Cullen v. Pinholster.*

I. NO COURT HAS ADJUDICATED MR. EATON'S CLAIM THAT TRIAL COUNSEL'S COMPETENCY INVESTIGATION WAS DEFICIENT.

Mr. Eaton's case presents questions left open in *Cullen v. Pinholster,* 563 U.S. 170 (2011), including what constitutes an adjudication of a federal claim by a state court. Justice Sotomayor expressed concern about "the anomalous result that petitioners with new claims based on newly obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits in state court cannot obtain federal habeas relief if they cannot first satisfy § 2254(d)(1) without the new evidence." *Id.,* at 216 (Sotomayor, J., dissenting). She agreed with this Court's observation in *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 7-8, that "it is . . . irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim." *Cullen v. Pinholster, supra,* at 215. Justice Thomas, writing for the majority, responded, "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*." *Id.,* at 186, n. 10 (emphasis added). Noting that "[t]he majority declines, however, to provide any guidance to the lower courts on how to distinguish claims adjudicated on the merits from new claims," *id.,* at 216, n. 7, Justice Sotomayor suggested that "the majority either has foreclosed habeas relief for diligent petitioners who, through no fault of their own, were unable to present exculpatory evidence to the state court that adjudicated their claims or has created a new set of procedural complexities for the lower courts to navigate to ensure the availability of the Great Writ for diligent

petitioners." *Id.,* at 217 (Sotomayor, dissenting). Mr. Eaton's case is a good demonstration of the need for clarity to protect diligent habeas petitioners.

A. The Wyoming Supreme Court did not adjudicate the performance prong of the *Strickland* claim presented in Mr. Eaton's federal habeas petition.

Respondent and the court below claim that the Wyoming Supreme Court's rejection of Mr. Eaton's state claim, *i.e*., that trial counsel was ineffective for "failing to address" Mr. Eaton's competence, App. 241, adjudicated the performance prong of Mr. Eaton's federal habeas claim that trial counsel "was ineffective for failing to investigate" Mr. Eaton's competence to proceed. App. 26-27. See BIO, pp. 11-12. Petitioner's position that courts need more guidance on what constitutes "adjudication" is made clear by the fact that Respondent took the opposite position in the district court, conceding that the Wyoming Supreme Court by-passed *Strickland's* performance prong, and denied Mr. Eaton's guilt-phase ineffectiveness claim "using the prejudice portion of the *Strickland* test." ROA Vol. 13, p. 267. In rejecting Mr. Eaton's due process competency claim, The Wyoming Supreme Court stated, "we intend only to address the initial premise, i.e., that Eaton was not competent to stand trial." BIO 11-12. However, in rejecting Mr. Eaton's *Strickland* claim, that court referred back to this discussion, clearly resting its ruling on its view that Mr. Eaton was not incompetent. App. 262.

Contrary to Respondent's argument, BIO 12, the state court's language distinguishing *Keats v. State*, 115 P.3d 1110 (Wyo. 2005), reflects the state court's avoidance of the deficient performance issue. The central issue in *Keats* is whether defense counsel was ineffective for "failing to investigate a mental health defense." *Id.,* at 1112. In reversing Keats' conviction, the court found that "[t]he facts of the situation actually suggest that further investigation was essential," and that "trial counsel's failure to investigate constituted ineffective assistance of counsel." *Id.,* 1119-1120. The fact that the court felt *Keats* had only "tangential pertinence" on the

ineffective assistance of counsel issue suggests that it never reached *Strickland*'s performance prong. And the fact that the court never once used the word "investigate" or its equivalent in discussing Mr. Eaton's *Strickland* claim is persuasive proof that it never adjudicated the "failure to investigate competence" claim asserted in federal court. Contrary to Respondent's argument, BIO 13, ignoring Wyoming's expressed decision to avoid *Strickland*'s performance prong does indeed conflict with the Eighth Circuit's decision in *Nance v. Norris,* 392 F.3d 284 (8th Cir. 2004), which declined to apply § 2254(d) where a state court specifically disclaimed deciding a petitioner's constitutional grounds.

