Habeas After Pinholster

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Abstract: Until April 2011, every federal habeas court in America could conduct hearings and consider new evidence when reviewing a state court’s interpretation of federal law under the Antiterrorism and Effective Death Penalty Act (AEDPA). When state proceedings did not allow a petitioner a fair chance to develop the factual record, federal courts could, and sometimes did, fill the gap. The U.S. Supreme Court’s 2011 opinion in Cullen v. Pinholster significantly altered this landscape. By limiting federal review to the state record for claims already adjudicated in state court, Pinholster places an enormous premium on the adequate development of the state-court record. After Pinholster, petitioners denied the ability to develop their claims in state court will seek alternative solutions. Indeed, state defendants have already begun to pursue some of the potential paths around Pinholster, suggesting what is to come. The resulting challenges will raise fundamental, unanswered questions about AEDPA, the Suspension Clause, and the role of due process in postconviction review. This Article explores likely paths forward, filling the gaps that Pinholster, together with the Court’s recent decisions in Boumediene v. Bush, District Attorney’s Office v. Osborne, and Skinner v. Switzer, has created in both the literature and the jurisprudence.

INTRODUCTION

At first glance, the 2011 case Cullen v. Pinholster1 appears to be just another in a long line of U.S. Supreme Court opinions reversing the Ninth Circuit and making it more difficult for state prisoners to obtain federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA).2 Which, of course, it is. Nor was the portion of the

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1 131 S. Ct. 1388 (2011).
2 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.). This may account for the dearth of immediate attention to Pinholster. There has been surprisingly little discussion in the online media. The little attention that scholars have paid to the Pinholster opinion has focused on somewhat narrower (although equally
opinion that will be the focus of this Article—the portion limiting federal review of claims previously adjudicated at the state level to the state-court record—particularly divisive: it attracted seven votes. But 

Pinholster will have significant ramifications, not just for the habeas petitioners immediately affected, but for the resolution of fundamental questions surrounding AEDPA, the Suspension Clause, and postconviction due process.

Prior to Pinholster, petitioners who were barred from adequately developing their claims in state court could do so in federal court. As an example, consider Albert Richards. Richards, a homeless ex-Marine with a serious heart condition and a crack habit, was convicted of murdering another homeless man in Tarrant County, Texas, by beating him with a rock; the victim died hours after the beating. At trial, Richards’s attorney used hearsay objections to prevent the prosecution from introducing evidence that the victim had suffered another, more serious attack after the altercation with Richards, and she failed to introduce this evidence herself.

important) issues. Katherine McAllister, for example, briefly discusses deference to state courts and attorneys under the Strickland standard following Pinholster, as well as the impacts on capital defendants. See Katherine A. McAllister, Comment, Deferential Dilemmas: Pinholster v. Ayers and Federal Habeas Claims for Ineffective Assistance of Counsel After AEDPA, 52 B.C. L. REV. E. SUPP. 121, 127–31 (2011), http://www.bc.edu/bclr/esupp_2011/10_mcallister.pdf. Professor Nancy King believes that Pinholster will be most important for capital defendants. Nancy King, Beyond Cullen v. Pinholster: When New Evidence Amounts to a “New Claim,” habeasbook.com (Apr. 14, 2011), http://www.habeasbook.com/2011/04/beyond-cullen-v-pinholster-when-new-evidence-amounts-to-a-new-claim/ (arguing that federal evidentiary hearings, like grants of relief, almost never occur in non-capital habeas cases and that “[Pinholster] is likely to have its most significant impact in capital cases”). Professor King correctly observes that habeas already is rarely granted and that federal hearings are rarely held in habeas cases. See id. Professor King’s argument that courts rarely grant federal evidentiary hearings—citing to Justice Sotomayor’s observation in her Pinholster dissent that such hearings are “very rare”—does not, however, address the issue explored here: that, for the narrow but important set of prisoners who might have obtained habeas relief, Pinholster prohibits all federal expansion of the record, not just evidentiary hearings. See infra notes 69–79 and accompanying text. Moreover, as Professor King herself has shown, federal evidentiary hearings, though rare, are strongly correlated with success. See Nancy J. King et al., Final Technical Report: 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 10 (2007).

3 Pinholster, 131 S. Ct. at 1388, 1394 n.*.
4 See infra notes 32–56 and accompanying text.
5 Richards v. Quarterman (Richards I), 578 F. Supp. 2d 849, 855, 864, 865, 869–70 (N.D. Tex. 2008), aff’d, 566 F.3d 553 (5th Cir. 2009).
6 Id. at 855, 859–64.
The state hearing on Richards’s ineffective assistance of counsel claim consisted of a single affidavit from Richards’s trial counsel, which was requested by the state; Richards, acting pro se, was not allowed to participate in the expansion of the record.\(^7\) This affidavit, which stated that trial counsel had “presented any and all exculpatory evidence available to [her],” helped convince the state court to adopt the state attorney’s findings of fact and conclusions of law wholesale.\(^8\) It was enough, too, to satisfy the federal magistrate judge assigned to the case.\(^9\) It did not, however, satisfy the district court, which held a federal evidentiary hearing—a step that the court found permissible under AEDPA because Richards had not “failed to develop the factual basis” for his claim.\(^10\) As was revealed at that hearing, Richards’s trial counsel prepared her affidavit “in consultation with, and with the assistance of, the [state’s attorney].”\(^11\) The federal hearing also revealed enough evidence to persuade the Fifth Circuit—a court not generally known for being amenable to habeas claims\(^12\)—that it was “extremely likely that, but for [trial counsel’s] objectively unreasonable representation of Richards, the jury would have concluded that the later assault led to [the victim’s] death.”\(^13\)

Development of the facts in federal district court helped Richards overcome the incomplete record from the woefully inadequate state proceedings. The reasoning underlying the district court’s decision to grant Richards an evidentiary hearing was endorsed by every circuit to have considered the issue.\(^14\) After Pinholster, however, that reasoning is

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\(^7\) Id. at 852.
\(^8\) Richards v. Quarterman (Richards II), 566 F.3d 553, 559–60 (5th Cir. 2009).
\(^11\) Id. at 852.
\(^13\) Richards II, 566 F.3d at 571.
\(^14\) See Pinholster, 131 S. Ct. at 1417 (Sotomayor, J., dissenting) (noting that, prior to Pinholster, circuit courts had taken two approaches to applying § 2254(d)(1), both of which allowed new evidence to be considered, and concluding that the majority’s approach of barring evidence outside of the state record “charts a third, novel course that, so far as I am aware, no
no longer valid.\textsuperscript{15} This will make it more difficult for petitioners to obtain relief, and in light of the current controversy over whether the cost of federal habeas review of non-capital state convictions is justified by the relatively small number of successful petitions, every narrowing of that pool is particularly significant.\textsuperscript{16} Even more important, however, are the issues facing the courts in the post-	extit{Pinholster} world.

The problem of inadequate state fact-development proceedings, illustrated so starkly by cases like Richards’s, is too great to ignore. Prior to AEDPA, federal courts deferred to state court factual findings only if specific and rigorous procedural safeguards were followed.\textsuperscript{17} Although AEDPA removed these requirements,\textsuperscript{18} some leading scholars and courts have nonetheless produced readings of AEDPA that incorporate at least a weakened procedural fairness prerequisite to deference, some of which remain viable after 	extit{Pinholster}.\textsuperscript{19} The Supreme Court and many of the circuits, however, have thus far avoided the issue, likely because of the role of federal fact development in preventing injustice in the face of obvious breakdowns in state process. With this failsafe removed by 	extit{Pinholster}, the critical, long-simmering question of whether AEDPA is truly indifferent to the fairness of the state court adjudications under review will have to be decided.\textsuperscript{20}

Nor is this the only significant issue likely to be decided as a result of petitioners’ efforts to overcome the hurdle erected by 	extit{Pinholster}. In a case decided a few months before 	extit{Pinholster}, the Court declared that when a state court has denied relief on a federal claim, “it may be presumed that the state court adjudicated the claim on the merits in the court of appeals has adopted’’); see also BRIAN R. MEANS, POSTCONVICTIO

\textsuperscript{15} See infra notes 90–93 and accompanying text.


\textsuperscript{18} See id. (describing how AEDPA “drop[ped] the specific procedural and substantive standards contained in the former § 2254(d)”).

\textsuperscript{19} See, e.g., Justin F. Marceau, 	extit{Don’t Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications}, 62 Hastings L.J. 1, 4–5, 62–63 (2010) (arguing that courts should not give deference to facts from state proceedings that were not “full and fair,” and citing to courts that have followed this approach); Yackle, supra note 17, at 140–41 (arguing that the new § 2254(e)(1) raises “serious constitutional questions”); infra notes 165, 179, 182 (discussing courts that have so held).

