

No. 25-

In the Supreme Court of the United States

BIRT FORD,
PETITIONER,

v.

ANDREW COLE,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act permits federal habeas relief when a state prisoner proves that the state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law” or was “based on an unreasonable determination of the facts.” 28 U.S.C. § 2254(d). To obtain a federal evidentiary hearing, a prisoner must show—subject to two exceptions not applicable here—that they exercised “diligence,” by making “a reasonable attempt, in light of the information available at the time, to investigate and pursue [their] claims in state court.” *Williams v. Taylor*, 529 U.S. 420, 435 (2000); 28 U.S.C. § 2254(e)(2). The question presented is:

Whether, consistent with §§ 2254(d) and (e)(2), a federal court may deny an evidentiary hearing for lack of diligence and deny habeas relief for lack of evidence when the prisoner presented a colorable claim in state court and pursued available procedures to develop the claim’s factual basis, only for the state court to deny any opportunity for such development and then reject the claim because the prisoner “did not provide any evidence.” App. 77a.

PARTIES TO THE PROCEEDINGS

Petitioner Birt Ford was the petitioner in the district court and the court of appeals.

Respondent Andrew Cole is the warden of the Pendleton Correctional Facility and is being sued in his official capacity. In district court proceedings, Dushan Zatecky was the warden of the Pendleton Correctional Facility. In the court of appeals proceedings, Dennis Reagle was the warden of the Pendleton Correctional Facility. Pursuant to Federal Rule of Appellate Procedure 43(c) and Supreme Court Rule 35.3, Mr. Zatecky and later Mr. Reagle were automatically substituted as a party in this case.

RELATED PROCEEDINGS

United States Court of Appeals (7th Cir.):

Ford v. Reagle, No. 21-3061, 2025 WL 3637961 (7th Cir. Dec. 15, 2025). Rehearing denied Dec. 15, 2025.

Ford v. Reagle, 154 F.4th 884 (7th Cir. 2025). Judgment entered Sept. 22, 2025.

United States District Court (S.D. Ind.):

Ford v. Zatecky, No. 1:20-cv-01639-RLY-TAB, (S.D. Ind. Sept. 28, 2021). Judgment entered Sept. 28, 2021.

Ford v. Zatecky, No. 1:20-cv-01639-RLY-TAB, (S.D. Ind. Sept. 1, 2020). Order denying motion for evidentiary hearing.

Indiana State Court (Post-Conviction Proceedings):

Ford v. State, No. 19A-PC-2721, 145 N.E.3d 120 (Ind. Apr. 23, 2020). Order denying petition to transfer.

Ford v. State, No. 19A-PC-2721, 145 N.E. 3d 140 (Ind. Ct. App. 2020). Judgment affirmed Mar. 20, 2020.

Ford v. State, No. 02D04-0708-PC-000101 (Allen Sup. Ct. Oct. 18, 2019). Judgment entered Oct. 18, 2019.

Indiana State Court (Trial and Direct Appeal):

Ford v. State, No. 02A03-0510-CR-510, 869 N.E.2d 446 (Ind. Jan. 3, 2007). Order denying petition to transfer.

Ford v. State, No. 02A03-0510-CR-510, 856 N.E.2d 795, Ind. Ct. App. 2006). Judgment affirmed Nov. 6, 2006.

Ford v. State, No. 02D04-0506-FA-000032 (Allen Sup. Ct. Sept. 9, 2005). Judgment entered Sept. 9, 2005.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Birt Ford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit is published at 154 F.4th 884 and is reproduced in the appendix to this petition at App. 3a–25a. The order of the district court denying Petitioner’s writ of habeas corpus is unpublished and is reproduced in the appendix to this petition at App. 26a–62a.

JURISDICTION

The Seventh Circuit issued its opinion and judgment on September 22, 2025. It denied a petition for rehearing on December 15, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

On March 6, 2026, Justice Barrett granted Petitioner’s application for extension of time to file a petition for writ of certiorari, from March 15 to April 14, 2026.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides that:

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

28 U.S.C. § 2254(d), provides that:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence

presented in the State court proceeding.

28 U.S.C. § 2254(e)(2) provides that:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

INTRODUCTION

A week before his criminal trial, Birt Ford spoke for the first time to his court-appointed defense attorney, Mitchell Hicks. App. 134a. “[D]uring this conversation,” “Mr. Hicks told” Ford that the “State was willing to negotiate” a plea, and Ford asked Hicks to “go see what kind of deal they would offer.” *Id.* But Hicks “never did what [Ford] requested concerning this potential plea agreement.” *Id.* Ford proceeded to trial and a jury convicted him of multiple felonies and misdemeanors. He was sentenced to seventy years imprisonment.

Ever since, Ford has consistently argued that his trial counsel was constitutionally ineffective. He has repeatedly tried to marshal evidence in support of that claim. In state postconviction proceedings, Ford—proceeding pro se—mailed interrogatories to Hicks, moved to compel Hicks to respond to these interrogatories, moved to depose Hicks, and requested an evidentiary hearing to develop the evidence. App. 10a. The state postconviction court denied each of these requests. The state appellate court then denied Ford relief because, in its view, Ford “did not provide any evidence” in support of his ineffective-assistance claim beyond “his own self-serving affidavit.” App. 77a.

Stymied in state court, Ford filed a habeas petition in federal district court. The Antiterrorism and Effective Death Penalty Act imposes several requirements on prisoners seeking such relief.

To start, Ford needed to show that the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law,” 28 U.S.C. § 2254(d)(1), or was “based on an unreasonable determination of the facts,” *id.* § 2254(d)(2). As to

§ 2254(d)(1), this Court has held that counsel is ineffective if they negotiate a plea offer but fail to communicate the offer back to the client. *Missouri v. Frye*, 566 U.S. 134, 145 (2012). A lawyer who does even less—i.e., who does not even negotiate, even though the State is willing to talk and the client asks his counsel to pursue negotiations—is even more clearly ineffective. And as to 28 U.S.C. § 2254(d)(2), it would be difficult to imagine a more patent example of a state court “decision that was based on an unreasonable determination of the facts” than faulting a prisoner for failing to obtain evidence that the state court prevented him from obtaining.