Respondent mistakenly contends that *Harrington v. Richter,* 562 U.S. 86 (2011), governs review of the Wyoming Supreme Court's denial of Mr. Eaton's guilt phase ineffectiveness claim. BIO 14. "[F]ederal habeas law employs a 'look through' presumption" when a state court decision is unexplained. *Wilson v. Sellers*, 138 S. Ct. 1188, 1193 (2018). *Richter* applies only when there is no reasoned decision to which to "look through." *Harrington v. Richter*, 562 U.S. 86, 96–97 (2011) (holding); *see also Brumfield v. Cain,* ___ U.S. ___, 135 S. Ct. 2269, 2282–83 (2015), holding that *Richter*'s rule requiring deference to "hypothetical reasons [a] state court might have given for rejecting [a] federal claim" is limited to cases where no state court has issued an opinion giving reasons for the denial." When a state court decides one prong of *Strickland* but not the other, there is "no determination on that point to which a federal court must defer." *Id.,* at 2276. S*ee also Wiggins,* 539 U.S. at 534. In the face of a state court's summary denial of a constitutional claim such as the one here, this Court held:

> The essence of unexplained orders is that they say nothing. We think that a presumption which gives them no effect -- which simply "looks through" them to the last reasoned decision -- most nearly reflects the role they are ordinarily intended to play.

Ylst v. Nunnemaker, 501 S. Ct. 797, 804 (1991). The Wyoming Supreme Court's summary denial of Mr. Eaton's *Strickland* claim expressly pointed back to its rejection of his free-standing due process competency claim to explain its decision, but without addressing *Strickland's* performance prong. App. 262. Application of *Richter* in these circumstances would be clear error.

With the above clarification of the Wyoming Supreme Court ruling, the decision of the Tenth Circuit to defer to a non-existent state court ruling does indeed conflict with the decisions in *Canaan v. McBride*, 395 F.3d 376, 382 (7th Cir. 2005), *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir. 2004), and *Davis v. Sec'y for the Dep't of Corr*., 341 F.3d 1310, 1313 (11th Cir. 2003), which hold that § 2254(d) is not applicable to elements of claims not adjudicated on the merits. On the record in Mr. Eaton's case, the Tenth Circuit's deference to a non-existent state court ruling puts it at odds with these rulings. Interestingly, Respondent notes that the state courts in these cases were "squarely presented with the claims the petitioner's raised in their federal habeas corpus petitions but chose not to address them," as a basis for distinguishing these holdings, BIO, pp. 14-15, an implicit acknowledgment that Mr. Eaton's claim is "new" or "different" than the claim presented in state court. In any event, the record establishes that the Wyoming Supreme Court did not adjudicate Mr. Eaton's failure-to-investigate allegation of his ineffective assistance of counsel claim, and that holding deviates from the rule applied in these decisions from other circuits.

B. The Wyoming Supreme Court failed to adjudicate the performance prong of his *Strickland* claim.

Respondent's argument Mr. Eaton did not "fairly present" his failure-to-adjudicate argument to the district court and the court of appeals, BIO 17, is misleading for two reasons. First, in the district court, Respondent conceded that the Wyoming Supreme Court denied Mr. Eaton's *Strickland* claim "using the prejudice portion of the Strickland test," ROA Vol. 13, p. 287, and cited authority supporting the Wyoming Supreme Court's decision to resolve the claim based

solely on its finding that Mr. Eaton was not incompetent. *Id.,* pp. 287-88. Mr. Eaton's Reply to Respondent's Motion for Summary Judgment observed that "[a]s Respondent observes, the Wyoming Supreme Court by-passed Strickland's performance prong and 'disposed of this issue using the prejudice portion of the Strickland test.'" ROA Vol. 13, p. 527, quoting Respondent's Motion for Summary Judgment, ROA Vol. 13, p. 287. Second, Petitioner did in fact argue in his Opening Brief in the court of appeals that Wyoming's denial of adequate fact finding procedures left the performance prong of his *Strickland* claim unadjudicated in state court. Appellant's Brief, 90. Except for Respondent's 180-degree pivot on his admission that Wyoming did not adjudicate *Strickland*'s performance prong, the issue was fairly presented to the courts below.