\textsuperscript{20} Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 Buff. L. Rev. 381, 402 (1996) (arguing that the “crucial question is the nature and measure of the significance § 2254(d) instructs a federal district court to attach to a previous state judgment”).
absence of any indication . . . to the contrary.”\textsuperscript{21} If the Court continues down the path of treating all state court decisions equally regardless of how they were reached and severs AEDPA from any interest in the quality of the state postconviction process, Suspension Clause challenges will quickly follow. To resolve these challenges, the Court will need to provide answers to the basic but unresolved questions of whether the right to federal habeas extends to state prisoners—and if so, what it guarantees. In \textit{Boumediene v. Bush} in 2008, the Supreme Court spoke of a right to a “full and fair opportunity” for fact development,\textsuperscript{22} but the definition of “opportunity” has remained an open question for thirty years.\textsuperscript{23}

Important developments in postconviction due process are also likely. In a pair of recent cases, the Court has established a right to fundamental fairness in state postconviction procedures and cleared the way for claims under that right to be pursued through 42 U.S.C. § 1983.\textsuperscript{24} These claims represent another avenue, independent of AEDPA, for addressing inadequate state fact development after \textit{Pinholster}. Here, too, a question that the Court has left open will need an answer: is procedural due process offended by an unfair application of a generally fair set of rules?\textsuperscript{25}

The critical issues to be decided in the wake of \textit{Pinholster} will have a dramatic effect on the future of postconviction litigation. Each could be, and often has been, the object of independent study. This Article examines these pressing questions in light of \textit{Pinholster} and other recent cases that have altered the postconviction landscape. Part I provides an account of \textit{Pinholster} and its immediate effects, and argues that by sharply curtailing federal fact development, \textit{Pinholster} will provoke a variety of challenges to the fairness of state procedures.\textsuperscript{25} Part II, building from the literature, identifies the likely routes that petitioners seeking to overcome deficient state proceedings will take to finding, at last,

\begin{footnotesize}
\textsuperscript{21} Harrington v. Richter, 131 S. Ct. 770, 784–85 (2011); see also id. at 786 (“Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.” (internal quotation marks omitted)).

\textsuperscript{22} 553 U.S. 723, 790–91 (2008).

\textsuperscript{23} See infra notes 242–248 (discussing courts’ differing approaches to “opportunity” since \textit{Stone v. Powell}, 428 U.S. 465 (1976)).

\textsuperscript{24} See Skinner v. Switzer, 131 S. Ct. 1289, 1296, 1298 (2011) (holding that a petitioner may bring a due process challenge to a state’s postconviction DNA access procedures through a § 1983 claim); Dist. Attorney’s Office v. Osborne, 129 S. Ct. 2308, 2320 (2009) (holding that due process requires that state procedures for establishing innocence based on new evidence after conviction be fundamentally fair).

\textsuperscript{25} See infra notes 28–130 and accompanying text.
\end{footnotesize}
a guarantee of procedural fairness in AEDPA. Part III discusses the Suspension Clause and due process challenges that are likely to emerge in the aftermath of Pinholster, as well as the fundamental, unanswered questions that they will raise about the nature of fairness in postconviction review.

I. PINHOLSTER AND ITS IMPACT

Prior to Pinholster, federal habeas petitioners had access to evidentiary hearings and other avenues of federal fact development to allow them to adduce new evidence to overcome AEDPA’s high bar to relief on claims previously adjudicated in a state court. For petitioners who had not had an adequate opportunity to develop the facts in state court, federal hearings and discovery served as a backstop of sorts—albeit an imperfect one, as federal hearings remained subject to AEDPA’s highly deferential standards. Pinholster eliminated this backstop by limiting review of previously adjudicated claims to the state-court record. Accordingly, fact development in the state courts—which had always been extremely important under AEDPA—is now even more vital to a petitioner’s claim. Section A introduces AEDPA and the pre-Pinholster approach to federal fact development. Section B discusses the Pinholster opinion and explains why Pinholster creates a significant barrier for federal habeas petitioners who did not or were unable to fully develop the factual record in state court.

A. Habeas Under AEDPA

The writ of habeas corpus has long been the primary procedural vehicle for challenging unconstitutional detentions. And although
the Constitution prohibits suspending the “great writ,” the Supreme Court has given Congress wide latitude in defining the writ’s scope. Congress exercised this power in 1996 by enacting AEDPA, which significantly restricts the ability of state prisoners to obtain federal habeas relief. Fifteen years later, AEDPA has proven to be as confusing as it is controversial, prompting dozens of Supreme Court cases (including, of course, the topic of this Article) interpreting it and a vast number

33 U.S. Const., art. I, § 9, cl. 2.

34 See Felker v. Turpin, 518 U.S. 651, 664 (1996) (“[W]e have . . . recognized that judgments about the proper scope of the writ are ‘normally for Congress to make.’” (quoting Lonchar v. Thomas, 517 U.S. 314, 323 (1996))).


36 Panetti v. Quarterman, 551 U.S. 930, 943–44 (2007) (describing a phrase in § 2244 as “not self-defining,” and interpreting that phrase by looking beyond AEDPA’s text in order to avoid “distortions and inefficiencies”); Lindh v. Murphy, 521 U.S. 320, 336 (1997) (observing that “the Act is not a silk purse of the art of statutory drafting”); Lee Kovarsky, Original Habeas Redux, 97 Va. L. Rev. 61, 80 (2011) (arguing that “AEDPA’s poor drafting is legendary” and citing to Panetti as an example of the Court avoiding a “formalistic application” of AEDPA’s text (citing Panetti, 551 U.S. at 943–44)); Yackle, supra note 20, at 381 (arguing that AEDPA is “not well drafted” and contains “extraordinarily arcane verbiage that will require considerable time and resources to sort out”).

of scholarly articles mostly decrying it. A brief account of the workings of relevant portions of AEDPA will provide the context for a discussion of Pinholster.

Under AEDPA, a federal court may consider granting habeas relief to an individual in state custody under very limited circumstances. When a state court has adjudicated a petitioner’s claim on the merits (as the great majority of claims have been), a federal court may grant habeas relief only if the state court adjudication either (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) involved an “unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” Satisfaction of either § 2254(d)(1) or (d)(2) is necessary, but not sufficient, for habeas relief: a petitioner who clears one of these hurdles must still show that he is “in custody in violation of the Constitution or laws or treaties of the United States” (as must all federal habeas petitioners).


38 See Marceau, supra note 19, at 4 (citing to the many “academic attacks” on AEDPA); see also, e.g., Larry W. Yackle, State Convicts and Federal Courts: Reopening the Habeas Corpus Debate, 91 CORNELL L. REV. 541, 542, 547 (2006) (arguing that AEDPA “manufactured” procedural problems).

39 Professor Larry Yackle has provided more detailed accounts. See generally Larry W. Yackle, Explaining Habeas Corpus, 60 N.Y.U. L. Rev. 991 (1985) (explaining that before AEDPA, the writ was necessary to enforce federal rights, which were unpopular in many states); Yackle, supra note 20 (arguing, shortly after AEDPA’s passage, that § 2254(d) did not require deference to reasonable state court decisions on questions of federal law or mixed questions of law and fact).

40 The majority of circuit courts interpret any substantive decision of a state court, or any substantive decision that describes the federal law on which it relies, to be an adjudication on the merits. See Margery I. Miller, Note, A Different View of Habeas: Interpreting AEDPA’s “Adjudicated on the Merits” Clause When Habeas Corpus Is Understood as an Appellate Function of the Federal Courts, 72 FORDHAM L. REV. 2593, 2615 (2004).


42 Id. § 2254(d)(2).

43 See Jackson v. McKee, 525 F.3d 430, 438 (6th Cir. 2008) (agreeing with the State’s argument that “§ 2254(d)(1) is a necessary, but not a sufficient, condition for habeas relief”).

44 28 U.S.C. § 2254(a); cf. Jackson, 525 F.3d at 438 (“Even if he could meet the ‘unreasonable application’ requirement set forth in § 2254(d)(1), Jackson needs more. Section 2254(a) independently limits habeas relief to situations where a person ‘is in custody in violation of the Constitution or laws or treaties of the United States . . . .’”); Ballinger v. Prelesnik, No. 2:09-CV-13886, 2011 WL 5216277, at *1 n.1 (E.D. Mich. Nov. 2, 2011) (“It is usually the case that where a state court unreasonably rejects a constitutional claim it can also be immediately determined that the constitutional right was violated. But this is not always true.”). AEDPA also does not remove preexisting limitations on the availability of
AEDPA, in addition to narrowing the types of state court errors for which federal relief is potentially available, also limits federal fact development in habeas cases. First, a federal court must presume that facts found by a state court are correct, although some courts and commentators have suggested that this presumption of correctness is weakened if the state court decision is held unreasonable under either § 2254(d)(1) or (d)(2). Further, with narrow exceptions, § 2254(e)(2) bars federal courts from holding evidentiary hearings on claims for which the petitioner did not establish a factual basis in state court.

relief. See Brian M. Hoffstadt, The Deconstruction and Reconstruction of Habeas, 78 S. Cal. L. Rev. 1125, 1159–60 (2005) (explaining that “a[though the statutory language in 28 U.S.C. § 2254 purports to encompass any claim that the petitioner’s custody is ‘in violation of the Constitution or laws . . . of the United States,’” courts exclude from these claims alleged Fourth Amendment violations addressed in a “full and fair” proceeding and laws of “federal constitutional criminal procedure” decided after the conclusion of the direct appeal).


