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# Federal Evidentiary Hearings Under the New Habeas Corpus Statute

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# ARTICLES

# FEDERAL EVIDENTIARY HEARINGS UNDER THE NEW HABEAS CORPUS STATUTE

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Constitutional claims invariably turn on the underlying historical facts. In order to adjudicate claims presented in habeas corpus petitions, accordingly, the federal courts must somehow ascertain the facts. In some instances, the factual record can be augmented via discovery or expansion of the record under the federal habeas corpus rules.[1] Otherwise, disputed factual issues typically must be determined on the basis of previous litigation in state court or in independent federal evidentiary hearings.

The Anti-Terrorism and Effective Death Penalty Act of 1996 contains provisions touching fact-finding in federal habeas corpus proceedings.[2] In this preliminary sketch, I will try to fit the relevant provisions of the new law to the preexisting landscape. The Act is not as clear as it might be in a number of crucial respects. I trust that readers will indulge me in some early-inning guesswork.

Statutory construction demands attention not only to the literal dictionary definitions of isolated terms, but also to the overarching statutory scheme in which terms are located. For the meaning of statutory language, "plain or not," depends on the context in which the language is used.[3] In this instance, courts must look hard at the precise text of the new provisions on federal hearings and must respect that text as positive law. At the same time, courts must take account of other statutory provisions governing federal collateral litigation—both provisions that have been added by the 1996 Act and provisions that have been on the books for years and were not disturbed by the new law. In addition, and just as importantly, courts must accommodate the wealth of judge-crafted doc-

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[1] *See* 28 U.S.C. § 2254 Rule 6 (discovery); § 2254 Rule 7 (expansion of the record).

[2] *See* Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (1996) (to be codified at 28 U.S.C. § 2254) [hereinafter Pub. L. 104-132, § 104].

[3] *See* Brown v. Gardner, 115 S.Ct. 552, 555 (1994) (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991)). *See also* United Savings Ass'n v. Timbers of Inwood Forest, 484 U.S. 365, 371 (1988) (explaining that a statutory provision "that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.").

trine in this field, which also forms part of the background against which Congress has acted.

It is not only that preexisting statutes and decisions retain the authority they have always had, unless the new law alters them in some way. The 1996 Act constitutes a thoroughgoing reappraisal of virtually every aspect of litigation in the habeas field. Within that comprehensive overhaul of the entire system, Congress has left some longstanding statutory provisions and settled judicial doctrines intact and thus has confirmed their role in the framework the 1996 legislation sets in place.[4]

Three issues are paramount: (1) when a federal court must or can hold its own evidentiary hearing; (2) the significance to be attached to previous state court findings of fact; and (3) the consequences of the petitioner's procedural default with respect to fact-finding in state court. In my view, the new statute has no bearing on the first of these issues, but significant implications for the other two. Both the previously controlling statutes and the Supreme Court's decisions from *Townsend v. Sain*[5] to *Keeney v. Tamayo-Reyes*[6] are affected.

Previously, the statutory language in point was located in 28 U.S.C. § 2254(d). The 1996 Act repeals that language. The newly minted § 2254(d) governs the treatment the federal habeas courts must give to previous state court adjudications on the merits.[7] One feature of the new § 2254(d) bears, however, on fact-finding in state court:

> 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

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[4] It is no secret that the 104th Congress was sharply divided along ideological lines. That fact of political life explains much about how and why the bills that contributed provisions to the 1996 Act were developed. The debates in committee hearings and on the floor occurred at a level of generality well above the details of pending bills. Typically, members focused on the undifferentiated need for habeas corpus reform, on the inefficiencies associated with habeas litigation, on the relative competence of federal and state courts, and on the supposed virtues and vices of the death penalty. The result is problematic. Procedural provisions that now are understood to be enormously important were never subjected to rigorous examination. *See Habeas Corpus Reform: Hearing on S. 623 Before the Senate Comm. on the Judiciary,* 104th Cong., 1st Sess. (daily ed. March 28, 1995); 141 CONG. REC. S7803-79 (daily ed. June 7, 1995); 141 CONG. REC. H1400-34 (daily ed. Feb. 8, 1995); 142 CONG. REC. S3446-50, S3454-78 (daily ed. April 17, 1996); 142 CONG. REC. H3599-3618 (daily ed. April 18, 1996).

This is true of the provisions I mean to examine in this article. Sadly, there is no helpful legislative history on which to rely. The committee report in the House addressed only an early House bill, which included none of the provisions relevant here. *See* H.R. Rep. No. 104-23, 104th Cong., 1st Sess. (1995). There was no committee report in the Senate. The report of the Conference Committee was perfunctory, offering no explanation for these or any procedural features of the new law. *See* 142 Cong. Rec. H3305 et seq. (daily ed. April 15, 1996).

[5] 372 U.S. 293 (1963).

[6] 504 U.S. 1 (1992).