Satisfying § 2254(d) alone does not entitle a prisoner to relief. *See Brown v. Davenport*, 596 U.S. 118, 134 (2022). Instead, it clears the path for federal adjudication. That in turn raises the critical question of whether 28 U.S.C. § 2254(e)(2) permits Ford an evidentiary hearing to obtain the necessary factual development that the state courts here denied.

There is no statutory bar to holding such a hearing. Section 2254(e)(2) states that a federal court “shall not hold an evidentiary hearing on [a] claim” if “the applicant has failed to develop the factual basis of a claim in State court proceedings.”¹ And this Court has explained that “a failure to develop the factual basis of a claim is not established unless there is [a] lack of diligence,” which “generally” means that a state prisoner must, to show diligence, have “presented that claim to the state court in accordance with state procedures.” *Williams v. Taylor*,

¹ The statute recognizes two narrow exceptions to this rule, neither of which applies here.

529 U.S. 420, 432 (2000); *Shinn v. Ramirez*, 596 U.S. 366, 371 (2022).

In line with this understanding, eight courts of appeals have recognized that, when a prisoner presents a colorable claim for relief and seeks “an evidentiary hearing in the manner required by state law” and the “state court just refuse[s]” to hold one, then “[n]othing bars the district court from holding a hearing.” *Fooks v. Superintendent, Smithfield SCI*, 96 F.4th 595, 597 (3d Cir. 2024); see also, e.g., *Rodney v. Garrett*, 116 F.4th 947, 956–57 (9th Cir. 2024); *Harrison v. Quarterman*, 496 F.3d 419, 429 (5th Cir. 2007).

The Seventh Circuit has taken a different approach. Despite Ford’s efforts to develop the record in state court, the panel below held that he was not diligent. App. 21a–23a. That is because, it noted, Ford “was represented by counsel” for eleven years in state postconviction court before he began litigating his case pro se. App. 21a. During those eleven years, Ford’s counsel failed to “develop[] a factual basis for [Ford’s] *Strickland* claim.” *Id.* Such “failures,” the panel determined, “are imputed to Ford,” and bar Ford from having any opportunity, in state or in federal court, to obtain the evidence he needs to substantiate his ineffective-assistance claim. *Id.*

To its credit, the Seventh Circuit recognized that Ford’s “postconviction counsel’s performance” was “especially concerning.” App. 21a n.3. So concerning, in fact, that Ford fired his postconviction counsel. And the year after postconviction counsel withdrew from this case, the Indiana Supreme Court suspended postconviction counsel’s license after determining that he had, for several clients over several years, “neglected [his] representation after collecting his fee” and “fail[ed] to

withdraw from representation upon being discharged.” *In re Welke*, 131 N.E.3d 161, 164, 165 n.3 (Ind. 2019).

Despite these concerns, the Seventh Circuit claimed that its hands were tied. In its view, Ford’s manifold efforts to develop the record *after* counsel’s withdrawal—mailing interrogatories, submitting receipts documenting his efforts, moving to compel and depose, moving for an evidentiary hearing—were no more than an “eleventh-hour request for court assistance,” and thus irrelevant to establishing diligence. App. 22a. Instead, “[u]nder *Shinn* and *Williams*, postconviction counsel’s neglect is attributed to Ford,” and the length of that neglect alone is enough to demonstrate a lack of diligence, regardless of Ford’s own actions to present his claim and later develop the record. *Id.*

That is not what *Williams* and *Shinn* held. *Williams* states that “[d]iligence for purposes of” § 2254(e)(2) “will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court.” *Williams*, 529 U.S. at 435, 437. No one disputes that Ford did that and more. *Shinn* reaffirms that prisoners must “raise their federal claims in compliance with state procedures,” and that their claims are defaulted if they do not do so. 596 U.S. at 378. Ineffective assistance by postconviction counsel, *Shinn* adds, does not provide cause to overcome this default, because the failures of postconviction counsel are imputed to the client. *Id.* at 382. But this case does not implicate that holding, because Ford did not default. To the contrary, he properly raised his claim in state postconviction proceedings and then repeatedly and unequivocally requested evidentiary development of it in both state and federal court.

In other words, unlike *Shinn*, Ford does not tie his request for an evidentiary hearing to the failures of his postconviction counsel. Instead, he seeks a hearing because he complied with the applicable state rules to develop the evidentiary record, but the record remains undeveloped because the state court denied his procedurally proper requests.

The panel's decision is all the more startling because no other state or federal court has even once suggested that Ford was dilatory or insufficiently diligent. To the contrary, after summarizing Ford's attempts to develop the record, the federal district court here opined that "precedent would suggest" that "Ford was diligent in his pursuit of testimony from his trial counsel." App. 42a n.2.

The State did not discuss or challenge this understanding on appeal. It did not even cite *Williams* or *Shinn* in its brief, much less ask the Seventh Circuit to find Ford not diligent. The panel reached that conclusion on its own. In so doing, the panel identified no state deadline that Ford missed, no state rule that he violated, and no discernible standard by which a prisoner might know whether his efforts come too early or arrive too late.

At bottom, the panel engrafted a "know it when you see it" time bar onto § 2254(e)(2). But the statutory text contains no such bar, this Court's precedents have not recognized one, and no other court of appeals has applied one. The rigidity of that bar, invoked even when a prisoner has made a reasonable attempt to investigate their claims in state court, would be devastating to those with meritorious claims. This Court should grant review and reverse.

STATEMENT OF THE CASE

A. Statutory framework.

In Indiana, there is “no statute of limitations for a postconviction petition”: “Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims that the conviction or the sentence was in violation of the Constitution of the United States may institute at any time a proceeding” to “secure relief.” *Thompson v. Brown*, 901 F.3d 851, 854 (7th Cir. 2018); Ind. P.C.R. 1(a) (cleaned up).

In these postconviction proceedings, Indiana prisoners may either be counseled or proceed pro se. When a prisoner is represented by a public defender, they “need not worry about delay” when “the public defender review[s] his petition, because that time [is] not his responsibility.” *Thompson*, 901 F.3d at 855 (citing *Douglas v. State*, 634 N.E.2d 811 (Ind. Ct. App. 1994)). In all events, a counseled prisoner—whether represented by a public defender or a private attorney—may not file a pleading or motion on their own in Indiana postconviction proceedings. Instead, “[e]very pleading or motion” must “be signed by” an “attorney of record.” Ind. R. Trial P. 11(A). If “an issue of material fact is raised” in a petitioner’s “pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted,” then the postconviction “court shall hold an evidentiary hearing as soon as reasonably possible.” Ind. P.C.R. 1(4)(g).