46 See Justin F. Marceau, Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1), 82 Tul. L. Rev. 385, 423–41 (2007) (describing the split among federal courts’ interpretations of § 2254(d)(2) and § 2254(e)(1); reviewing the statutory structure, legislative history, and pre-AEDPA practice regarding factual deference; and concluding that (1)”state findings still must comport with minimum standards of procedural regularity, and extrinsic evidence may be considered by a federal court in assessing whether a state’s finding of fact might be rebutted,” and that (2) in light of the independent textual provision § 2254(e)(1), courts should not read § 2254(d)(2) to require deference to facts developed from deficient proceedings because such a reading would effectively erase § 2254(e)(1)). Alternatively, others have argued that § 2254(e)(1)’s presumption that state factfinding is correct does not apply in cases “in which the only evidence is the evidence presented in state court,” but rather “is reserved for cases in which additional evidence is developed in federal habeas proceedings.” See Brief for the ACLU and the ACLU of Alabama as Amici Curiae Supporting Petitioner at 3, Wood v. Allen, 130 S. Ct. 841 (2010) (No. 08-9156). In Wood, the Supreme Court found no unreasonable determination of the facts but explicitly avoided the question of whether § 2254(e)(1) always applies in the § 2254(d)(2) analysis. 130 S. Ct. at 845; see also infra note 161 (further explaining the holding in Wood). Another argument is that the § 2254(e)(1) presumption does not apply in cases “in which the only evidence is the evidence presented in state court.” See Taylor v. Maddox, 366 F.3d 992, 999–1000 (9th Cir. 2004) (interpreting § 2254(e)(1) to apply when there is “new evidence presented for the first time in federal court” and § 2254(d)(2) to apply “most readily to situations where petitioner challenges the state court’s findings based entirely on the state record”). But see Rountree v. Balicki, 640 F.3d 530, 537–38 (3d Cir. 2011) (finding, in a case limited to the record before the state court, that “[t]he test for § 2254(d)(2)’s ‘unreasonable determination of facts’ clause is whether the petitioner has demonstrated by ‘clear and convincing evidence,’ § 2254(e)(1), that the state court’s determination of the facts was unreasonable in light of the record”), cert. denied, 132 S. Ct. 533 (2011).

47 If a petitioner has “failed to develop the factual basis of a claim” in state court, the federal habeas court may only hold a federal evidentiary hearing on that claim if a new, retroactively applied rule of constitutional law has developed since the state court proceeding, 28 U.S.C. § 2254(e)(2)(A)(i), or if there exists newly discovered evidence that “could not have been previously discovered through the exercise of due diligence,” id. § 2254(e)(2)(A)(ii). In
For factual bases that a petitioner has developed below, the § 2254(e)(2) bar does not apply, leaving the decision to grant an evidentiary hearing to “the sound discretion of district courts.” As the Court explained in Schriro v. Landrigan in 2007, however, this discretion is sharply limited by the requirements of § 2254(d): because courts must determine whether a hearing could lead to relief, they must consider “the deferential standards prescribed by § 2254 . . . in deciding whether an evidentiary hearing is appropriate.” Thus, according to Schriro, “if the record refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.” Although the Court did not address the issue directly, the same reasoning presumably applies to other ways of expanding the factual record in federal habeas cases, which under the habeas rules include discovery and record supplementation for good cause.

Despite this limitation on federal fact development, the circuit courts continued to unanimously hold after Schriro (as they had since the adoption of AEDPA) that federal courts could consider evidence developed at the federal level—through exhibits attached to the petition, evidentiary hearings, discovery, or record supplementation—to determine whether § 2254(d)(1) had been satisfied. They based this addition to satisfying either of the above requirements, the facts must meet a demanding materiality standard. See id. § 2254(e)(2)(B). To establish materiality, the petitioner must show that “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.”

48 Williams, 529 U.S. at 430 (“By the terms of its opening clause [§ 2254(e)(2)] applies only to prisoners who have ‘failed to develop the factual basis of a claim in State court proceedings.’”); Fullwood v. Lee, 290 F.3d 663, 688 (4th Cir. 2002) (“Because [the petitioner] did not ‘fail[] to develop’ the factual basis of this claim, section 2254(e)(2) presents no bar to an evidentiary hearing in district court.” (second alteration in original)).

49 Schriro, 550 U.S. at 473 (citing 28 U.S.C. § 2254 Rule 8(a) (2006)) (stating that “the judge must review the answer [and] any transcripts and records of state-court proceedings . . . to determine whether an evidentiary hearing is warranted”).

50 Id. at 474.

51 Id.

52 Under the Rules Governing Section 2254 Cases in the United States District Courts, a judge may choose to allow discovery (for good cause) and supplementation of the federal record, including, inter alia, the use of interrogatories. 28 U.S.C. § 2254 Rule 6 (2006) (allowing discovery); id. Rule 7 (allowing the record to be supplemented). Throughout this Article, “fact development,” as used to describe a state or federal court process, refers to courts conducting evidentiary hearings and/or allowing discovery and record supplementation.

53 See Pinholster, 131 S. Ct. at 1417 (Sotomayor, J., dissenting) (noting that, prior to Pinholster, circuit courts had taken two approaches to applying § 2254(d)(1), both of which
conclusion, in part, on AEDPA’s language; although § 2254(d)(2) allowed a federal grant of habeas relief only if a state adjudication involved an unreasonable determination of the facts “in light of the evidence presented in the State court proceeding,” § 2254(d)(1) did not include similar language.\textsuperscript{54} Lower courts accordingly believed that they could conduct new fact development when deciding whether a state court decision was unreasonable or contrary to clearly established federal law, even if they did not always choose to allow in new evidence.\textsuperscript{55} \textit{Pinholster} changed the rules, however, by barring federal courts from considering any new evidence when determining whether § 2254(d)(1) is satisfied.\textsuperscript{56}

\textbf{B. Pinholster’s Modification of the Habeas Landscape}

1. The \textit{Pinholster} Decision

In 1982, California police arrested Scott Lynn Pinholster, and the State charged him with first-degree murder for burglarizing a house and fatally stabbing two people.\textsuperscript{57} A jury found Pinholster guilty, and during the penalty phase of the trial, Pinholster’s appointed attorneys only called one witness—Pinholster’s mother—despite having earlier consulted with a psychiatrist about Pinholster’s mental state at the time of the murder.\textsuperscript{58} The jury sentenced Pinholster to death on each of the two murder counts.\textsuperscript{59} Represented by new counsel, Pinholster filed an

\begin{footnotes}
\item[54] Cf. \textit{Pinholster}, 131 S. Ct. at 1415–16 (Sotomayor, J., dissenting) (quoting 28 U.S.C. § 2254(d)(2)).
\item[55] It is unclear exactly how often federal courts conducted evidentiary hearings or otherwise considered evidence outside the state-court record prior to \textit{Pinholster}. Numerous courts, however, have noted the existence of federal evidence admitted prior to \textit{Pinholster} that they could no longer consider in their § 2254(d) determinations following \textit{Pinholster}. See infra note 98.
\item[56] \textit{Pinholster}, 131 S. Ct. at 1400 & n.7 (placing an apparently categorical bar on a federal court’s consideration of any evidence beyond the state record until a petitioner has satisfied § 2254(d)(1) and, impliedly, § 2254(d)(2)).
\item[57] \textit{Id.} at 1394–95.
\item[58] \textit{Id.} at 1395–96.
\item[59] \textit{Id.} at 1396.
\end{footnotes}
unsuccessful habeas petition in state court.\textsuperscript{60} In this petition, Pinholster alleged, among other things, that his penalty-phase counsel had been ineffective in failing to “adequately investigate and present mitigating evidence, including evidence of mental disorders.”\textsuperscript{61} Pinholster’s new counsel introduced evidence of Pinholster’s mental problems from various records, a new psychiatrist, and family members.\textsuperscript{62}

In his subsequent federal habeas petition, Pinholster alleged for the first time that his penalty-phase counsel had failed to give adequate background information to the original psychiatrist consulted prior to the penalty phase.\textsuperscript{63} Pinholster included a declaration from the original psychiatrist indicating that, had the psychiatrist received more background information, he would have looked more closely into Pinholster’s personality problems.\textsuperscript{64} Because Pinholster had not provided this declaration to the state court, the federal court held his petition in abeyance.\textsuperscript{65} Pinholster then filed a second habeas petition in state court—now including the original psychiatrist’s declaration.\textsuperscript{66} The court denied this petition on the merits.\textsuperscript{67} Pinholster then returned to

\textsuperscript{60} Id.