[7] *See* Pub. L. 104-132, § 104 (amending 28 U.S.C. § 2254(d)).

to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— . . .
(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.[8]

The principal provision of the 1996 Act regarding fact-finding is 28 U.S.C. § 2254(e):

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
(2) 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.[9]

## I. When a Federal Hearing Must or Can Be Held

The threshold question whether a federal habeas court must or can hold its own evidentiary hearing has long been controlled not by statute, but rather by the Supreme Court's decision in *Townsend.* In that case, the Court held that, as a general matter, a federal hearing must be conducted if the applicant alleges disputed facts that, if true, would entitle the applicant to relief.[10] Recognizing that the facts might have come to light in state court, the Court said in *Townsend*

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[8] For present purposes, I have omitted paragraph (1) of this new version of § 2254(d), even though that paragraph has drawn significant attention. Paragraph (2) may in time prove just as important. On its face, paragraph (2) invites the federal courts to reopen a state court's adjudication of the facts underlying a federal claim in order to determine whether the state court reasonably assessed the evidence. And this notwithstanding the general rule that state court findings of historical fact remain presumptively correct. *See infra* text accompanying note 9. For my own early take on paragraph (1), see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute,* 44 Buff. L. Rev. 381, 398-448 (1996) [hereinafter *Primer*].

[9] Pub. L. 104-132, § 104 (to be codified at 28 U.S.C. § 2254(e)). The contents of what was previously § 2254(e) has been moved to § 2254(f); the contents of what was previously § 2254(f) has been moved to § 2254(g).

[10] *See Townsend,* 372 U.S. at 312.

that a federal habeas court must nevertheless hold its own hearing under any of the following circumstances:

(1) the merits of the factual dispute were not resolved in the state hearing;
(2) the state factual determination is not fairly supported by the record as a whole;
(3) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing;
(4) there is a substantial allegation of newly discovered evidence;
(5) the material facts were not adequately developed at the state court hearing; or
(6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.[11]

Beyond this, the Court held in *Townsend* that when none of these criteria mandates a federal hearing, a federal district court still has power to conduct a hearing in its discretion.[12]

In the wake of the *Townsend* decision, Congress enacted the former § 2254(d).[13] That statute established a presumption in favor of state findings of

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[11] *Id.* at 312.

[12] *See id.* at 318. *Accord* White v. Estelle, 556 F.2d 1366, 1368 n.4 (5th Cir. 1977).

[13] That now-repealed provision read as follows (emphasis added):

*In any proceeding instituted in a Federal court* by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, *evidenced by a written finding, written opinion, or other reliable and adequate written indicia,* shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of

historical fact—so long as the state court put its findings in writing and the proceedings in which the findings were made met several tests for procedural regularity and substantive accuracy. Those tests essentially tracked the *Townsend* criteria.

The precise fit between the former § 2254(d) and *Townsend* was never perfectly clear. The prevailing view was that the former § 2254(d) neither displaced nor codified *Townsend's* holding on the threshold question of whether a court must conduct a hearing. Rather, the former § 2254(d) assumed that a federal hearing was to be held and addressed only the bearing previous state court findings should have *in* that federal proceeding.[14] The key to that interpretation lay in the text of the former § 2254(d) itself, which provided that the presumption in favor of state findings would apply "in" a federal habeas proceeding and that the applicant could rebut that presumption "in an evidentiary hearing in the [federal] proceeding" by adducing convincing evidence that the state finding was erroneous.[15]

The new provision in the 1996 Act, § 2254(e), employs essentially this same basic structure and some of the same language.[16] Like its predecessor, § 2254(e) provides that a state court's findings of historical fact are presumptively correct and that a prisoner can rebut that presumption only by producing "convincing" evidence.[17] And again like its predecessor, § 2254(e) has it that the presumption arises "[i]n a proceeding instituted [in federal court]."[18] The most straightforward interpretation of the new provision is, then, that it simply substitutes for the former § 2254(d) and is addressed, as was its precursor, only to the treat-

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such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And *in an evidentiary hearing in the proceeding in the Federal court*, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

[14] *See e.g.*, RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1372 (14th ed. 1996); *accord* La Vallee v. Delle Rose, 410 U.S. 690, 701 n.2 (1973) (Marshall, J., dissenting); Guice v. Fortenberry, 661 F.2d 496, 500-01 (5th Cir. 1981). *See also* Keeney v. Tamayo-Reyes, 504 U.S. 1, 21 (1992) (O'Connor, J., dissenting).

[15] *See supra* note 13; *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1122 n.46, 1140-45 (1970).

[16] *See supra* text accompanying note 9.

[17] The new law insists that rebuttal evidence must be both "convincing" and "clear," but that difference is of no practical consequence.

[18] *See supra* text accompanying note 9.

ment of state court factual findings in a hearing that a federal court has decided it must or can conduct in light of *Townsend*.