C. Mr. Eaton's guilt phase *Strickland* claim presented in his federal habeas petition was new and different from the claim considered by the Wyoming Supreme Court.

That Mr. Eaton's federal ineffective assistance of counsel claim is new and different from the claim decided by the state court is clear on the face of the record, notwithstanding Respondent's claim to the contrary. Respondent's concession that the Wyoming Supreme Court declined to adjudicate the performance prong of Mr. Eaton's *Strickland* claim, ROA Vol. 13, p. 287, followed by his repudiation of this concession in the court below, is the "stark change of direction" that muddies the water on this issue. It is true that Mr. Eaton argued that the district court erred in failing to grant *de novo* review to the deficient performance prong of Mr. Eaton's *Strickland* claim because the state court "disposed of the issue using the prejudice part of the *Strickland* test and did not consider the performance aspect of the test." BIO 18, citing Appellant's Brief, pp. 527-29. However, this argument is harmonious with Mr. Eaton's position that the evidence uncovered by federal habeas counsel transformed his *Strickland* claim. A detailed history of the claim is important to clear up Respondent's suggestion that the state court adjudication issue was not fairly presented below. *See* BIO 18-22.

Respondent is correct that the issues presented herein all involve Mr. Eaton's federal habeas claim that "[t]rial counsel . . . was ineffective for *failing to investigate* and assert the issue of Mr. Eaton's lack of competence to proceed." BIO 4, quoting App. 26-27. Respondent also accurately stated the obviously different state court *Strickland* claim "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.'" BIO 3, quoting App. 241. Petitioner focused heavily on the deficient investigation allegation that is exclusive to his federal habeas claim. When Respondent argued below that "the Wyoming Supreme Court's brief discussion on the matter was determinative of both parts of the *Strickland* analysis," BIO 6, citing Appellee's Brief at 85-86, Mr. Eaton's reply emphasized the obvious—that the guilt phase ineffective assistance of counsel claim alleged in Mr. Eaton's federal habeas corpus petition was different than the one alleged and resolved by the Wyoming Supreme Court. Reply Brief at 28-29. Some form of the word "investigate" is used 143 times in Mr. Eaton's Opening Brief below, and not once in the Wyoming Supreme Court's decision on the ineffective assistance of counsel/competency issue.

Respondent claim that Mr. Eaton "never asserted this was a new or different claim until he filed his reply brief in the court of appeals," BIO 18, misstates the record. Mr. Eaton's Opening Brief argued that the Wyoming Supreme Court failure to adjudicate the performance prong of his failure-to-investigate claim "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*.'" Appellant's Brief 90, n. 15 (emphasis added). In the context of this argument, Mr. Eaton discussed the evidence, not investigated by trial counsel, establishing mental illness throughout Mr. Eaton's life and family history, again

emphasizing the Wyoming Supreme Court's silence on "the reasonableness of the investigation said to support [trial counsel's] strategy." Appellant's Brief 92, quoting *Wiggins v. Smith, supra,* at 527.

Respondent's claim that Mr. Eaton's "new claim" argument is a "stark change of direction," BIO 18, is wrong. *Pinholster* articulated the "new claim" exception out of concern for the same equities that Mr. Eaton argued in his brief—that habeas relief might be foreclosed "for diligent petitioners who, through no fault of their own, were unable to present exculpatory evidence to the state court that adjudicated their claims." *Cullen v. Pinholster, supra,* at 217 (Sotomayor, J., dissenting). As Respondent points out, "Mr. Eaton always claimed the *de novo* standard of review applied to his ineffective assistance of counsel claim." BIO 26.