\textsuperscript{61} Id. The quotations are the words of the Court, not the words of Pinholster’s habeas attorney.

\textsuperscript{62} Pinholster, 131 S. Ct. at 1396.

\textsuperscript{63} Id.

\textsuperscript{64} Id.

\textsuperscript{65} Id. The court held his petition in abeyance because it contained both exhausted and unexhausted claims. See Rose v. Lundy, 455 U.S. 509, 522 (1982). In 1982 in Rose v. Lundy, the Supreme Court held that “a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.” Id. This dismissal allows the petitioner to litigate the claims in state court and return to federal court, provided that the petitioner satisfies AEDPA’s statute of limitations. See infra note 179 and accompanying text. The Supreme Court “has endorsed” this stay and abeyance in lieu of dismissal in cases where AEDPA’s statute of limitations would bar the petitioner’s claim. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.1 & n.16 (6th ed. 2011). This remedy, however, offers little practical recourse for petitioners. See Hoffstadt, supra note 44, at 1161–63. As Professor Brian Hoffstadt explains, petitioners who “return to state court to file a state habeas petition seeking to exhaust the unexhausted claims” encounter two hurdles. Id. First, states bar “piecemeal challenges” and will refuse to hear the claim—meaning that the petitioner has “exhausted” the claim by raising it and obtaining a decision (in this case, a denial of the claim) in state court. Id. at 1161–62. Second, the state’s refusal to hear the piecemeal claim is based on a procedural rule, and claims that states deny for procedural reasons are considered procedurally defaulted and cannot generally be addressed in federal habeas proceedings. Id. at 1162–63 (citing Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Wainwright v. Sykes, 433 U.S. 72, 84 (1977)). Here, though, the California court rejected Pinholster’s second petition on the merits. Pinholster, 131 S. Ct. at 1396–97.

\textsuperscript{66} Pinholster, 131 S. Ct. at 1396–97.

\textsuperscript{67} Id.
the federal district court, which granted his request for an evidentiary hearing.\textsuperscript{68}

At the hearing, Pinholster presented mitigation evidence that his counsel had not presented at the penalty phase.\textsuperscript{69} This evidence included, among other items, testimony that his “biological father was an unemployed drunk” who “had mood swings and fits of anger, and was eventually diagnosed as paranoid with narcissistic personality disorder”; that Pinholster’s stepfather beat him “with his fists, a belt, and—on at least one occasion—a two-by-four board”; that “[a]fter Pinholster had been arrested three different times when he was ten or eleven years old, the juvenile court placed him in a home for emotionally disturbed boys, after which he stayed at a state mental hospital for about five months”; that “[h]is older brother, Alvin, was charged with the rape and sodomy of a fourteen-year-old, and was later diagnosed with schizophrenia and found to be incompetent to stand trial” and ultimately committed suicide; and that Pinholster “had suffered brain damage that explained his aggressive, impulsive, and antisocial behavior.”\textsuperscript{70} A psychiatrist diagnosed Pinholster with organic personality disorder “brought on by childhood and later-life head trauma.”\textsuperscript{71}

Following the hearing, the district court granted habeas relief on the grounds of “inadequacy of defense counsel in investigating and presenting mitigation evidence at the penalty phase.”\textsuperscript{72} An en banc panel of the Ninth Circuit Court of Appeals ultimately affirmed the district court’s grant of habeas relief, holding that 28 U.S.C. § 2254(e)(2), which bars new evidence in federal habeas except in certain circumstances, did not bar the district court’s evidentiary hearing, and that the court of appeals could consider the evidence from that hearing in deciding whether the state had unreasonably applied federal law under § 2254(d)(1).\textsuperscript{73} Chief Judge Alex Kozinski, joined by two others, dissented, arguing that evidence from the federal hearing could not be considered because Pinholster was not diligent in developing the factual record in the state courts as required by § 2254(e)(2).\textsuperscript{74}

The Supreme Court granted certiorari and addressed two issues: what evidence federal courts are allowed to consider in a § 2254(d)(1)

\textsuperscript{68} Id. at 1397.
\textsuperscript{69} Pinholster v. Ayers, 590 F.3d 651, 660 (9th Cir. 2009) (en banc).
\textsuperscript{70} Id. at 660–61.
\textsuperscript{71} Id. at 660–61.
\textsuperscript{72} Id. at 661.
\textsuperscript{73} Pinholster, 131 S. Ct. at 1397.
\textsuperscript{74} Ayers, 590 F.3d at 688–91 (Kozinski, C.J., dissenting).
review, and whether Pinholster should have been granted habeas relief.\(^75\) Its decision on the first issue, the focus of this Article, fundamentally changed AEDPA.\(^76\)

In addressing what evidence a federal court may consider when making a relief prerequisite determination under § 2254(d)(1), Justice Thomas, writing for six other Justices in this part of the opinion, looked to “the broader context of [AEDPA] as a whole.”\(^77\) The Court determined that, because AEDPA requires petitioners to exhaust state remedies “before filing for federal habeas relief,” and because § 2254(d)(1) refers to the past, “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”\(^78\) “It would be strange,” the Court concluded, “to ask federal courts to analyze whether a state court’s adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.”\(^79\)

The Court rejected the argument that its decision renders § 2254(e)(2)’s restrictions on evidentiary hearings superfluous, noting that, “[a]t a minimum,” that section will still limit hearings on claims not adjudicated on the merits in state court.\(^80\) Finally, Justice Thomas concluded, “AEDPA’s statutory scheme is designed to strongly discourage” state prisoners from submitting new evidence in federal court.\(^81\) “Provisions like § 2254(d)(1) and (e)(2) ensure that federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.”\(^82\) Having concluded that the evidence presented at the federal evidentiary hearing could not be considered under § 2254(d)(1), the Court, split five to four on this issue, reversed the grant of habeas relief, emphasizing the “doubly deferential” review required under \textit{Strickland} and AEDPA.\(^83\)

\(^{75}\) \textit{Pinholster}, 131 S. Ct. at 1398.

\(^{76}\) \textit{Compare supra} notes 32–55 and accompanying text (describing the habeas system under AEDPA), \textit{with infra} notes 95–130 and accompanying text (explaining how \textit{Pinholster} altered this system).

\(^{77}\) \textit{Pinholster}, 131 S. Ct. at 1398, 1413.

\(^{78}\) \textit{Id.} at 1398–99.

\(^{79}\) \textit{Id.} at 1399.

\(^{80}\) \textit{Id.} at 1401.

\(^{81}\) \textit{Id.}

\(^{82}\) \textit{Id.} (internal quotation marks omitted).

\(^{83}\) \textit{Pinholster}, 131 S. Ct. at 1403 (citing \textit{Strickland} v. Washington, 466 U.S. 668, 689 (1984)).
Justice Sotomayor, writing for herself alone in this portion of her dissent (but with the substantial agreement of, perhaps surprisingly, Justice Alito), disagreed on a number of grounds. First, she emphasized the rarity of evidentiary hearings and the many hurdles that petitioners must clear in order to obtain one. Arguing from the text of the statute, Justice Sotomayor then noted that only “§ 2254(d)(2)— unlike § 2254(d)(1)—expressly directs district courts to base their review on ‘the evidence presented in the State court proceeding.’” She then argued that the Court’s recognition “that some diligent habeas petitioners are unable to develop all of the facts supporting their claims in state court” was consistent with allowing new evidence to play a role in the § 2254(d)(1) determination.