On the other hand, if the “petitioner elects to proceed pro se,” the State may move that “the cause [be] submitted upon affidavit rather than hold an evidentiary hearing.” Ind. P.C.R. 1(9)(b); App. 30a n.1. The State

may make no such motion when a prisoner is represented. *See* Ind. P.C.R. 1(9)(b).

B. Indiana proceedings.

1. In June 2005, Birt Ford was charged with various crimes arising from an incident with his wife. App. 4a. The next month, the state court appointed Mitchell Hicks to serve as Ford’s trial counsel. On July 13, 2005, the State prosecutor “sent to” Hicks “a letter” in which the prosecutor “offered to discuss” “guilty plea negotiations.” Dist. Ct. Dkt. 1 at 13. Ford instructed Hicks to “go see what kind of deal they would offer,” but Hicks “never did what [Ford] requested concerning this potential plea agreement.” App. 134a. As a result, Ford proceeded to trial. A jury found him guilty of rape, burglary, and other offenses, and Ford was later sentenced to seventy years imprisonment. App. 4a. His conviction and sentence were affirmed on direct appeal. *Id.*

2. In August 2007, Ford filed a petition for postconviction relief in Indiana state court. *Id.* His petition alleges that Hicks “fail[ed] to pursue plea negotiations.” App. 12a. Ford was initially represented by a state public defender. That attorney withdrew in October 2010. App. 10a. Ford subsequently retained Brent Welke.

In the years that followed, Ford regularly attempted to contact Welke, but Welke often dodged Ford’s calls. Finally, Ford reached Welke, learned that Welke had done no work on his case, and fired him. Welke withdrew in November 2018. The next year, four of the five justices of the Indiana Supreme Court voted to suspend Welke’s license without automatic reinstatement. *In re Welke*, 131 N.E.3d 161, 165 (Ind. 2019). The fifth voted for permanent disbarment. *Id.* at 166.

In reaching this conclusion, the Indiana Supreme Court noted that Welke had been the subject of numerous misconduct complaints by his former clients. *Id.* at 164. “While the misconduct in each case has differed slightly, the cases collectively paint the picture of an attorney whose primary motivation appears to be the collection of legal fees rather than the provision of a valuable service for his clients.” *Id.* at 164–65.

In one instance, Welke engaged in a “bait and switch” representation” where Welke displaced “an experienced public defender” by “exploiting inaccurate stereotypes about public defenders and the particular vulnerability of defendants and their family members to unrealistic expectations.” *Id.* at 165. “In the end, switching from the public defender to [Welke] earned [the] Client a lighter wallet, comprehensively shoddier legal representation, weakened bargaining power, the inability to meaningfully participate in his own defense, . . . and several more years in prison than he otherwise would have received.” *Id.* In another case, Welke “charg[ed] unreasonable fees, fail[ed] to withdraw from representation upon being discharged . . . , and fail[ed] to refund unearned fees.” *Id.* at 164–65 n.3.

3. On November 15, 2018, one day after Welke withdrew, the State “moved to require Ford to submit [his] case by affidavit”—i.e., to proceed without an evidentiary hearing. App. 30a & n.1. One day after that, and without giving Ford an opportunity to respond, the Indiana postconviction court granted the State’s request. App. 120a–21a. Ford did not learn of the State’s motion or the court’s decision to grant that motion until a week later, when sorting through his prison mail.

Upon learning of the court’s order, Ford, now pro se, filed an objection and told the court that, as a prisoner, he

did “not have access [sic] to e-filing/e-mail,” could not “access [the] court order or any other documents on-line,” and did “not want to miss a vital date set by this court because he did not receive the order and cannot access on-line documents.” Seventh Cir. Dkt. 20 at 88. The Indiana postconviction court overruled Ford’s objection, concluding that it was “unsupported by any evidence or citation to authority.” *Id.* at 91.

Ford then “mailed interrogatories to Hicks,” (his trial attorney), and “asked the [postconviction] court for assistance to compel Hicks to file an affidavit responding to [these] interrogatories.” App. 10a. In his motion, Ford explained that Hicks had “twice failed to respond to his letters” regarding the failure to negotiate a plea. App. 30a. As support for this point, Ford “included receipts showing the second round of letters was sent via certified mail.” *Id.* The postconviction court denied this request. App. 30a–31a. Without acknowledging these certified mail receipts, the court stated that there was “nothing in the record” indicating that Ford had “actually requested any such affidavits from counsel.” App. 127a.

Ford next “moved for a court order to depose Hicks.” App. 10a. The postconviction court denied that motion as well. *Id.* The court later denied Ford’s request for an evidentiary hearing and ultimately dismissed his petition. On Ford’s plea-bargaining claim, the postconviction court held that, because Ford did “not assert that he would have admitted his guilt,” he did not demonstrate that such negotiations “would have affected the outcome of the proceedings.” App. 112a.

4. The Indiana Court of Appeals affirmed, but on a different ground. It “rested its decision on the lack of evidence corroborating Ford’s factual narrative.” App.

18a. The court faulted him for producing “no evidence beyond Ford’s own ‘self-serving affidavit’ [that] supported his version of events.” App. 12a. It added that, because “Ford’s trial counsel did not provide any evidence in this proceeding, we may presume that he would not have corroborated Ford’s account.” App. 77a. The Indiana Supreme Court denied further review.

C. Federal proceedings.

In June 2020, Ford filed a federal habeas petition in the Southern District of Indiana. The petition reiterated Ford’s plea-bargaining claim and renewed his request for an evidentiary hearing.