This said, it must also be said that, unlike its predecessor, § 2254(e) does not state that the applicant's burden of rebutting the presumption arises "in" a federal evidentiary hearing. It is possible to argue, accordingly, that § 2254(e) does not presuppose that a federal hearing is to be held on the basis of *Townsend* and that, instead, § 2254(e) has something to say about whether a hearing is to be conducted in the first instance. An interpretation of § 2254(e) along those lines would be hard to defend. If the new statute addresses the threshold question in *Townsend*, it does not do so explicitly, and it certainly does not do so with any clarity regarding any changes it might make in the *Townsend* analysis. Moreover, the omission of the former § 2254(d)'s reference to the petitioner's burden "in" a federal hearing is easily explained. This new provision is considerably shorter than its predecessor and may only reaffirm prior law in a more concise way.[19]

In my own view, accordingly, the 1996 Act does not disturb prior doctrine regarding the circumstances in which a federal habeas court must or can conduct a federal evidentiary hearing into the facts underlying a prisoner's claim. The part of *Townsend* governing that question remains intact.

## II. The Effect of State Factual Findings in a Federal Habeas Proceeding

Under the former § 2254(d), the presumption of accuracy owed to state findings was contingent on written evidence of the state court's conclusions, sound process in state court, and fair support in the evidentiary record.[20] Indeed, the former § 2254(d) set out its list of procedural and substantive standards as the means by which the federal habeas courts could determine whether state findings were entitled to the presumption. Read literally, the new § 2254(e)(1) preserves the presumption in favor of state court findings, but eliminates both the former requirement that findings must be in writing and any federal standards for the fact-finding process and the evidentiary record in state court. Bluntly stated, it appears that the federal habeas courts must accept state court findings at face value—no questions asked.

A change of that kind would be dramatic and not something that anyone would lightly read into the new law. One can imagine that, in some circumstances at least, serious constitutional questions would be raised by a rule that requires a federal court to accept a factual finding made in state court, with no

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[19] The former § 2254(d) was widely criticized for poor draftsmanship. Attempts to improve upon its grammar can be traced back at least to the Reagan Administration's bill. A Justice Department commentary on that bill explained that the idea was merely to "simplify" the former § 2254(d), which the Department of Justice considered to be "verbose, confusing and obscure." *The Habeas Corpus Reform Act of 1982, Hearing on S. 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 100 (1982) [hereinafter *Hearing*].

[20] *See supra* note 13.

written statement of the finding on which to focus and with no ability to assess the process out of which that finding emerged and the evidence on which it was based.[21]

Moreover, § 2254(e)(1) must be reconciled with the new version of § 2254(d), which has it that a federal habeas court may award relief on the merits if a state court based its decision against a petitioner on "an unreasonable determination of the facts in light of the evidence."[22] Under that new provision, a federal court can scarcely be indifferent to the process by which a state court reached a factual finding or the evidentiary support that finding enjoys.

I read § 2254(e)(1) to drop the specific procedural and substantive standards contained in the former § 2254(d). But I do not read it to dispense with a federal court's rudimentary responsibility to ensure that it is deciding a constitutional claim based on factual findings that were forged in a procedurally adequate way and were anchored in a sufficient evidentiary record. In this sense, § 2254(e)(1) departs from prior law, but only to substitute general notions of procedural regularity and substantive accuracy for detailed statutory standards.[23]

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[21] *Cf.* Guitierrez de Martinez v. Lamagno, 115 S.Ct. 2227, 2234 (1995) (declining to read a statute to instruct a federal court "automatically to enter a judgment pursuant to a decision the court [had] no authority to evaluate"). In the preclusion context, the Supreme Court has said that federal courts need not respect state judgments unless litigants had a "full and fair opportunity" to litigate their claims in state court, Allen v. McCurry, 449 U.S. 90, 95 (1980), and has made it clear that, at a minimum, the measure of that opportunity is due process in the constitutional sense. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 (1982). Similarly here, § 2254(e)(1) can mean, at the very most, that a federal habeas court must respect state fact-finding only if the state court process comported with ordinary constitutional standards.

President Clinton mentioned the constitutional issues this provision might raise in his official statement on the day he signed the 1996 Act into law: "If [§ 2254(e)] were read to deny litigants a meaningful opportunity to prove the facts necessary to vindicate Federal rights, it would raise serious constitutional questions. I do not read it that way." Statement of the President, Office of the Press Secretary (April 24, 1996) [hereinafter *Signing Statement*].

[22] *See supra* text accompanying note 8.

[23] The Reagan Administration's bill would have accorded a presumption of accuracy to a state court's "full and fair determination" of a factual issue. The Department of Justice explained that "full and fair" in this context would mean rough compliance with the *Townsend* standards. *See Hearing, supra* note 19, at 54, 93, 100. The original bill in the Senate in the 104th Congress, S. 3, would have invoked a presumption in favor of state findings made "after any procedure sufficient to develop an adequate record." The bill that superseded S. 3 on the Senate's agenda, S. 623, dropped that proviso and substituted the language later enacted. I know of no published explanation for the change. Yet as I explain in the text, I certainly do not infer that the enacted provision was meant to force the federal courts to give effect to factual findings without regard for the way in which they were reached. So far as I am aware, no one has ever suggested that Article III courts can be placed in that position. Here, too, I think the drafters were merely cutting what they considered to be excess verbiage.

## III. THE EFFECT OF PROCEDURAL DEFAULT IN STATE COURT

The principal changes the 1996 Act makes from prior law in this context occur with respect to procedural default in state court. As I read it, § 2254(e)(2) overrules both *Townsend* and *Tamayo-Reyes* in this regard.