Perhaps most importantly, Justice Sotomayor observed that the Court’s new rule appears to create an “anomaly,” providing the example of a petitioner who discovered evidence of a state’s withholding of exculpatory evidence following the close of a state hearing:

[I]f the petitioner had not presented his Brady claim to the state court at all, his claim would be deemed defaulted and the petitioner could attempt to show cause and prejudice to overcome the default. If, however, the new evidence merely bolsters a Brady claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain federal habeas relief after today’s holding. What may have been a reasonable decision on the state-court record may no longer be reasonable in light of the new evidence. Because the state court adjudicated the petitioner’s Brady claim on the merits, § 2254(d)(1) would still apply. Yet, under the majority’s interpretation of § 2254(d)(1), a federal court is now prohibited

84 Id. at 1411 (Alito, J., concurring in part and concurring in the judgment) (“Although I concur in the Court’s judgment, I agree with the conclusion reached in Part I of the dissent, namely, that, when an evidentiary hearing is properly held in federal court, review under 28 U.S.C. § 2254(d)(1) must take into account the evidence admitted at that hearing. As the dissent points out, refusing to consider the evidence received in the hearing in federal court gives § 2254(e)(2) an implausibly narrow scope and will lead either to results that Congress surely did not intend or to the distortion of other provisions of [AEDPA] and the law on ‘cause and prejudice.’” (citation omitted)).
85 Id. at 1413–21 (Sotomayor, J., dissenting).
86 Id. at 1413–14 (citing King et al., supra note 2, at 35–36).
87 Id. at 1415 (quoting 28 U.S.C. § 2254(d)(2) (2006)).
88 Id. at 1416–17.
from considering the new evidence in determining the reasonableness of the state-court decision.\footnote{Pinholster, 131 S. Ct. at 1418 (Sotomayor, J., dissenting) (citations omitted).}

This hypothetical example leads to the “anomalous result” that petitioners who failed to raise a claim in state court, and who later obtain new evidence and raise a new claim based on this evidence, will be rewarded with a federal hearing and habeas relief “if they can show cause and prejudice for their default.”\footnote{Id.} Those who have been diligent in raising a claim and later obtain new evidence supporting the claim, on the other hand, will not typically have a “new claim”—only new evidence. Under Pinholster, these petitioners are barred from federal factfinding and relief.\footnote{Id.} As Justice Sotomayor notes, “The majority responds to this anomaly by suggesting that my hypothetical petitioner ‘may well [have] a new claim,’”\footnote{Id. (second alteration in original).} but, as discussed in more detail in Section II.C, this new claim often may not exist.\footnote{See infra notes 174–203 and accompanying text.}

2. Pinholster’s Immediate Impact in the Lower Courts

Before Pinholster, federal courts reviewing state court adjudications under AEDPA’s § 2254(d)(1) assumed that they could—within the constraints of § 2254(e)(2), the habeas rules, and Schriro—collect new evidence\footnote{See, e.g., Ridgeway, 424 F. App’x at 59–60 (describing the court’s ordinary course of action prior to Pinholster).} to assess the reasonableness of the state court’s interpretation of federal law. After Pinholster, the evidence available to a reviewing court considering whether § 2254(d)(1) is satisfied—and thus, in many cases, whether habeas relief may be available—is considerably narrowed.\footnote{See supra notes 75–83 and accompanying text (explaining the Pinholster majority’s reasoning).} Indeed, as lower courts have already recognized, although Pinholster itself involved evidence from an evidentiary hearing, its reasoning clearly precludes federal courts from considering new evidence from any source, such as federal discovery, when conducting a § 2254(d)(1) analysis.\footnote{See, e.g., Champ v. Zavaras, 431 F. App’x 641, 655 (10th Cir. 2011) (“Although [Pinholster] dealt with new evidence that the district court admitted in the context of an evidentiary hearing, this newly articulated rule applies with equal force to any expansion of the record under Habeas Rule 7.”); Teleguz v. Kelly, No. 7:10CV00254, 2011 WL 3319885, at *9 (W.D. Va. Aug. 1, 2011) (concluding that Pinholster ‘significantly restricts my review of [pe-}
impact: immediately, federal courts, citing *Pinholster*, refused to hold evidentiary hearings\(^{97}\) and ignored evidence collected by federal courts prior to *Pinholster*.\(^{98}\)


\(^{98}\) But see *Bemore v. Martel*, No. 08cv0311 LAB (WVG), 2011 U.S. Dist. LEXIS 72296, at *5–8 (S.D. Cal. July 6, 2011) (conducting an evidentiary hearing because, under § 2254(e)(2), petitioner had not failed to diligently develop facts underlying his claims in state court; but noting that it would only be able to consider new facts from the hearing if “Petitioner first satisfies section 2254(d)” (emphasis omitted)); cf. *Ballinger*, 2011 WL 5216277, at *1 (denying a motion for reconsideration of the court’s decision to grant an evidentiary hearing...
In one stark example from the Second Circuit, Russell Ridgeway raised a *Strickland* ineffective assistance of counsel claim in his federal district court habeas petition, alleging that his attorney was ineffective for two reasons.\(^99\) First, the attorney did not call a medical expert who would have rebutted the prosecution’s claims about the only physical evidence of sexual abuse available in the case; second, the attorney failed to call Ridgeway’s mother and sisters who would have testified about Ridgeway’s relationship with the alleged sexual abuse victim.\(^100\)

The court of appeals, addressing petitioner’s appeal from the district court’s denial of relief, noted that the state record was “sparse, to say

because it had “already determined that [§] 2254(d)’s hurdle has been cleared” and now was considering whether petitioner was being unconstitutionally held under [§] 2254(a)); Love v. Cate, Nos. 10 55377, 10 55387, 2011 WL 3874873, at *4 n.1 (9th Cir. Aug. 21, 2011) (Grabber, J., dissenting) (noting that, where a court already has found an unreasonable application of federal law, a federal court may hold an evidentiary hearing to determine whether a prosecutor’s peremptory strike was racially motivated). Some courts vacated their own orders to conduct additional factfinding. See Johnson v. Walker, No. 2:09-cv-0067 WBS KJN P, 2011 U.S. Dist. LEXIS 46808, at *9–11 (E.D. Cal. May 2, 2011) (vacating an order for further briefing); United States ex rel. Brady v. Hardy, No. 10 C 2098, 2011 U.S. Dist. LEXIS 44570, at *4–5 (N.D. Ill. Apr. 25, 2011) (vacating the court’s prior decision to hold an evidentiary hearing).

\(^98\) Some federal courts, in light of *Pinholster*, ignored evidence collected in federal court prior to *Pinholster* and/or halted federal factfinding. See, e.g., Jackson v. Kelly, 650 F.3d 477, 492 (4th Cir. 2011) (relying only on the state-court record despite new evidence from an evidentiary hearing conducted in federal district court), cert. denied, 132 S. Ct. 64 (2011); Henness v. Bagley, 644 F.3d 308, 327 (6th Cir. 2011) (ignoring new evidence presented in district court); Price v. Thurmer, 637 F.3d 831, 837 (7th Cir. 2011) (ignoring evidence from a hearing conducted in the court of appeals but finding that, even if it could consider the evidence, petitioner would not have prevailed); Carter v. Bigelow, No. 2:02-CV-326 TS, 2011 U.S. Dist. LEXIS 71551, at *6, *8–9 (D. Utah June 27, 2011) (halting federal discovery, finding that it would be futile and that the court could not consider any evidence unearthed); Hand v. Houk, No. 2:07-cv-846, 2011 U.S. Dist. LEXIS 69001, at *162 (S.D. Ohio Apr. 25, 2011) (ignoring evidence from the court’s own evidentiary hearing because the “testimony should not have been admitted” under *Pinholster*); cf. Lee v. Almager, No. CV 08-3248-PA(E), 2011 U.S. Dist. LEXIS 78612, at *47–48 (C.D. Cal. June 7, 2011) (finding that the court could only review the state record even though it previously ordered a hearing, which had not yet occurred). But see Carter v. Sec’y, Dep’t of Corr., No. 6:09-cv-468-Orl-31KRS, 2011 U.S. Dist. LEXIS 51924, at *1–8 (M.D. Fla. May 16, 2011) (granting the respondent’s motion to dispense with a previously granted evidentiary hearing based on *Pinholster*, but nonetheless granting habeas relief on the state-court record); Beck v. Nooth, No. CV. 08-636-KI, 2011 U.S. Dist. LEXIS 40976, at *20–21 (D. Or. Apr. 14, 2011) (finding that the court had to ignore new evidence collected, but that habeas relief was nonetheless warranted “based upon the evidence before the state post-conviction court”). For cases that relied on federal evidentiary hearings and were vacated and remanded by the Supreme Court in light of *Pinholster*, see Ryan v. Schad, 131 S. Ct. 2092 (2011) (mem.), *vacating and remanding* 606 F.3d 1022 (9th Cir. 2010); Ryan v. Detrich, 131 S. Ct. 2449 (2011) (mem.), *vacating and remanding* 619 F.3d 1038 (9th Cir. 2010).

\(^99\) *Ridgeway*, 424 F. App’x at 59.

\(^100\) *Id.*
the least,” and “failed to establish conclusively that Ridgeway’s counsel had not consulted a medical expert or ignored Ridgeway’s request to call his relatives.”

New evidence presented by Ridgeway in federal district court “appear[ed] to lend some credence to Ridgeway’s claims,” however, and the court of appeals noted that, “[a]s in other cases, we might have remanded the cause to give Ridgeway’s counsel an opportunity to explain behavior” that appeared to fall beneath Strickland’s minimum requirements for effective assistance. The Supreme Court had, however, decided Pinholster two days before oral argument in Ridgeway, and the court was forced to affirm.