1. The federal district court determined that the Indiana Court of Appeals had committed a “misstep” in resolving Ford’s plea-bargaining claim. App. 39a. The Indiana Court of Appeals had “presume[d] that [Hicks] would not have corroborated Ford’s account” because Ford “did not provide any evidence” beyond his own affidavit. App. 38a. But this “analysis,” the district court explained, “ignores the fact that Ford tried to obtain trial counsel’s testimony, both by writing him letters and by asking the trial court to compel him to provide an affidavit, participate in a deposition, or hold an evidentiary hearing.” *Id.*

The district court thus “harbor[ed] concerns about Ford’s ability to fairly litigate this claim given the post-conviction court’s refusal to hold an evidentiary hearing or otherwise assist Ford in procuring testimony from his attorneys.” App. 40a. There is, it observed, “an evidentiary lacuna when it comes to Ford’s claim about trial counsel’s performance during the plea-bargaining process.” *Id.* “Without trial counsel’s testimony, we don’t know what counsel did or did not do.” *Id.* “For example,

it is possible that counsel did communicate with the prosecutor, who may have had a plea agreement drafted, and then he forgot to communicate the plea to Ford”—which would have been a textbook example of ineffective assistance. App. 40a–41a. Furthermore, the district court added, the relevant “precedent would suggest” that Ford, through his pro se efforts, was “diligent in his pursuit of testimony from his trial counsel.” App. 42a n.2.

The district court nonetheless declined to grant Ford’s petition or his request for an evidentiary hearing. Instead, it “looked through” the decision of the Indiana Court of Appeals to analyze and “examine the post-conviction court’s” reasoning for “reject[ing] . . . Ford’s plea bargain claim.” App. 13a, 39a. The district court reasoned that “[b]ecause Indiana does not permit pleas if a defendant refuses to admit his guilt,” and because “there is evidence that Ford maintained his innocence,” it follows that “the post-conviction court reasonably concluded that Ford [had] failed to meet his burden.” App. 40a.

The district court, however, acknowledged that “jurists of reason could disagree” on its resolution of Ford’s ineffective-assistance claim, and so granted Ford a certificate of appealability. App. 42a.

2. On appeal, Ford repeated his request for an evidentiary hearing under 28 U.S.C. § 2254(e) and for habeas relief under 28 U.S.C. § 2254(d). Ford also argued that the district court erred when it examined the reasons that the postconviction court gave for rejecting Ford’s plea-bargaining claim, because AEDPA requires that federal courts examine the last reasoned opinion by a state court, rather than stitch together multiple state court opinions.

The Seventh Circuit agreed with Ford on this latter point, crediting the argument as “well taken.” App. 17a. As the panel explained, “nothing in the [state] appellate court’s decision suggests that the appellate panel adopted the trial judge’s rationale; in fact, the court never mentioned it.” *Id.* Rather, the Indiana Court of Appeals “rested its decision on the lack of evidence corroborating Ford’s factual narrative on the plea-negotiation claim—and most significantly, the absence of any testimony from Hicks.” App. 18a. And “[a]s the last reasoned state-court decision on the merits,” a federal court must “focus” its “review on the appellate court’s reasons rather than the trial judge’s.” *Id.*

Having recognized the district court’s error, however, the panel then invoked for the first time a new obstacle to relief. Drawing on *Williams v. Taylor*, 529 U.S. 420 (2000), and *Shinn v. Ramirez*, 596 U.S. 366 (2022)—neither of which had been cited by any other court in this case or briefed by the parties—the panel concluded that Ford could “not establish diligence under § 2254(e)(2).” App. 22a. In its view, “the responsibility to develop the factual record rested with Ford’s postconviction counsel.” *Id.* “His attorneys are at fault for not doing so,” and “[u]nder *Shinn* and *Williams*,” “their 11-year failure to act is imputed to Ford,” thereby barring a finding of diligence as a matter of law. *Id.*

The panel acknowledged (1) that Ford’s “description” of his postconviction counsel’s performance was “especially concerning,” (2) that “the Indiana Supreme Court later suspended counsel’s license for misconduct,” and (3) that Ford later tried to expand the record while pro se. App. 10a–11a, 21a n.3. But the court of appeals determined that any “ineffective assistance in developing the state-court record is attributed to the prisoner,” and

characterized Ford’s pro se efforts as an unavailing “eleventh-hour request for court assistance.” App. 22a. In addition to rejecting Ford’s request for a hearing, the panel denied Ford habeas relief under 28 U.S.C. § 2254(d) and reasoned, as to § 2254(d)(2), that the Indiana Court of Appeal’s “decision was rooted in factual *deficiencies*, not factual *determinations*.” App. 20a.

The Seventh Circuit denied a petition for rehearing on December 15, 2025. App. 131a.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT’S APPROACH CONFLICTS WITH EIGHT OTHER COURTS OF APPEALS.

In *Williams v. Taylor*, this Court held that, under § 2254(e)(2), “a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” 529 U.S. at 432. “Diligence for purposes of [this provision] depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.” *Id.* at 435. That means a prisoner should, “at a minimum,” usually “seek an evidentiary hearing in state court in the manner prescribed by state law.” *Id.* at 437. *Shinn v. Ramirez* reinforces this fundamental instruction: “A federal habeas court generally may consider a state prisoner’s federal claim only if he has first presented that claim to the state court in accordance with state procedures.” 596 U.S. at 371.

A. Eight courts of appeals permit additional factual development in federal court when a prisoner presents their claim in state court and follows state procedures.

1. Consistent with these principles, eight circuits have recognized that a habeas petitioner is diligent when they have presented a colorable claim in state court and followed state procedures, but the state courts have blocked additional evidentiary development.

The Third Circuit’s decision in *Fooks v. Superintendent, Smithfield SCI*, 96 F.4th 595 (3d Cir. 2024), is instructive. Like this case, *Fooks* involved an alleged breakdown in plea bargaining: here, the failure to negotiate; there, the failure to give proper advice about the parole consequences of a plea. If true, such claims would clear the hurdle of § 2254(d) because, as *Fooks* explains, “[t]he Supreme Court has clearly established that a lawyer’s incorrect advice can violate *Strickland* when it affects ‘the outcome of the plea process.’” *Id.* at 598 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

In addition, as here, the state court in *Fooks* denied relief because the petitioner relied only on “his own bare allegations;” consequently, “nothing in the record supported Fooks’ claim.” *Compare id.* at 596–97 (cleaned up); *with* App. 77a (“The only support for Ford’s claim . . . is provided by his own self-serving affidavit.”). But that is because—again, just like this case—“Fooks never got to fully develop that record.” 96 F.4th at 597. “Although he repeatedly asked for an evidentiary hearing,” the “state court just refused” to grant him one. *Id.* That fact pattern cleared the path for Fooks to obtain a federal evidentiary hearing under § 2254(e)(2).