The *Townsend* case was decided in 1963 along with *Fay v. Noia*[24] and dealt with the default problem simply by incorporating *Noia's* waiver rule.[25] The Court acknowledged that a prisoner might abuse the fifth standard[26] for determining whether a federal hearing must be held by deliberately withholding evidence from the state court. To frustrate a strategy of that kind, the Court said that if a prisoner failed to develop the facts in state court in circumstances constituting a "deliberate bypass" of state procedures, a federal court could decline to hold a federal evidentiary hearing.[27]

In later cases, the Court discarded the "deliberate bypass" rule for purposes of cases like *Noia*—in which prisoners failed to raise claims at the time and in the manner prescribed by state law. In the leading case, *Wainwright v. Sykes*,[28]the Court concluded that the bypass rule showed insufficient respect for state procedural law and that a different approach would ensure that the availability of federal habeas corpus would not sacrifice the state interests served by state rules that cut off claims because of default.[29] The idea was not to erect an independent federal doctrine governing the conduct of state litigation. Rather, the point of the new approach was to reinforce the existing *state* law of default. Accordingly, the new doctrine worked (and continues to work) in tandem with the "adequate state ground" doctrine and, most importantly, with state procedural law and practice.[30]

The whole of the matter is a mouthful, but it goes like this. If there is a state procedural rule requiring a prisoner to raise a federal claim in a particular way or at a particular time; if the prisoner failed to comply with that rule; if, for that reason, the state courts refused or would refuse to consider the claim in later state proceedings; and if the resulting state disposition of the claim would constitute an adequate and independent state ground of decision that would fore-

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[24] 372 U.S. 391 (1963).

[25] *See* Townsend v. Sain, 372 U.S. 293, 317 (1963).

[26] *See supra* text accompanying note 11 (indicating that a federal hearing is mandatory if the material facts were not adequately developed in state court). *See also* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5-6 (1992) (recognizing that *Townsend* had expressed concern about manipulation with respect to the fifth test for mandatory hearings); *id.* at 17 (O'Connor, J., dissenting) (elaborating on *Townsend's* treatment of this point).

[27] *See Townsend*, 372 U.S. at 317.

[28] 433 U.S. 72 (1977).

[29] *See id.* at 87-90.

[30] *See* Coleman v. Thompson, 501 U.S. 722, 730 (1991) (making it clear that the adequate state ground doctrine was applicable in a habeas case); *see also* County Court of Ulster County v. Allen, 442 U.S. 140, 148 (1979) (making it clear that a federal habeas court would refuse to consider a claim only if the state courts had previously declined to do so on the basis of state law).

close direct review in the Supreme Court of the United States—then a federal habeas court will also refuse to consider the claim, unless the prisoner shows "cause" for having failed to raise the claim properly in state court and "actual prejudice" resulting from the default[31] *or* demonstrates that the federal error that went uncorrected in state court probably led to the conviction of an innocent person.[32]

In *Tamayo-Reyes*, the Court returned to the default issue in a case in which a petitioner had complied with state procedural law insofar as he had raised a claim in state court, but had failed thereafter to develop the facts related to that claim. In that kind of case, too, the Court rejected the "bypass" rule in favor of the doctrine developed in *Sykes*. Specifically, *Tamayo-Reyes* held that if a prisoner raised a claim in state court but failed to develop the material facts when given an opportunity to do so, she could obtain a federal hearing to develop those facts only if she showed "cause" and "prejudice" *or* demonstrated that the federal court's failure to conduct its own hearing would result in a "miscarriage of justice"—namely, the continued detention of a prisoner who was probably innocent.[33]

The decision in *Tamayo-Reyes* was harsh inasmuch as it compromised a federal court's ability to adjudicate the merits of a federal claim that was itself properly presented for decision.[34] In any case, the 1996 Act seems to restrict the availability of federal hearings even more. Under § 2254(e)(2), a prisoner who failed to develop the facts in state court can obtain a federal hearing only on a showing that: (A) the claim rests either on a "new" rule of "constitutional" law that "the Supreme Court" has made "retroactively applicable to cases on collateral review" or on a "factual predicate" that could not have been discovered previously by "due diligence" *and* (B) "the facts . . . would . . . establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty."[35]

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[31] *See Sykes*, 433 U.S. at 90-91.

[32] *See* Murray v. Carrier, 477 U.S. 478, 496 (1986). This last feature of the doctrine is ambiguous in that it fails to distinguish between prisoners who were probably innocent and those whose guilt probably would not have been established in a legally satisfying way. For a general discussion of the way in which this default doctrine works, see LARRY W. YACKLE, POSTCONVICTION REMEDIES 161-202 (Supp. 1996).

[33] *See* 504 U.S. at 11-12.

[34] Justice O'Connor argued in dissent that the federalism concerns that justified barring claims entirely on the basis of procedural default did not warrant restrictions on federal fact-finding when claims were considered on the merits. *See id.* at 18 (O'Connor, J., dissenting). The Court held, however, that all default cases were sufficiently similar to warrant application of the same doctrine. *See id.* at 8 n.3 (rejecting Justice O'Connor's distinction).