In the 2011 case Pape v. Thaler, the Fifth Circuit similarly reversed a district court’s decision to grant habeas relief on a Strickland ineffective assistance claim. The court first held that, under Pinholster, the district court had erred in conducting an evidentiary hearing and in using evidence from this hearing to grant habeas relief under § 2254(d)(1). The court of appeals then concluded that, “[b]ased on the record before us, the state court did not err by concluding that counsel had not acted deficiently.” In a similar case, Judge James Jones of the Western District of Virginia observed that Pinholster “instructs” the district court that it may not consider new evidence obtained after a state court adjudication—evidence that the court previously would have reviewed and that would have “bolster[ed] [petitioner’s] claims.” Judge Jones concluded by noting that his “review of a state criminal case as a federal judge is exceedingly limited,” even in capital cases, and therefore denied habeas relief.

In the most stark examples of Pinholster’s impact, the new limitation on § 2254(d) has required federal courts to ignore evidence they had already collected. In others, it has prevented federal courts from expanding the record in the first place—a problem that will persist. For petitioners who have not been allowed to develop their claims in state court, this is a significant problem.

101 Id. at 59–60.
102 Id. at 60 (citation omitted).
103 Id. at 59–60.
104 645 F.3d 281, 291 (5th Cir. 2011).
105 Id. at 288.
106 Id. at 291.
108 Id. at *45.
109 See supra note 98.
110 See supra note 97 (citing cases where courts have refused to hold evidentiary hearings after Pinholster).
3. The Pinholster Problem

AEDPA’s rules for federal fact development, although restrictive, previously provided a limited remedy for deficiencies in state fact development procedures. If a petitioner could not fully develop a record in state court he could introduce new evidence in some circumstances, and federal courts had discretion to conduct additional discovery, hold hearings, or supplement the record in determining whether a petitioner had satisfied § 2254(d)(1). Pinholster removes these safeguards.

By closing off a primary route to fact development in federal habeas review of state cases, Pinholster places an extraordinary premium on effective fact development at the state level. To clear the § 2254(d)(1) hurdle, petitioners must now rely solely on the state record unless they can show that their claim was not adjudicated on the merits below—an uncommon circumstance.111 This significantly exacerbates a known problem with AEDPA generally: AEDPA expanded the deference that federal courts must give to state court fact development and state courts’ interpretations of federal law while simultaneously removing the pre-AEDPA requirement that state postconviction review hearings be “full and fair” before receiving deference.112 As Professor Larry Yackle prophetically observed before AEDPA:

Would-be federal habeas petitioners raising fact-sensitive claims are routinely diverted to state postconviction proceedings in which the state courts can determine “factual” issues (broadly conceived) that will then be entitled to the statutory presumption [of correctness] when, and if, petitioners return to the federal forum. In the end, state postconviction remedies serve as substitutes for federal habeas corpus in the adjudication of federal claims.113

With a deficient factual record114 and no access to federal fact development, many habeas petitioners will have little chance of success in

111 See supra note 40.
112 See Yackle, supra note 17, at 140–41; see also Marceau, supra note 46, at 396–99 (describing some courts’ conclusions, which Marceau views as erroneous, that even unreasonable determinations of facts by state courts must receive deference under § 2254(e)(1)).
114 Where state postconviction proceedings are robust, Pinholster may have little effect because federal courts—even following the pre-Pinholster standard—may see no need to supplement the state-court record. The frequency with which federal courts allowed in new evidence through discovery or hearings prior to Pinholster is difficult to pinpoint and has not yet been studied.
obtaining relief. As the concurrence in a post-\textit{Pinholster} case from the Eleventh Circuit notes:

Without the aid of legal process and a developed record to rely upon, it would be virtually impossible for any petitioner to carry his or her ultimate burden of proof, let alone to demonstrate that he or she is entitled to habeas relief in federal court under AEDPA’s “doubly deferential” standard of review.\footnote{Borden v. Allen, 646 F.3d 785, 831 (11th Cir. 2011) (Wilson, J., concurring in part, dissenting in part) (quoting \textit{Pinholster}, 131 S. Ct. at 1403).}

The problem with state records arises from the inability of habeas petitioners—the great majority without access to counsel\footnote{Murray v. Giarratano, 492 U.S. 1, 7, 10 (1989) (confirming that “neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of ‘meaningful access’ require[s] the State to appoint counsel for indigent prisoners seeking state postconviction relief” and that this principle applies equally to capital and noncapital cases). \textit{But see} Eric M. Freedman, \textit{Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings}, 91 \textit{Cornell L. Rev.} 1079, 1080 (2006) (arguing that \textit{Giarratano} in fact supports a right to counsel in state postconviction review and should be abandoned).}—to discover and document relevant facts in light of state courts’ often restrictive fact-development procedures.\footnote{There is a dearth of empirical literature addressing fact-development deficiencies in state postconviction review proceedings. The literature tends to assume that state proceedings are effective or deficient, with little empirical proof. Professors Joseph Hoffman and Nancy King, for example, in arguing for the elimination of habeas review of state convictions except in capital cases, “make no empirical claims about the effectiveness of present state appellate and postconviction review processes.” Hoffman & King, supra note 16, at 836. They assume, however, that state courts “will continue to provide a reasonable level of post-trial or post-plea judicial review of claims of constitutional error” in state postconviction review cases—thus implying an assumption that state courts already provide this reasonable level of review. Id. at 836–37. Professor Yackle, on the other hand, argues that state proceedings are deficient. Yackle, supra note 38, at 556. Professor Yackle argues that state judges are “charged to see that federal procedural safeguards are respected. Yet their ability to do so is compromised by the overriding mission to vindicate state criminal law”—an observation that he admits is an “exaggeration” but claims is a sound “general point.” Id. Professor Andrew Hammel, in contrast to Hoffman, King, and Yackle, emphasizes the difficulty of making accurate assumptions about the quality of state postconviction processes: “For every habeas ‘rogue state’ which subjects death row inmates to an inadequate or haphazard postconviction forum (and then seeks to enforce defaults in federal court caused by the deficiencies in its procedure), there are other states which demonstrate concern for fair postconviction procedures.” Andrew Hammel, \textit{Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas}, 39 \textit{Am. Crim. L. Rev.} 1, 50 (2002). Hammel notes, however, that a study that he cites to support this proposition (an empirical review of error rates in capital cases between 1973 and 1995) used data that “were collected during the era of federally-funded resource centers and therefore probably reflect higher standards of advocacy than prevail today.” Id. at 51 n.333 (citing James S. Liebman et al., \textit{Capital Attrition: Error Rates in Capital Cases, 1973–1995}, 78 \textit{Tex. L. Rev.} 1839, 1848 (2000)). Hammel believes}
Penalty Project have concluded that “many prisoners cannot secure a state court hearing or preserve their right to further review,” pointing primarily to the problem of limited resources.\footnote{\textit{See} John H. Blume et al., \textit{In Defense of Noncapital Habeas: A Response to Hoffman and King}, 96 \textit{Cornell L. Rev.} 435, 447 (2011). Access to counsel, the quality of counsel, and the procedures afforded during postconviction review vary substantially among states. \textit{Cf.} Casey C. Kannenberg, \textit{Wading Through the Morass of Modern Federal Habeas Review of State Capital Prisoners’ Claims}, 28 \textit{Quinnipiac L. Rev.} 107, 120–24 (2009) (citing 28 U.S.C. §§ 2261, 2265) (discussing AEDPA’s “opt-in” mechanism, which provides accelerated federal habeas review of state capital cases and removes ineffectiveness of counsel as a grounds for relief if states meet certain requirements for providing competent postconviction counsel, and noting that only Arizona met the opt-in requirements); Alissa Pollitz Worden et al., \textit{A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States}, 74 \textit{Alb. L. Rev.} 1423, 1434 (2011) (noting that the “system for providing counsel at [the appellate] stage varies among states, with some taking direct responsibility through the provision of defender services under the direct auspices of the state, while others delegate the responsibility to counties”).} And even where counsel or pro se litigants make diligent efforts to develop the record, elected judges may be loath “to authorize funding for investigative or expert services, [or] to order production of evidence”\footnote{\textit{Blume et al., supra} note 118, at 446.} in light of limited budgets and the fear of being labeled “soft” on crime.