Because there is no state decision on trial counsel's deficient investigation, Mr. Eaton's Opening Brief below argued that the district court was required to review *Strickland's* performance prong *de novo*, *See* Appellant's Brief, pp. 84, 87-113, citing *Porter v. McCollum*, 558 U.S. 30, 38 (2009). Respondent shifted positions, contending for the first time in state or federal court in Appellee's Brief below that the Wyoming Supreme Court determined "both parts of the *Strickland* analysis." BIO 6, citing Appellee's Brief at 85-88. In reply to Respondent's reversed stance on the issue, Mr. Eaton in his Reply Brief was forced to reiterate in more detail that the Wyoming Supreme Court was never presented with a claim that trial counsel's investigation of Mr. Eaton's competence to proceed was deficient. Reply Br., pp. 28-29.

Respondent's suggestion that Petitioner ignores habeas corpus principles that would apply to a new claim, such as exhaustion and procedural default, BIO 21, is without merit, as the record conclusively refutes this argument. Mr. Eaton argued cause-and-prejudice in his Opening Brief below. Appellant's Brief. pp. 47, 113-117. The district court found that appellate counsel were

ineffective for failing to investigate Mr. Eaton's background and mental health, App. 227-236, and attributed their ineffectiveness to Wyoming's "arbitrary and unreasonable" refusal to provide the necessary time and resources to investigate. App. App. 50. The district court found that despite appellate counsel's "clearly diligent effort," a complete psychosocial history was not presented to the state court. App. 236. Dr. Ash's affidavit and his testimony at the federal district court hearing, persuasively explains how habeas counsel's investigation fundamentally changed his mental health findings. App. 314-324. Given Respondent's failure to appeal these findings, they are law of the case on these issues. *See* Appellant's Brief, pp. 50, 150, citing *Capps v. Sullivan,* 13 F.3d 350, 353 (10th Cir. 1993).

Not only would these facts open the cause-and-prejudice gateway to allow consideration of Mr. Eaton's new failure-to-investigate claim, but they also provide compelling reason to revisit Justice Alito's suggestion "refusing to consider the evidence received in the hearing in federal court gives § 2254(e)(2) an implausibly narrow scope and will lead either to results that Congress surely did not intend or to the distortion of other provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, and the law on "cause and prejudice.") *Cullen v. Pinholster, supra,* at 203.

Because Mr. Eaton can establish cause and prejudice for his new "failure to investigate" claim, there is no merit to Respondent's attempt to distinguish *Gonzalez v. Wong,* 667 F.3d 965 (9th Cir. 2011), *Dickens v. Ryan,* 740 F.3d 1302 (9th Cir. 2014), and *Warren v. Baenen*, 712 F.3d 1090 (7th Cir. 2013). The underlying principle of all those cases is that a habeas petitioner, like Mr. Eaton, who can show cause and prejudice can obtain federal habeas corpus review of "new claim," notwithstanding § 2254(d).

II. *PINHOLSTER* SHOULD NOT APPLY TO DILIGENT PETITIONERS USING § 2254(d)(2) TO CHALLENGE STATE COURT DECISIONS BASED ON UNREASONABLE FACT-FINDING PROCEDURES.

Pinholster's precise holding is that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster,* 181, yet the courts below applied *Pinholster* to Mr. Eaton's argument that the state court decision was unreasonable under § 2254(d)(2), stating, incorrectly, that "Eaton fails to explain in his opening brief which, if any, of the WSC's specific factual findings were unreasonable based on the record before it when it adjudicated the guilt-phase IAC claim." App. 11. Respondent repeats this misinterpretation of the record in his BIO, at 22-23. In both the district court and the court of appeals, Mr. Eaton supported his § 2254(d)(2) argument with a detailed discussion of the psychiatric testimony and other compelling evidence of mental illness and incompetency that he would have developed but for Wyoming's flawed fact-finding process.

Although the district court's summary judgment ruling on Mr. Eaton's ineffective assistance of counsel claims predated *Brumfield v. Cain,* 135 S. Ct. 2269 (2015), it saw the issue the same way:

> The question pending before this Court is whether Eaton was afforded an adequate opportunity to present his claims of ineffective assistance of counsel before the state court given the sixty-day window to prepare and present his claims at the Calene remand hearing. Put differently, *was it 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 (emphasis added). The district court found that "under the circumstances of this case,… 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 (emphasis added). Nevertheless, the court applied *Pinholster* to Mr. Eaton's guilt phase ineffectiveness claim, relying on § 2254(d)(1). App. 53.