[35] *See supra* text accompanying note 9. This formulation incorporates something of the standard the 1996 Act uses elsewhere, in 28 U.S.C. § 2244 (as amended), as part of the test for deciding whether a prisoner can file multiple federal habeas petitions. The fit, however, is not good. In that context, the prisoners concerned have already had one opportunity to litigate in federal court. That is not necessarily true in the case of prisoners

At a glance, one might read this new formulation to do what the Supreme Court has steadfastly declined to do: to establish a free standing federal law of default that bars the federal courts from adjudicating a claim, whether or not the state courts refused or would refuse to consider it. A construction of that kind would be extraordinary. It would vanquish an elaborate body of settled doctrine with no explicit warrant either in new statutory language or in probative legislative history. Here, more than anywhere else in this discussion, it is crucial to keep in mind that Congress legislates against the backdrop of existing law, including Supreme Court precedents. It just will not do to read § 2254(e)(2) to sweep aside all that has gone before—in a single stroke and, at that, only by negative implication.

It is far more sensible to read this new provision to presuppose the familiar environment and to adjust the Court's default doctrine within that framework. This is to say, § 2254(e)(2) operates on the premise that a prisoner's claim has been, or would be, foreclosed in state court on the basis of default. To that extent, this new statute tracks the Court's prior decisions. Once triggered, however, § 2254(e)(2) does depart from the Court's doctrine. The literal, textual differences here are obvious enough. Certainly, the new law rejects *Townsend's* "bypass" test—as did *Tamayo-Reyes*. Moving on, § 2254(e)(2) breaks with *Tamayo-Reyes* as well—in at least four ways.

### A. *What Counts as "Cause"?*

The new statute does not mention "cause" but, instead, specifies that a prisoner can overcome default only if she relies on a "new rule" of "constitutional" law or shows that she could not have discovered the factual basis of her claim earlier. These new statutory standards reflect some, but not all, of the instances in which the Court has found "cause" in the past.[36] On the face of it, these differences appear significant. But on reflection I am not sure any really dramatic change is afoot. The word "cause" is a term of art in habeas law, and if that term had been used in § 2254(e)(2), I would have understood that the statute incorporates the meaning the Court has assigned to "cause." Yet the absence of an express reference to "cause" need not carry the opposite implication. Rather than employing a term of art in hopes its definition it will draw the

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seeking evidentiary hearings. I would have thought, accordingly, that the standard here would be less rigid. Inexplicably, it is even more Draconian. Under § 2244(b)(2)(A), a prisoner who wishes to file a second habeas application may do so if his claim rests on a "new" and "retroactive" rule of constitutional law—whether or not the claim is related to innocence in the manner prescribed in the language I have reproduced in the text. Here, by contrast, if a prisoner seeks a federal hearing on the ground that his claim relies on a "new" and "retroactive" rule, the "facts underlying the claim" must go to innocence in this special sense.

[36] *See e.g.*, Amadeo v. Zant, 486 U.S. 214 (1988) (holding that a prisoner had shown "cause" when he could not have discovered the basis of a claim in time to raise it in state court); Reed v. Ross, 468 U.S. 1 (1984) (holding that the novelty of a claim could establish "cause").

appropriate distinctions, the new statute may simply and straightforwardly articulate the circumstances in which incomplete fact-finding in state court should not preclude supplemental fact-finding in federal habeas corpus.

It is surely telling that § 2254(e)(2) is by its own terms addressed only to cases in which "the applicant has failed to develop" facts previously in state court. That express language connotes some ascription of responsibility for flawed state court fact-finding to the prisoner who later seeks a more thorough exploration of the facts in the federal forum. That, in turn, is consistent with the fundamental idea in all the familiar default cases: the notion that a habeas petitioner may fairly bear the consequences of inadequate state court litigation where the responsibility can be ascribed either to the prisoner himself or to his lawyer.

If, however, the facts were not developed for some reason beyond the prisoner's control, it would be inconsistent with the central purpose of a default rule to visit a forfeiture on the blameless petitioner. I doubt that anyone would argue that a federal hearing should be precluded if a tornado interrupted a prisoner's attempt to litigate facts in state court. Likewise, it would make little sense to foreclose federal fact-finding if the state's own agents "caused" evidence to be overlooked in state proceedings.

This is what the Supreme Court meant in *Murray v. Carrier* when it said that "cause" would typically be found for default if "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule"—and expressly mentioned "interference" by state officers.[37]The same theory undergirded *Coleman v. Thompson,* where the Court held that a mistake by defense counsel would constitute "cause" if it rose to the level of ineffective assistance in violation of the Fourteenth Amendment—a matter for which the state was responsible.[38]

It seems to me, then, that many of the instances in which the Court has found "cause" in prior cases may still warrant federal fact-finding under the new statute—even though they are not captured by the standards explicitly mentioned in § 2254(e)(2). The Court previously found "cause" in cases in which state court fact-finding was inadequate for reasons that could not be ascribed to the petitioner (and thus considered the flawed state proceedings in those cases excusable). The new statute, by contrast, folds its treatment of situations like that into the baseline condition for its application to any case—namely, the understanding that "the applicant" must have been responsible for the lack of adequate fact development in the first instance.[39] If the prisoner was not responsible, then

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[37] 477 U.S. at 488.