Beyond the constraints posed by inadequate representation and expert services for petitioners, state courts’ post-trial procedures for fact development are limited. As thirty-one states defending their post-conviction procedures recently noted, “[V]irtually every State provides for the summary disposition of post-conviction claims without a hearing.”\footnote{\textit{Brief for State of Idaho and 30 Other States as Amici Curiae in Support of Respon- dent at} 5–6, Bell v. Kelly, 555 U.S. 55 (2008) (No. 07-1223), \textit{available at} http://www.american bar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_1223_RespondentAmCuID30OtherStates.authcheckdam.pdf.} Although states often provide for postconviction hearings in limited circumstances,\footnote{\textit{For examples of states that provide for some type of postconviction hearing, see} 725 \textit{I.L. Comp. Stat. Ann.} 5/122-6 (West 2008) (providing a hearing at the court’s discretion); \textit{Kan. Stat. Ann.} § 60-1507 (West 2005) (providing a hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief”); \textit{La. Code Crim. Proc. Ann.} art. 930 (2008) (providing a hearing for facts not otherwise resolved); \textit{Minn. Stat. Ann.} § 590.04 (West 2010) (providing for introduction of affidavits, depositions, and oral testimony at the judge’s discretion); \textit{N.Y. Crim. Proc. Law} § 440.30 (McKinney 2005) (requiring grant of a motion to vacate a judgment without a hearing if there is “unquestionable documentary proof” or “sworn allegations of fact . . . conceded by the people to be true” that support a “ground constituting legal basis for the motion”); \textit{N.C. Gen. Stat. Ann.} § 15A-1420(c)(1) (West 2011) (providing a hearing unless the court determines that the motion is without merit); \textit{Ohio Rev. Code Ann.} § 2953.21 (West 2006)}. state courts often deny a hearing unless the
petitioner crosses a high procedural hurdle, such as demonstrating that new evidence has been discovered that would more likely than not lead the court to overturn a conviction—typically a showing that “the prisoner lacks the wherewithal to make.”\textsuperscript{122} Other states offer “discovery” (which may potentially include a hearing) if petitioners have presented a prima facie case or cleared other initial barriers to factfinding.\textsuperscript{123} When courts conduct a simple paper hearing\textsuperscript{124} or allow limited discovery under these procedures, they may deny the admission of crucial affidavits, tests, or expert reports that the petitioner has managed to obtain.\textsuperscript{125} In many cases, a state court’s fact development procedures may be facially adequate, but even here, the deferential abuse-of-discretion review for a lower court’s refusal to admit certain evidence in

\textsuperscript{122} Blume et al., supra note 118, at 445–47.
\textsuperscript{123} See, e.g., Alaska Stat. § 12.72.030 (2010); Mont. Code Ann. § 46-21-201 (2011) (allowing the “discovery procedures available in criminal or civil proceedings” upon a showing of good cause); Mass. R. Crim. P. 30 (allowing affidavits and discovery “[w]here affidavits filed by the moving party . . . establish a prima facie case for relief”).
\textsuperscript{125} See, e.g., Wilson v. Workman, 577 F.3d 1284, 1292 (10th Cir. 2009) (noting that the state appellate court relied solely on the record from trial in denying petitioner’s appeal, denying any opportunity for the petitioner to make a claim or to submit any affidavits or “other non-record evidence” to support this claim); infra note 283 and accompanying text (describing a state hearing limited to one affidavit prepared by counsel).
post-trial proceedings\textsuperscript{126}—and the evidence allowed to be omitted under this standard—provides little recourse for discretion not exercised in defendants’ favor.\textsuperscript{127} Prior to \textit{Pinholster}, a petitioner saddled with a weak state record could often use evidence produced in federal court to overcome § 2254(d)(1): a showing that the petitioner had sought unsuccessfully to expand the record in state court often established that the petitioner had not “failed” to develop the factual basis for his claim under § 2254(e).\textsuperscript{128} By limiting the § 2254(d)(1) analysis to the state record and by removing the option to use § 2254(e) for a hearing, the Supreme Court has precluded this option. Although Justice Sotomayor assumed in her dissent that “the majority [did] not intend to suggest that review is limited to the state-court record when a petitioner’s inability to develop the facts supporting his claim was the fault of the state court itself,”\textsuperscript{129} neither her dissent nor the Court’s opinion offers a clear roadmap to avoiding this outcome.\textsuperscript{130}

\textsuperscript{126} I refer to “post-trial” procedures to describe state procedural requirements in proceedings that address challenges to the constitutionality of a criminal conviction. Although a defendant must raise some challenges at trial, in most states these challenges must be brought through appellate and/or postconviction collateral review procedures.

\textsuperscript{127} Cf. People v. Stanaway, 521 N.W.2d 557, 575 (Mich. 1994) (“Criminal defendants do not have general rights to discovery.”); State v. Williams, 846 S.W.2d 408, 410 (Tex. App. 1992) (“There is no general right under the United States Constitution to discovery by a defendant in a criminal case of evidence in possession of the State . . . .”).

\textsuperscript{128} Moreover, a petitioner could allege additional facts in federal court as long as they did not “fundamentally alter” the claim. \textit{See} Vasquez v. Hillery, 474 U.S. 254, 260 (1986); Picard v. Connor, 404 U.S. 270, 277–78 (1971); \textit{Hertz & Liebman, supra note 65, § 23.3(c)(ii)–(iii)}; \textit{28 James W. Moore et al., Moore’s Federal Practice—Criminal Procedure} § 671.06(3)(a)(i) & n.28 (3d ed. 2011).

\textsuperscript{129} \textit{Pinholster}, 131 S. Ct. at 1417 n.5 (Sotomayor, J., dissenting).

\textsuperscript{130} Justice Sotomayor’s assumption may not, however, be a safe one. Justice Sotomayor’s \textit{Pinholster} dissent cites to oral argument in \textit{Bell} to support her assumption. \textit{Id.} In that argument, however, Justice Scalia believed that states need not provide minimal process to comport with the constitution—states could, for example, bar the introduction of new evidence. \textit{See} Transcript of Oral Argument at 50, \textit{Bell}, 555 U.S. 55 (No. 07-1223), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-1223.pdf. This is not particularly reassuring for petitioners because, as Justice Sotomayor points out, they now lack clear avenues to adequate fact development in state or federal court. \textit{Pinholster}, 131 S. Ct. at 1417 n.5 (Sotomayor, J., dissenting) (citing to Transcript of Oral Argument, \textit{supra}). Justice Scalia and his interlocutor, an attorney defending state procedures, argued that defendants lacked this independent right. First, they reasoned, states need not offer any form of postconviction review, so they also need not provide minimal process as part of this review. Transcript of Oral Argument, \textit{supra}, at 50–51. Justice Scalia, in questioning counsel, asked, “I guess the State court can say, you know, 60 days after the trial is—is doomsday. No more new evidence. . . . Suppose that’s unconstitutional—but it isn’t.” \textit{Id.} at 50. Counsel replied that such procedure would not be unconstitutional because “the State court—we don’t have to provide for direct appeals.” \textit{Id.} Second, Justice Scalia suggested that if states were required to follow certain postconviction review procedures, federal
By limiting review under § 2254(d) to the state level, Pinholster places even more emphasis on the state record. Petitioners who were unable to develop the facts supporting their claims in state court will employ alternative ways of overcoming this problem, both within and outside of AEDPA. In resolving these challenges—which, with Pinholster’s elimination of the federal backstop, will take on a new urgency—the Court will have to consider critical, unresolved questions surrounding AEDPA, the Suspension Clause, and postconviction due process.

II. AEDPA and the Quality of State Postconviction Procedures

As petitioners attempt to cope with inadequate state fact development after Pinholster, they have a variety of claims and arguments available. This Part addresses arguments based on the text of AEDPA itself; constitutional claims are considered in Part III.

Within AEDPA, the approaches with the greatest potential for addressing the problem are, at their core, efforts to read into the statute a procedural fairness prerequisite to affording deference to a state court decision—despite the fact that AEDPA eliminated the express procedural prerequisites in its predecessor.131 This argument has a pedigree as old as AEDPA itself: in the year that AEDPA was enacted, Professor Yackle argued that although AEDPA “drop[ped] the specific procedural and substantive standards contained in the former § 2254(d),” it did not “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.”132 Although taken up by a number of circuit courts, the Supreme Court has not decided the issue. This omission is likely due in part to the role of federal fact develop-

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132 Yackle, supra note 17, at 141; see also Marceau, supra note 19, at 9–20 (discussing what makes an adjudication “full and fair”); Marceau, supra note 46, at 427 (arguing that “it is generally acknowledged that AEDPA does not displace the whole of habeas law as it existed prior to 1996”).
ment in remediing the most egregious state procedural failures prior to *Pinholster*. The elimination of this safety valve will bring the issue to the forefront.

The most promising paths to finding a procedural prerequisite to deference are also marked in the literature, but must be reassessed in light of *Pinholster*. The Court’s decision foreclosed one previously viable approach—that § 2254(d)(1) does not apply when new material evidence is discovered in federal court—and calls others into question.

After *Pinholster*, habeas petitioners have three plausible textual arguments that AEDPA deference should not apply in the face of unfair state fact-development proceedings. First, when a state court’s procedures are woefully deficient, the state court has arguably failed to adjudicate a claim on the merits. This approach removes the § 2254(d)(1) and (d)(2) barriers to relief, opening the door to federal fact development, subject to § 2254(e)’s requirements. Second, a deficient fact development scheme could render state court factfindings procedurally “unreasonable,” satisfying § 2254(d)(2). Finally, as hinted in *Pinholster* itself, a petitioner could attempt to raise new claims on federal habeas review, pointing to the deficient state procedures as the cause of his failure to have the new claim addressed in the state court.