In reaching that conclusion, the Third Circuit acknowledged that “habeas relief is hard to get.” *Id.* at 596. But “courts must give petitioners a fair shot.” *Id.* “Because Fooks never got the state evidentiary hearing that he sought, he should have gotten a federal one,” as “he is asking for his first bite at the apple, not a second.” *Id.* at 597, 599.

2. In *Rodney v. Garrett*, the Ninth Circuit examined both *Williams* and *Shinn*, and determined, based on its review of those cases, that “[a] prisoner is not at fault for purposes of § 2254(e)(2) when his diligent efforts to perform an act are thwarted by the conduct of another or by happenstance.” 116 F.4th 947, 956 (9th Cir. 2024) (cleaned up).

From that starting point, the Ninth Circuit explained that when a petitioner “request[s] the appointment of post-conviction counsel,” and the state court does “not appoint counsel,” does “not allow discovery,” and “decline[s] to hold an evidentiary hearing,” then the prisoner does “not fail to develop the state-court record within the meaning of § 2254(e)(2).” *Id.* at 956–57. That is because the prisoner has done “all that he could”; an “indigent prisoner who is denied counsel and discovery has no practical likelihood of obtaining” and “develop[ing] the evidentiary bases of his IAC claims.” *Id.* at 957.

Like the petitioner in *Rodney*, Ford also did “all that he could.” *Id.* He hired counsel and, while represented, could not bring any motions on his own, given Indiana’s bar on hybrid representation. Ind. R. Trial P. 11(A). After Ford fired his counsel, he repeatedly tried to expand the record, but there was no “practical likelihood” that he could do so from prison on his own without court assistance. 116 F.4th at 957. The state court’s refusal to

provide that assistance is why factual development is both necessary and appropriate in federal court.

3. In *Harrison v. Quarterman*, 496 F.3d 419, 429 n.6 (5th Cir. 2007), the petitioner “requested an evidentiary hearing” in state proceedings. He also sought to obtain an affidavit from a corroborating witness but was barred from doing so because the Texas Department of Criminal Justice “prevented him from corresponding with” that witness. *Id.* at 428. Assuming these facts to be true, the Fifth Circuit determined that petitioner’s allegations were sufficient to satisfy *Strickland*. *Id.* It added, as to § 2254(e)(2), that petitioner’s “failure to obtain an affidavit” is “not attributable to him,” and remanded to the district court for further development of the record. *Id.* at 428–29.

Notably, the Fifth Circuit declined to credit respondent’s argument that the prisoner was not diligent because he waited “ten months after his conviction became final” before “attempt[ing] to” contact a corroborating witness. *Id.* at 428. Respondent, the Fifth Circuit observed, “apparently wants this court to read § 2254(e)(2)’s diligence requirement as mandating that a habeas petitioner act ‘as soon as possible,’ but that is not the law.” *Id.* at 429. The law, instead, turns on “whether the prisoner made a *reasonable attempt*, in light of the information available at the time, to investigate and pursue claims in state court.” *Id.* (quoting *Williams*, 529 U.S. at 435) (emphasis in original). By attempting to contact the witness “while his state habeas petition was still pending,” and by seeking an evidentiary hearing, the prisoner in *Harrison* had checked that box. *Id.*

4. The Tenth Circuit has also recognized that when a petitioner “raise[s] [an] issue in his state application for post-conviction relief” and “ask[s] the trial court for a

hearing,” but “the court refuse[s],” that is “sufficient to satisfy § 2254(e)’s diligence requirement.” *Stouffer v. Trammell*, 738 F.3d 1205, 1219 (10th Cir. 2013). And in *Milton v. Miller*, 744 F.3d 660, 663 (10th Cir. 2014), it applied that understanding to a claim that “trial counsel failed to inform [the prisoner] of a favorable pretrial plea offer.” Were that so, then the state court’s resolution of the claim would have triggered § 2254(d). *Id.* at 671–72.

Tellingly, in *Milton*, the State filed—unlike this case—an affidavit from one of the prisoner’s trial attorneys stating that he had in fact informed the petitioner of the State’s plea offer. *Id.* at 664. But the Tenth Circuit ruled that it could not “simply assume the credibility of” this affidavit over the prisoner’s “sworn assertions” otherwise. *Id.* at 672. “In the end,” the affidavit “simply creates a dispute of fact which has never been explicitly resolved by any court and which the record is inadequate to resolve.” *Id.*

5. Likewise, in *Fulton v. Graham*, 802 F.3d 257, 261 (2d Cir. 2015), the prisoner argued in state court proceedings “that his trial counsel was ineffective for failing adequately to advise him regarding [a] plea offer.” As here, that prisoner was not granted an evidentiary hearing in state court and could thus rely only on his own affidavit.

But unlike the Seventh Circuit, the Second Circuit held that “[a]lthough they may later be subject to challenge, [these] sworn assertions provide sufficient reason at this stage to believe that he may be entitled to relief upon further development of the relevant facts.” *Id.* at 266. The Second Circuit added that it saw “no basis to conclude that” the prisoner had “failed to develop the factual basis of [his] claim,” since he had “request[ed] an evidentiary hearing” in state court and followed the

relevant procedures in state and federal habeas to develop his claim. *Id.*

6. Similarly, in the Eleventh Circuit, “when a petitioner request[s] an evidentiary hearing at every appropriate stage in state court and [is] denied a hearing on the claim entirely, the petitioner has satisfied the diligence requirement.” *Pope v. Sec’y for Dep’t of Corr.*, 680 F.3d 1271, 1289 (11th Cir. 2012). Applying that rule in *Pope*, the court determined that the petitioner had “exercised diligence in attempting to develop the factual basis of his . . . claims before the state court” because he “requested an evidentiary hearing on these claims at every appropriate stage of the state court collateral proceeding.” *Id.* It added that “these allegations, considered together, are powerful, and *if* he is able to prove they are true, he would be entitled to habeas relief.” *Id.* at 1294.