[38] *See* 501 U.S. 722, 752-54 (1991).

[39] The President made precisely this point in his signing statement when he said that "[§ 2254(e)] applies to situations in which 'the applicant has failed to develop the factual basis' of his or her claim. Therefore, [§ 2254(e)] is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court." *Signing Statement, supra* note 21.

§ 2254(e)(2) is inapplicable, and the availability of federal fact-finding continues to turn on the Court's preexisting doctrine.

To be sure, § 2254(e)(2) fixes demanding standards for cases in which default can be ascribed to the petitioner. Here, too, however, careful scrutiny may tame the beast down a bit. Consider, for example, that subparagraph (A)(i) recognizes an excuse for default where the prisoner's claim rests on a "new rule" of "constitutional" law, made "retroactive to cases on collateral review by the Supreme Court." Poor grammar to one side, this suggests, on first blush, the kind of exceptional case in which the *Teague* doctrine allows a federal habeas court to enforce a "new rule" of law.[40] I have argued elsewhere, however, that the new § 2254(d), with which subparagraph (A)(i) must be reconciled, actually displaces *Teague*—and that this reference to "new" rules contemplates any change in the law that the Supreme Court might announce.[41]

If that point is debatable, I think a second should be less controversial. Both subparagraph (A)(i) and subparagraph (B) purport to allow for excuses only to litigate facts related to "constitutional" matters—either new rules of "constitutional" law or evidence that would have convinced the jury to acquit—but for "constitutional" error. In neither instance can the term "constitutional" be taken literally.

Under the basic jurisdictional statute for habeas cases, 28 U.S.C. § 2241(c)(3), a petitioner is entitled to assert either a constitutional claim or a claim under the "laws" of the United States.[42] Nothing in the 1996 Act purports to change that baseline. It makes no sense, then, that if a petitioner failed to develop the facts underlying a nonconstitutional claim in state court, she is out of luck in federal court no matter how "new" her claim may be, no matter how difficult it would have been to discover its "factual predicate" earlier, and, indeed, no matter how closely the claim is linked to innocence. This, on the theory that only "constitutional" claims need apply for federal fact-finding. An arrangement of that kind would bear no rational relationship to any discernible public policy. For if a nonconstitutional claim is cognizable in habeas corpus at all, there is no reason why it should not warrant federal fact-finding in the same circumstances in which constitutional claims are entitled to a federal hearing.[43]

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[40] *See* Teague v. Lane, 489 U.S. 288 (1989). *See also* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2381-99 (1993) (explaining the *Teague* doctrine).

[41] *See Primer, supra* note 8, at 414-21 & n.121.

[42] State prisoners rarely have nonconstitutional claims to advance, of course. Yet the Supreme Court has only recently confirmed that a sufficiently serious violation of federal nonconstitutional law can warrant federal habeas corpus relief. *See* Reed v. Farley, 114 S.Ct. 2291 (1994).

[43] If this is not plain enough, consider that there are other places in the 1996 Act where a literal reading of "constitutional" would produce silly results. For example, under a 1996 amendment to 28 U.S.C. § 2253, both state prisoners filing habeas petitions and federal prisoners filing § 2255 motions may appeal negative district court judgments, provided they obtain a certificate of appealability. By the terms of the amendment, however, a certificate can issue only on a showing of the denial of a "constitutional" right. If

Viewed in context, the term "constitutional" in these subparagraphs of § 2254(e)(2) cannot be taken literally at all. The new law simply uses the designation "constitutional" in a loose sense. Most of the claims in habeas cases *are* constitutional, and the statute employs that designation because it is conventional and usually accurate—without contemplating that its use will be taken to exclude federal fact-finding with respect to nonconstitutional claims by negative implication. Realistically construed, "constitutional" can only mean "federal."

In the end, I read § 2254(e)(2) to permit the federal courts to hold fact-finding hearings in most of the same circumstances in which hearings were conducted in the past. Some cases do not implicate the new statute at all, because the facts were not developed in state court through no fault of the petitioner. Others fit within the new statute's two categories of excused defaults ascribable to the prisoner.[44]

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the use of the "constitutional" label is taken literally, then all prisoners, state and federal, can press nonconstitutional claims at the district level, but not higher. In effect, district court judgments on nonconstitutional federal claims are final.