In challenging this decision in the court of appeals, Mr. Eaton explained how adequate state fact-finding procedures would have altered his guilt phase *Strickland* claim. He pointed out that the district court's observations in the preceding paragraph apply equally to his guilt-phase *Strickland* claim, Appellant's Brief, pp. 71-72, 74, 79, 114-117, how pretrial examiner Dr. Kenneth Ash was misled by trial counsel's deficient investigation, *id.,* pp. 72-73, that numerous facts put counsel on notice that competency was an issue, *id.,* pp. 74-78, 80-81, and that death penalty mitigation experts Russell Stetler and Richard Burr advised the state court that appellate counsel needed addition time to conduct a thorough biopsychosocial history investigation, and then, "in light of all the new information... ask the mental health experts to examine to the extent possible retrospectively *whether Mr. Eaton was competent to stand trial.*" *Id.,* p. 80, quoting ROA Vol. 18, p. 940. Mr. Eaton also pointed out that appellate counsel later filed the report of William Logan, M.D., questioning Mr. Eaton's competence in light of information that trial counsel had withheld from Dr. Ash, and quoting Dr. Ash's statement that facts not disclosed to him by trial counsel "would warrant further evaluation." Appellant's Brief, p. 82, quoting ROA Vol. 1, pp. 608, 610. Finally, Mr. Eaton's habeas counsel did exactly as Mr. Burr and Mr. Stetler suggested; they provided the fruits of their biopsychosocial history investigation to Dr. Ash, who persuasively explained how the new information undermined his diagnosis and competency assessment. Appellant's Brief, pp. 84, 90-113. Throughout, Mr. Eaton identified the state court competency rulings and explained how they were undermined by trial counsel's deficient performance, Appellant's Brief, pp. 74-77, 78-83, and he argued that the decisions were unreasonable under §§ 2254(d)(1) and (d)(2). *Id.,* pp. 71-72, 109, 117-121.[1] The argument that Mr. Eaton "did not explain

[1] Contrary to Respondent's incorrect representation to the contrary, BIO 24, Mr. Eaton also addressed the implications of the foregoing facts on his right to a hearing under 28 U.S.C. § 2254(e)(2). Appellant's Brief, pp. 117-120.

which of the Wyoming Supreme Court factual findings were unreasonable based on the state court record," BIO 23, is disingenuous at best.

Petitioner presents more than a simple disagreement with the decision of the court of appeals. BIO 23. Mr. Eaton also points to sound jurisprudential reasons for taking up this issue. Contrary to Respondent's argument, BIO 23-24, the issue presented is broader than simply whether other circuits have treated diligent habeas petitioners as falling inside or outside of *Brumfield*'s holding. To the contrary, it involves how federal courts should treat habeas petitioners whose compelling evidence supporting their constitutional claims was not presented in state courts in spite of their diligence.[2] Should the federal court consider the claim not "adjudicated on the merits," as in *Gordon v. Braxton,* 780 F.3d 196, 202 (4th Cir. 2015), *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)? How thinly may a federal court slice the issue of whether a state court adjudicated a claim? In *Thomas v. Warner,* 428 F.3d 491, 501 (2005), the court concluded that "[o]ur review of whether counsel's conduct was objectively unreasonable is *de novo*, as the Pennsylvania courts never reached this issue, having denied the claim on strategy grounds." The court did address whether petitioner was diligent in state court, but only in connection with the district court's decision to conduct a hearing pursuant to § 2254(e)(2).[3] *Id.,* at 498. *Brumfield* clearly protects diligent habeas petitioners through the "unreasonable determination of facts" clause of § 2254(d)(2). *Brumfield v. Cain, supra,* at 2273.

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[2] The district court found that Mr. Eaton's mental health evidence was undeveloped because of deficient state court procedures "despite [appellate counsel's] clearly diligent effort." App. 236.