7. The Sixth Circuit likewise recognizes that an individual is diligent if they “request[] an evidentiary hearing on the issue of ineffective assistance of counsel at every stage of her post-conviction proceedings,” but those “requests [are] denied in the state courts.” *McFarland v. Yukins*, 356 F.3d 688, 712 (6th Cir. 2004).

8. Finally, the Fourth Circuit has determined that diligence is met when a prisoner submits “affidavits in support of a specific Sixth Amendment claim” to the state court, and requests “both discovery and an evidentiary hearing” in state court—but the state court denies the opportunity “for further evidentiary development.” *Hurst v. Joyner*, 757 F.3d 389, 399 (4th Cir. 2014). Under those circumstances, the prisoner does not “fail[] to develop the factual basis of [his] claim under § 2254(e), and [federal courts] are left with an incomplete and inadequate record for review.” *Id.* at 399–400.

B. The Seventh Circuit is alone in engrafting a time bar onto § 2254(e)(2).

The Seventh Circuit’s decision diverges sharply from the decisions of these other circuits interpreting § 2254(e)(2). Under the panel’s rule, if a petitioner’s counsel does not appear to “develop the factual record” over an eleven-year period of representation, that is a *per se* bar to establishing diligence—regardless of any other fact or circumstance in the case. App. 22a.

No other federal court of appeals places a ticking clock on how quickly a petitioner must move through state court proceedings. Instead, other circuits have focused on whether an individual sought factual development at the appropriate “stage” of postconviction proceedings—which Ford indisputably did when he moved to compel, moved for an affidavit, and sought an evidentiary hearing in state postconviction court, and then renewed his request for factual development in federal court. *Pope*, 680 F.3d at 1289; *accord McFarland*, 356 F.3d at 712. These other circuits have likewise explained, *contra* the Seventh Circuit, that when a petitioner is left with only their own affidavit because the state court prevented any other factual development, then a federal court cannot simply sideline the allegations in that affidavit as “self-serving.” *See, e.g., Hurst*, 757 F.3d at 399 (prisoner’s presentation of “evidentiary affidavits in support of a specific Sixth Amendment claim to the state . . . court” was “sufficient to entitle him to . . . evidentiary hearing”); *Fooks*, 96 F.4th at 597; *Milton*, 744 F.3d at 672; *Fulton*, 802 F.3d at 266.

In short, just as this Court instructed in *Williams*, other courts of appeals focus on whether a petitioner has “made a reasonable attempt, in light of the information

available.” *Rodney*, 116 F.4th at 956. And when the petitioner has been denied a hearing in state court despite such a reasonable attempt, then “he is asking for his first bite at the apple, not a second” in federal court. *Fooks*, 96 F.4th at 597. The Seventh Circuit’s rule takes none of that context into account.

II. THE SEVENTH CIRCUIT’S DECISION IS INCORRECT.

A. The decision below is atextual.

“As with any question of statutory interpretation, our analysis begins with the plain language of the statute.” *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). This Court has reiterated that principle both for AEDPA generally, see *Harrington v. Richter*, 562 U.S. 86, 98 (2011), and for § 2254(e)(2) specifically, see *Williams*, 529 U.S. at 431.

The panel’s reasoning flouts that understanding. To start, § 2254(e)(2) does not state that petitioners have “failed to develop” their claim if they do not act within a particular period of time. It does not, in fact, say anything about time at all. It instead simply requires that petitioners raise and endeavor to develop the claim in state court proceedings given the facts and circumstances at hand.

Reading an implicit time bar into § 2254(e)(2) is all the more inappropriate because AEDPA is otherwise replete with specific and explicit timing provisions: § 2244(d)(1) specifies a one-year period of limitation to file for federal habeas; § 2244(d)(2) tolls that period when there is a pending application for postconviction relief in state

court; § 2266(b)(1)(A) requires a federal district court to “render a final determination and enter a final judgment” within 450 days for any capital case; and § 2244(b)(3)(D) requires a federal court of appeals to rule on “a second or successive application not later than 30 days after the filing of the motion.” Congress knew, in other words, how to include a timing and limitation bar. It did so repeatedly throughout AEDPA. It included no such provision in § 2254(e)(2). There is no reason for the Seventh Circuit to add one to the statute.

B. The decision below misreads this Court’s precedent.

Notwithstanding the Seventh Circuit’s assertions to the contrary, neither *Williams* nor *Shinn* endorse the panel’s imposition of a time bar on § 2254(e)(2).

1. In interpreting § 2254(e)(2), *Williams* instead stresses that courts must undertake a context-dependent inquiry: Whether a prisoner satisfies diligence “depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.” 529 U.S. at 435. “[I]n the usual case,” that means a prisoner must “at a minimum, seek an evidentiary hearing in state court.” *Id.* at 437.

The result in *Williams* illustrates how that context-dependent analysis works in practice, because the prisoner in *Williams* did *not*, in fact, “seek an evidentiary hearing in state court.” *Id.* To the contrary, in state habeas, his counsel did not “raise,” much less attempt to “develop,” the prisoner’s “claims of juror bias, prosecutorial misconduct, or the prosecution’s alleged *Brady* violation.” *Id.* at 429. Those claims made their

debut in federal habeas. *Id.* This Court nonetheless granted the prisoner an evidentiary hearing as to his juror bias and prosecutorial misconduct claims because “[t]he trial record contain[ed] no evidence which would have put a reasonable attorney on notice” of such claims. *Id.* at 442. On the other hand, because there were “repeated references” in the trial record to the purported *Brady* violation, the Court imputed postconviction counsel’s “failure to investigate these references” to the prisoner, and so denied him a hearing on that claim. *Id.* at 438–39.

To summarize: *Williams* states that diligence *usually* requires the petitioner to seek an evidentiary hearing in state court. Yet it also recognizes that diligence ultimately turns not on whether a prisoner has satisfied this *usual* requirement, but whether the prisoner’s actions were reasonable based on the information available at the time in a particular case. So long as one’s actions are reasonable—again, based on the specific circumstances in a specific case—then a prisoner has shown diligence and may obtain a hearing in federal court, even if they did not expressly request an evidentiary hearing in state court.