Making a single district judge the sole arbiter of nonconstitutional federal claims would not only be novel; it would be unconstitutional. In the case of § 2255 motions, the claims at stake would not typically have been available at trial or on appeal, but would be entirely fresh—cognizable for the first time in collateral proceedings. Moreover, the arrangement that would result from this reading of § 2253 would not be outcome-neutral. For § 2253 does not require the respondent to obtain a certificate before appealing a judgment in the prisoner's favor. If § 2253 is read to permit government appeals in cases involving nonconstitutional claims, but to preclude prisoner-initiated appeals, this newly amended statute would skew the results that Article III courts can reach on federal issues. Errors that favor prisoners could be upset, but errors that favor the government would stand. That kind of legislative manipulation of judicial outcomes has been invalid since United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

[44] There is another way in which formal default may continue to be excused, even if responsibility can be assigned to the prisoner. In *Tamayo-Reyes,* the Court incorporated its new doctrine for procedural default into the fact-finding context wholesale. That included the "cause-and-predjudice" and "probable innocence" formulations. It also included the anterior inquiry into the adequacy and independence of the state court's procedural ground of decision. *See* Coleman v. Thompson, 501 U.S. 722, 730 (1991) (explaining that the adequate state ground doctrine was applicable in habeas cases and indicating that it was to be taken up before a court turned to the "cause-and-prejudice" and "probable innocence" parts of the analysis). *See supra* note 30 and accompanying text. To be sure, *Tamayo-Reyes* did not expressly refer to the adequate state ground doctrine. Yet the Court's reasoning in that case was that default with respect to developing facts in state court could not be distinguished from default with respect to raising claims. The idea, then, was to use the same default rules in both contexts—in aid of uniformity, if nothing else.

Here again, the new statute is silent regarding prior default doctrine, including the adequate state ground doctrine, and it is possible to draw the inference that § 2254(e)(2) has now discarded that doctrine in fact-finding cases. Yet as I explained earlier, courts can hardly construe this statute to abrogate prior law by negative implication. Moreover, it is worth recalling that the adequate state ground rule was not expressly mentioned in the

B. *The Element of "Prejudice"*

The new statute does not explicitly require a prisoner to show "prejudice." Taken literally, it may be read to discard that element of the Court's prior doctrine for handling default with respect to fact-finding. Initially, I tend to think that reading would be troubling. Once again, it is risky business to infer significant changes from the new statute's silence. Moreover, if § 2254(e)(2) were read to eliminate the "prejudice" requirement in cases in which the facts were inadequately developed in state court, we would be left with considerable inconsistency. For in other cases, still governed by the Court's doctrine, prisoners who failed to raise claims at all would find themselves boxed out of federal court entirely unless they showed "prejudice" in addition to "cause."[45] The Supreme Court would probably regard that kind of inconstancy with suspicion. In the interest of simplicity and consistency, the Court might read a "prejudice" requirement into cases involving flawed fact-finding.[46]

Nevertheless, there is reason to think that, in this instance, the 1996 Act actually does make a change from prior law. It has never been clear why a prisoner should be required to demonstrate "prejudice" in a case in which there was genuine "cause" for default in state court.[47] Accordingly, the new statute may sensi-

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former § 2254(d), either—or, for that matter, in any other statute. It has always been a creature of judge-made law or, perhaps, a judicial gloss on relevant statutes. I would not conclude, then, that the mere failure of the 1996 Act to codify that doctrine expressly is of any consequence.

The adequate state ground doctrine bears mightily on the circumstances in which prisoners may overcome default for which they were answerable—yet circumstances not neatly captured in the two situations in which § 2254(e)(2) expressly allows an excuse. One can imagine instances in which the state courts imposed a forfeiture sanction on the basis of a prisoner's failure to comply with a formal state procedural rule, but in which the resulting state judgment would be inadequate to foreclose subsequent federal adjudication. *Cf.* James v. Kentucky, 466 U.S. 341 (1984) (finding a state's insistence that a defendant request a jury "instruction" rather than an "admonition" was inadequate to insulate the state court's judgment from review in the Supreme Court). In cases of that kind, federal fact-finding is available despite formal default in state court—by operation of the adequate state ground doctrine, which comes into play prior to, and independent of, § 2254(e)(2).

[45] This would follow from the Court's default doctrine cases generally, which require both "cause" as that term is conventionally defined and "prejudice."

[46] *Cf.* McCleskey v. Zant, 499 U.S. 467 (1991) (squaring the pre-Act doctrine for successive federal petition cases with the doctrine for cases in which default occurred in state court and disregarding the relevant statutory language).

[47] In this vein, it is worth noting that in Francis v. Henderson, 425 U.S. 536 (1976), and later in Wainwright v. Sykes, 433 U.S. 72 (1977), the Court unaccountably required prisoners to show both "cause" and "prejudice," when previously the idea had been that a demonstration of "cause" alone was sufficient to overcome default and that a showing of "prejudice" should excuse a litigant from having to show "cause." *See* Louis M. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 462-63 (1980).

bly jettison the "prejudice" feature of the Court's doctrine as unjustified—in cases in which prisoners raised their claims in state court, but in which the facts were not developed (for whatever reason).[48]

This reading would create disuniformity, to be sure, but the inconsistency would extend only to cases in which petitioners were not responsible for the shortcomings in previous state proceedings. In cases in which prisoners were themselves responsible for default, namely cases in which they "failed to develop the factual basis" of their claims within the meaning of § 2254(e)(2), some notion of "prejudice" would remain in the mix. For when § 2254(e)(2) specifies the circumstances in which default attributable to the prisoner may be excused, it requires all prisoners to link their claims to actual innocence.