[3] Contrary to Respondent's claim, BIO 24, Mr. Eaton *did* argue that a hearing was appropriate under 28 U.S.C. § 2254(e)(2). Appellant's Brief, pp. 117-118 ("Just as in [*Williams v. Taylor,* 529 U.S. 420, 437 (2000)], 'comity is not served by saying a prisoner "has failed to develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2).'")

The decision below injects considerable confusion into the interplay between 28 U.S.C. § 2254(d)(1), (d)(2) and § 2254(e)(2). In suggesting that new evidence not developed in state court despite petitioner's diligence might "give rise to an altogether different claim," not subject to *Pinholster's* evidentiary restriction, Justice Sotomayor "assume[d] 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." *Cullen v. Pinholster, supra,* at 215, n. 5 (Sotomayor, J., dissenting). The decision below demonstrates that *Pinholster* has indeed created a "new set of procedural complexities," *id.,* at 214, that require additional guidance from this Court to avoid *Pinholster's* "potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court." *Id.,* at 217. Certiorari should be granted to preserve the writ for diligent habeas petitioners who were denied reasonable opportunity to present meritorious claims in state court.

III. CAN A HABEAS PETITIONER WAIVE HIS RIGHT TO *DE NOVO* REVIEW?

If Mr. Eaton is correct that his federal *Strickland* "failure-to-investigate" claim is "new" or "different" than his state "failure-to-address-competency" claim, then he was entitled to *de novo* review under *Cullen v. Pinholster,* 563 U.S. 170, 186, n. 10 (2010). The court of appeals avoided this issue because it was addressed more thoroughly in his reply brief. App.13. That decision raises the question of whether a habeas petitioner can default his right to *de novo* review, or, in other words, whether an appellate court must *sua sponte* apply the correct standard of review. Respondent admits that Mr. Eaton "has always claimed the *de novo* standard of review applied to his ineffective assistance of counsel claim," BIO 26, and that "there are differences among the circuits about whether the standard of review can be waived in a habeas proceeding." BIO 25.

Respondent's primary position is that the court of appeals did not default Mr. Eaton's right to *de novo* review, only an argument in support of *de novo* review. BIO 24, 26. That is a distinction without a difference; if his *Pinholster* "new or different claim" argument is correct, he certainly was entitled to *de novo* review, and the court of appeals decision to default that argument ultimately had the effect of denying Mr. Eaton the standard of review to which he was entitled. The Sixth Circuit explicitly rejected Respondent's position in similar circumstances in *Ray v. Maclaren*, 655 Fed.Appx. 301, 308 (6th Cir. 2016). Ray argued in his initial brief for the Sixth Circuit that the state court unreasonably applied *United States v. Cronic,* 466 U.S. 648 (1984) to his case. *Id*. In his reply brief, Ray additionally argued that the state court decision was contrary to clearly established federal law and that the state court failed to adjudicate his *Cronic* claim on the merits. *Id*. Stating, "[a]n argument concerning the standard of review cannot be waived," the court considered all of Ray's arguments and found the third argument "most persuasive." *Id*., at 308 n.5.[4] The Seventh Circuit similarly stated, "waiver does not apply to *arguments regarding* the applicable standard of review." *Winfield v. Dorethy*, 871 F.3d 555, 560 (7th Cir. 2017) (emphasis added). In *Langley v. Prince*, 926 F.3d 145, 162 (5th Cir. 2019), the Fifth Circuit applied AEDPA deference based on issues not raised by the state. Regardless of how the issue is characterized, the ruling below sits on one side of a well-defined split between the circuits.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

[4] On remand, the district court held the state did not adjudicate Ray's *Cronic* claim, applied *de novo* review, and granted relief. *Ray v. Bauman*, 326 F.Supp.3d 445, 459; 471 (E.D. Mich. 2018).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that the original plus ten true and correct copies of Petitioner's Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were forwarded, postage prepaid, to:

Scott S. Harris, Clerk
United States Supreme Court
One First Street N.E.
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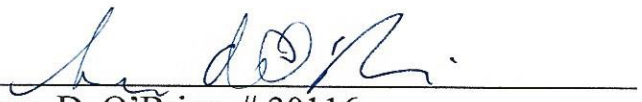
this 13th day of April, 2020.



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