Under this framework, Ford stands on even firmer footing than the prisoner in *Williams*. Unlike that prisoner, Ford presented his claim in state court, sought an evidentiary hearing in state court, and moved to compel and depose his trial counsel in state court. Furthermore, the specific circumstances in this case explain why Ford filed those motions and made that request when he did: because Indiana prohibits hybrid representation, so he could not file any motions in state court on his own during the eleven years he was

represented. *Underwood v. State*, 722 N.E.2d 828, 832 (Ind. 2000).

Nor, for that matter, did Ford have any reason to suspect that these years would be held against him. The State has never asserted the affirmative defense of laches, and there is no statute of limitations in Indiana on when a postconviction petition may be filed. Moreover, under state law, the postconviction court “shall hold an evidentiary hearing” so long as a represented party can establish a dispute of material fact through their “pleadings, depositions, answers to interrogatories . . . and any affidavits.” Ind. P.C.R. 1(a) & (4)(g). Such a dispute would have been made plain had Hicks in fact been compelled to respond to Ford’s interrogatories and, in his “answers to [Ford’s] interrogatories,” denied the allegations from Ford’s affidavit. Ind. P.C.R. 1(4)(g); *Milton*, 744 F.3d at 664, 672.

The Seventh Circuit’s rule takes none of these circumstances into account. Under its rigid rule, it is irrelevant that Indiana law imposes no time bar on a prisoner for filing a postconviction petition or for developing a postconviction claim. It is likewise irrelevant that, under Indiana law, laches is an affirmative defense which the State must assert—and which it did not do here. *See Twyman v. State*, 459 N.E.2d 705, 711 (Ind. 1984). And it is irrelevant that Ford properly followed state procedures to develop his claim for relief. Indeed, under the panel’s reasoning, Ford would be in the same position if he had never filed any motions seeking depositions, affidavits, or a hearing. He would be in the same place if he had never even raised his claim at all.

That result cannot be what Congress intended. *Williams* says so clearly: “[T]he statute does not equate

prisoners who exercise diligence in pursuing their claims with those who do not,” and § 2254(e)(2) provides the means for distinguishing the former from the latter. 529 U.S. at 436. The panel’s ruling erases that distinction from the statute.

2. *Shinn* does not hold otherwise. There, the Court examined whether a petitioner may obtain a federal evidentiary hearing when they have not “presented th[eir] claim to the state court in accordance with state procedures”—when, in short, the claim is procedurally defaulted. 596 U.S. at 371. And if “ineffective assistance of state postconviction counsel” is why a claim has been defaulted, “a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record,” because “attorney ignorance or inadvertence cannot excuse procedural default.” *Id.* at 380, 382 (cleaned up).

In reaching this conclusion, *Shinn* focused on the interplay between procedural default and § 2254(e)(2). It discussed the rationale behind procedural default at length. *Id.* at 377–82. It stressed that the prisoners in *Shinn* “did not raise” their ineffective-assistance claims in state court. *Id.* at 372–74. And it explained that a federal hearing is unavailable because, were it otherwise, prisoners might “sandbag state courts by selecting a few promising claims for airing on state postconviction review, while reserving others for federal habeas review should state proceedings come up short.” *Id.* at 391 (internal quotation marks and alterations omitted).

None of those circumstances bear on this case. Ford did not sandbag. He did not default. He presented his claim in his state postconviction petition, mailed interrogatories to his trial attorney to develop his claim,

sent certified mail receipts to the state courts to prove he had done so, and repeatedly requested an opportunity to expand the record. Put simply, unlike *Shinn*, Ford is not seeking a federal hearing because of his postconviction counsel's ineffectiveness in raising a claim. He seeks a hearing for a claim he raised and sought to develop notwithstanding that ineffectiveness. The need for further factual development flows from the state court's denial of those timely requests, not the negligence of postconviction counsel.

C. The decision below is unworkable.

1. The Seventh Circuit's ruling raises serious practical problems. What is the "diligence" deadline that the next petitioner should bear in mind when proceeding through state postconviction? How should a petitioner balance taking the time to adequately investigate a complex legal question against the (undefined) hourglass that the Seventh Circuit has imposed? When should Ford have known to move on from his retained counsel?

It could not have been after three years, because that is how long the appointed public defender spent reviewing Ford's case, and all agree that this amount of time is "not [the petitioner's] responsibility." *Thompson*, 901 F.3d at 855. Was it four? Five? The Seventh Circuit offers no answers to these questions—unsurprising for a "fix" that is unmoored from text and precedent.

2. The standardless nature of the panel's inquiry is precisely what AEDPA sought to eliminate. In enacting AEDPA, Congress sought to replace an "atextual and ad hoc approach" with "a comprehensive system for addressing federal habeas claims brought by state prisoners." *Edwards v. Vannoy*, 593 U.S. 255, 279–80

(2021) (Thomas, J., concurring). The statute intends to curb judge-made law: Courts are “duty bound to enforce” the statute by its own terms, and should not establish “judge-made exceptions to judge-made barriers.” *McQuiggin v. Perkins*, 569 U.S. 383, 403–04 (2013) (Scalia, J., dissenting). Yet if that understanding requires this Court to “reject [an] equitable rewrite of § 2254(e)(2)” that favors prisoners “because it lacks any principled limit,” then the principle must go both ways. *Shinn*, 596 U.S. at 386. There cannot be a “free-and-easy approach” to judge-made barriers, but a rigid and inflexible one to judge-made exceptions. *McQuiggin*, 569 U.S. at 403. The better path—as this Court has made clear—is to construe “the language of the statute” as written. *Williams*, 529 U.S. at 431.

3. The panel’s ruling is particularly ill-suited given the realities of state postconviction review. Such review frequently takes years. The average in some states for noncapital cases is under four years, in others over a decade. Nancy J. King, et al., *Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, at 22 (2007). This Court has time and again heard § 2254 cases involving state postconviction proceedings that have lasted many years. *See, e.g., Wilson v. Sellers*, 584 U.S. 122 (2018) (eight years); *Dunn v. Reeves*, 594 U.S. 731 (2021) (fourteen years). Such proceedings frequently last as long or even longer in Indiana. *See, e.g., Edwards v. State*, 676 N.E.2d 1087, 1090 (Ind. Ct. App. 1997) (recognizing that “fourteen years is a lengthy period to seek relief, [but] the mere passage of time alone is not enough to” warrant the dismissal of a postconviction

petition); *Silvers v. State*, 250 N.E.3d 511, 517 (Ind. Ct. App. 2025) (fifteen years).