Taken literally, the conjunctive "and" between paragraphs (A) and (B) limits federal evidentiary hearings to prisoners who not only rely on a "new rule" or establish that they could not have discovered the facts earlier, but also to prisoners who can demonstrate that the facts underlying their claims would have convinced a reasonable judge or jury to acquit. That, in turn, preserves a kind of "prejudice" requirement under another heading.[49]

### C. *The "Innocence" Element*

The "and" between paragraphs (A) and (B) does appear to require all prisoners attempting to overcome default to make a substantial showing of actual innocence of the underlying offense.[50] If this is what § 2254(e) really means, it is a truly remarkable enactment.

Here again, constitutional questions would be raised if the new law were read to instruct an Article III court to adjudicate the merits of a claim in ignorance of

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[48] Recall that there are good reasons for being more generous to prisoners in the fact-finding context generally. *See supra* note 34.

[49] When the Court said in *Tamayo-Reyes* that it was adopting the "cause-and-prejudice" formulation for fact-finding cases, the Court went on to say that it was also embracing the now-familiar addendum that a prisoner who showed probable innocence would not have to establish "cause." The Court did not say that a showing of "prejudice" would equally be unnecessary, but that was because any prisoner who demonstrated that a violation of his federal rights had probably led to an erroneous conviction had surely established "prejudice" *a fortiorari*. *Cf.* Sawyer v. Whitley, 505 U.S. 333, 346-47 (1992) (explaining that the "prejudice" element in some constitutional claims is a less demanding standard than the "innocence" test that now appears in § 2254(e)(2)(B)).

[50] This may be an overstatement. After the Supreme Court created the rule that default could be overlooked if a prisoner showed that an uncorrected constitutional violation had resulted in an erroneous conviction, the Court held that default could equally be excused if an error had led to an erroneous and unlawful death sentence. In a case of that kind, the Court said that the prisoner might be considered "innocent" in a different sense—"innocent of death." *Sawyer*, 505 U.S. at 343. The reference to innocence in § 2254(e)(2)(B) may be open to the same kind of interpretation, such that a prisoner may be able to satisfy this provision of the new statute by showing that as a result of constitutional error she received a death sentence for which she was legally ineligible.

the material facts. This is true if state court litigation was inadequate for reasons beyond the prisoner's control. It is equally true if state court litigation was incomplete because of the prisoner's formal, but excusable, default. And, here again, the new version of § 2254(d) must be considered. If a federal court can grant relief on the merits when a prior state court decision against the prisoner rested on an "unreasonable" determination of the underlying facts, it hardly seems sensible that a federal court should itself be obliged to proceed without a "reasonable" understanding of the facts—an understanding reached in federal court, if not previously in state court.

I should think that if a prisoner shows that he could not have discovered the basis of a claim in time to develop the relevant facts in state court, he should not be denied an opportunity to do that necessary work in federal court, whether or not the claim goes to actual innocence of the underlying offense. In a like manner, by the way, I should think that if a prisoner ties a claim to actual innocence in a strong way, a federal court should be able to hold a fact-finding hearing even if the prisoner might have discovered the factual predicate for the claim earlier if he (or his attorney) had been more diligent. That, of course, is the reasoning in the Court's prior cases.[51] The literal language in § 2254(e)(2), however, looks the other way.

### D. *The Evidentiary Standard for an "Innocence" Showing*

When § 2254(e)(2)(B) calls on prisoners to show that the facts suggest innocence, it departs from the "probability" standard that *Tamayo-Reyes* and prior cases employed and substitutes the test the Supreme Court has engaged only when a prisoner files a second or successive federal petition attacking the validity of a death sentence (rather than her underlying criminal conviction).[52] The justification for choosing such a demanding standard in this context escapes me.[53]

I hope these preliminary thoughts about the 1996 Act can be of help to courts struggling to give the new statute a fair and sensible interpretation. I freely admit that I am troubled by some of the implications I see in § 2254(e). Yet if courts bring clear-eyed, hard-minded, practical judgment to bear, they can reconcile this new enactment with a workable and working framework for the effective adjudication of claims in federal court. Justice Scalia's admonition comes to

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[51] *See supra* text accompanying note 33.

[52] In *Sawyer*, 505 U.S. at 348, the Court said that a prisoner attacking a death sentence must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty" under state law.

[53] In Schlup v. Delo, 115 S.Ct. 851, 865 (1995), the Court acknowledged that the *Sawyer* test was extraordinarily difficult to satisfy and thus declined to use it in a case in which a prisoner attacked not a death sentence, but the validity of his underlying conviction. That, one should note, was still in the context of second or successive federal petitions. To reach back for the *Sawyer* standard in this instance, in which prisoners seek federal evdidentiary hearings regarding what may be initial applications for federal relief, seems inexplicably harsh.

mind: Statutory terms should be construed "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law . . . [in order to] make sense rather than nonsense out of the *corpus juris*."[54]

[54] West Virginia Hosp. v. Casey, 499 U.S. 83, 100-01 (1991).