To be clear, none of this means state postconviction proceedings should be allowed to go on indefinitely. There are tools to address delay: a motion asserting laches by the State, *Twyman*, 459 N.E.2d at 711, or an order for failure to prosecute by the state court, Ind. R. Trial P. 41(E). But here no such motion was brought, no showing of prejudice was made, and no such order was filed. Contrary to AEDPA's goal of promoting federalism, then, the panel's decision to deny relief—based on a theory the State did not assert and the state courts did not recognize—does nothing to advance “state sovereignty.” *Shinn*, 596 U.S. at 376.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS AN IMPORTANT QUESTION OF FEDERAL LAW.

1. This case presents a significant issue concerning the breadth and scope of § 2254(e)(2): whether a federal evidentiary hearing is available for a colorable claim raised in state court and which the prisoner unequivocally and properly sought to develop in state court.

Here, Ford followed Indiana law by not filing motions on his own when counseled. And he followed Indiana law when, proceeding pro se, he tried nearly half a dozen times to expand the record, and documented those efforts to the postconviction court. The state courts nevertheless denied him every opportunity to develop those necessary facts. Indeed, the district court here pointed out the “evidentiary lacuna when it comes to Ford’s claim about trial counsel’s performance during the plea-bargaining

process”—a lacuna that stems from “the post-conviction court’s refusal to hold an evidentiary hearing or otherwise assist Ford in procuring testimony from his attorneys.” App. 40a.

What prevented the district court from holding an evidentiary hearing was its erroneous application of the “last reasoned opinion” rule, by looking through the reasoning of the Indiana Court of Appeals to incorporate the Indiana postconviction court’s analysis. App. 39a. On appeal, however, the Seventh Circuit held that the district court erred in so doing: “As the last reasoned state-court decision on the merits, we focus our review on the appellate court’s reasons rather than the trial judge’s.” App. 18a. But having set aside the obstacle that prevented the trial judge from holding a hearing, the court of appeals erected a new roadblock—a de facto time bar. The text of § 2254(e)(2) does not incorporate such a bar, and the Seventh Circuit cited no case law for the proposition that § 2254(e)(2) implicitly imposes one.

That is for good reason, and this case provides an opportunity for the Court to make clear why. If the panel decision stands, it creates an untenable situation for those with meritorious claims, especially claims involving the ineffective assistance of trial counsel. “While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.” *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). But if a state court denies additional factfinding despite the prisoner’s repeated attempts to expand the record, and a federal court upholds that denial based on a reason with no basis in state or federal law, then the prisoner has no opportunity—in state or federal court—to develop their

claims. Instead, they are trapped in a closed loop: no state factfinding, no federal hearing, and no federal review.

2. A federal court cannot hold an evidentiary hearing for a claim adjudicated on the merits unless a prisoner demonstrates diligence under § 2254(e)(2) and also satisfies § 2254(d).

That additional requirement, however, poses no obstacle to review here because, as the panel notes, its § 2254(d) and § 2254(e) analyses are intertwined. As the Seventh Circuit explains, these are “[e]qually important” inquiries, because the Indiana “appellate court’s decision was rooted in factual *deficiencies*, not factual determinations.” App. 20a; *see* 28 U.S.C. § 2254(d)(2) (“An application for a writ of habeas corpus . . . shall not be granted . . . unless the adjudication of the claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”). Those deficiencies are, in turn, “based on the lack of an evidentiary record,” which itself is a product of Ford’s lack of any opportunity—in state or in federal court—to develop that record. App. 20a.

On this point—that the analysis of § 2254(d)(2) and § 2254(e)(2) run together—the panel’s ruling rests on well-recognized ground. In *Brumfield v. Cain*, 576 U.S. 305, 311–12 (2015), the state court denied the prisoner an evidentiary hearing as to the prisoner’s mental competence. The district court concluded that this amounted to an unreasonable determination of the facts under § 2254(d)(2), and held a federal evidentiary hearing under § 2254(e)(2). *Id.* The courts of appeals have, consistent with this understanding, recognized that “[t]he

failure to hold a hearing could itself be an unreasonable determination of fact.” *Small v. Woods*, 146 F.4th 590, 600 (7th Cir. 2025). That is because when “a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient and not entitled to deference.” *Stermer v. Warren*, 959 F.3d 704, 721 (6th Cir. 2020) (cleaned up); *see also Hurlles v. Ryan*, 752 F.3d 768, 790 (9th Cir. 2014) (“We have held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient and not entitled to deference.”) (internal quotation marks omitted).²

* * *

Our criminal justice system is “a system of pleas, not a system of trials.” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). And when an attorney allegedly renders ineffective assistance in the plea-bargaining process, the information supporting such a claim is almost invariably outside the trial record. *Martinez*, 566 U.S. at 12. Under governing precedent, a prisoner must usually present and

² Ford argued below that the decision of the Indiana Court of Appeals was an unreasonable factual determination under § 2254(d)(2) and that, under de novo review, his trial attorney’s inaction ran afoul of *Strickland v. Washington*, 466 U.S. 668 (1984). Seventh Cir. Br. at 42–60; *see also Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (no AEDPA deference when § 2254(d) is satisfied). That said, the nature of Ford’s claim—that Ford’s attorney failed to engage in plea negotiations—would also likely satisfy § 2254(d)(1). *See Milton*, 744 F.3d at 672; *Fulton*, 802 F.3d at 266; *Fooks*, 96 F.4th at 598.

make a reasonable attempt to develop that claim in “state courts in compliance with state procedural rules.” *Shinn*, 596 U.S. at 376; *Williams*, 529 U.S. at 435. If a prisoner does that and is still barred from any additional factual development in state court, then § 2254(e)(2) ensures that the prisoner will, at the very least, be afforded some opportunity to develop and prove their claim in federal court. Because of the Seventh Circuit’s approach to § 2254(e)(2) and § 2254(d), Ford never got that opportunity.

CONCLUSION

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

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