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133 See Marceau, supra note 19, at 9–20.
134 *Cullen v. Pinholster*, 131 S. Ct. 1388, 1400 (2011); see also *Brown v. Smith*, 551 F.3d 424, 429 (6th Cir. 2008) (“We think that [AEDPA deference does not apply] whenever new, substantial evidence supporting a habeas claim comes to light during the proceedings in federal district court.”); *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003) (“AEDPA’s deference requirement does not apply when a claim made on federal habeas review is premised on *Brady* material that has surfaced for the first time during federal proceedings.”).
135 For a discussion of the importance of identifying whether a court has addressed a claim on the merits, whether a claim is procedurally defaulted, or whether petitioner raised a claim but the state court failed to address it, see infra notes 177–187 and accompanying text.
136 See infra note 142 and accompanying text; *Boyd v. Waymart*, 579 F.3d 330, 332 (3d Cir. 2009) (per curiam) (noting that where a habeas case is adjudicated on the merits in state court, “federal habeas relief is subject to the standards prescribed by [AEDPA], 28 U.S.C. § 2254(d)”).
137 See infra notes 161–173 and accompanying text. Similarly, if a state court has adjudicated the merits of the claim, deficient state procedures may violate due process or other constitutional rights, in which case the state court may have unreasonably applied or acted contrary to federal law, thus satisfying § 2254(d)(1). Part III of this Article discusses the due process question in the 42 U.S.C. § 1983 (2006) context; the due process analysis would be similar for a § 2254(d)(1) claim. See infra notes 204–282 and accompanying text.
138 See infra notes 174–194 and accompanying text.
A. Inadequate State Fact Development as a Failure to Adjudicate a Claim on the Merits

If a petitioner can persuade a federal habeas court that a claim was not “adjudicated on the merits” in state court, the petitioner can avoid Pinholster altogether.\(^{139}\) Pinholster only bars consideration of federally developed facts under 28 U.S.C. § 2254(d)(1),\(^{140}\) which applies only to claims adjudicated on the merits. Thus, when a state court has not adjudicated a claim on the merits, the federal court may therefore review the claim without according § 2254(d) deference,\(^{141}\) and its fact-develop-

\(^{139}\) Cf. James v. Schriro, 659 F.3d 855, 876 (9th Cir. 2011) (determining that the court could consider new evidence presented in a federal evidentiary hearing in granting relief on a Strickland claim because a state postconviction court found that the claim was procedurally barred rather than adjudicated on the merits, and Pinholster allows consideration of such evidence subject to § 2254(e)’s requirements). This scenario differs from the scenarios discussed in this Part, in which a petitioner might argue that claims addressed in a cursory fashion by a state court or ignored entirely (rather than procedurally defaulted) were not adjudicated on the merits.

\(^{140}\) See Pinholster, 131 S. Ct. at 1400 (“If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.”). The Court’s reasoning, however, appears to also bar federal factfinding under § 2254(d)(2). In § 2254(d)(1), Congress simply provides (as summarized by the Court) that a federal habeas court is to review “a state-court adjudication that ‘resulted in’ a decision that was contrary to, or ‘involved’ an unreasonable application of, established law.” Id. at 1398. Section 2254(d)(2) also provides that a federal court may consider granting relief if an adjudication resulted in an unreasonable determination of the facts “in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2) (2006). The Supreme Court construes “in light of the evidence” as “clarifying language,” and concludes that this language—which is found in § 2254(d)(2) but not § 2254(d)(1)—“does not detract from our view that § 2254(d)(1) also is plainly limited to the state-court record.” Pinholster, 131 S. Ct. at 1400 n.7 (emphasis added). The use of the word also suggests that the Court anticipates that a court addressing claims under both § 2254(d)(1) and (d)(2) may only review the state-court record. See id.

\(^{141}\) See Pinholster, 131 S. Ct. at 1418 (Sotomayor, J., dissenting) (arguing that, under the majority’s approach, where a claim and its supporting evidence had not been adjudicated on the merits, the federal court would review the purportedly “new” claim de novo); Cone v. Bell, 129 S. Ct. 1769, 1784 (2009) (reviewing de novo a Brady claim for which the state courts “did not reach the merits,” and noting that the claim was not subject to § 2254(d) deference); see also Fisher v. Lee, 215 F.3d 438, 446 (4th Cir. 2000) (“If the claim was properly presented to the state court and the state court adjudicated it, the deferential standard of review set forth in § 2254(d) applies and federal habeas relief may not be granted unless the relevant state-court adjudication was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. If, however, a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits our review of questions of law and mixed questions of law and fact is de novo.” (citations and internal quotation marks omitted)). The court also could remand for an evidentiary hearing. Hoffman v.
ment powers are limited “only” by § 2254(e) and the habeas rules. This provides a petitioner with a relatively clean slate on which to challenge procedural inadequacies in state postconviction proceedings.

The clearest way for state courts to fail to adjudicate a claim on the merits is by simply neglecting to address the claim, although this happens infrequently. Some circuits have held, however, that when a state court addresses a claim but has failed to consider all the material facts supporting the claim despite a petitioner’s diligence in developing the record, its decision also is not “on the merits” for AEDPA purposes. Then-Judge Michael McConnell, writing for the en banc Tenth Circuit, noted that “[a] claim is more than a mere theory on which a court could grant relief; a claim must have a factual basis, and an adjudication of that claim requires an evaluation of that factual basis.”

Judge McConnell concluded that when a state has ignored proffered non-record evidence in adjudicating a claim, it has not adjudicated that claim “on the merits”:

When the state court relies solely upon the record evidence, and denies both the claim itself and an evidentiary hearing on the proffered non-record evidence without any alternative holding based upon the proffered evidence, there is no adjudication on the merits that would warrant deferential review.

Arave, 236 F.3d 523, 536 (9th Cir. 2001). But see Pinholster, 131 S. Ct. at 1401 & n.9 (noting that the court is still constrained by other portions of AEDPA).

See Pinholster, 131 S. Ct. at 1401 & n.9 (finding that “[a] minimum . . . § 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court” and that “[i]n all events . . . the requirements of § 2254(a) through (c) remain significant limitations on the power of a federal court to grant habeas relief”).

Even where a state court issues an unexplained order, an adjudication on the merits has typically occurred. Miller, supra note 40, at 2616 & n.147 (noting that a majority of courts follow this approach); see 16A FEDERAL PROCEDURE, LAWYERS EDITION § 1179 (2007 ed. & Supp. 2011). The federal habeas court reviewing the order is to look to the “last explained state-court judgment” to determine whether the state court’s order is on the merits or is an independent and adequate state decision that bars federal habeas review (a petitioner default for failure to raise a claim, for example). See Ylst v. Nunnemaker, 501 U.S. 797, 805 (1991) (emphasis omitted). This leaves little room for a court to decide that the decision was neither on the merits nor a state “independent and adequate” decision.

See Marceau, supra note 19, at 62 (noting that “[t]here is . . . growing support among the federal courts for a recognition that a claim which has not been fully and fairly reviewed in state court will not be considered an adjudication on the merits for purposes of § 2254(d)”; see also infra notes 143–147 and accompanying text (describing cases holding that an adjudication is not on the merits unless it discusses all material facts).

Wilson v. Workman, 577 F.3d 1284, 1291 (10th Cir. 2009) (en banc).
A merits adjudication requires the court to consider the “sub-
stance” of the defendant’s claim, and when the claim involves
a mixed question of law and fact but a procedural rule pre-
vents the state court from even considering the factual
grounds, the court has failed to do so.\textsuperscript{146}

The Fourth Circuit has similarly held:

[W]hen a state court forecloses further development of the
factual record, it passes up the opportunity that exhaustion
ensures. If the record ultimately proves to be incomplete, de-
ference to the state court’s judgment would be inappropriate
because judgment on a materially incomplete record is not an
adjudication on the merits for purposes of § 2254(d).\textsuperscript{147}

Faced with \textit{Pinholster}'s narrowing of courts’ discretion to develop facts,
petitioners have already begun to argue that a state court decision re-
sulting from sparse facts and inadequate process is not an adjudication
on the merits.\textsuperscript{148}

In her otherwise sound \textit{Pinholster} dissent, Justice Sotomayor stated
that the \textit{Pinholster} majority had rejected this approach and criticized it
herself on the grounds that “[i]t would undermine the comity prin-
ciples motivating AEDPA to decline to defer to a state-court adjudication
of a claim because the state court, through no fault of its own, lacked
all the relevant evidence.”\textsuperscript{149} Neither Justice Sotomayor’s characteriza-
tion of the majority opinion nor her criticism of the circuits, however, is

\textsuperscript{146} \textit{Id.} at 1292.

\textsuperscript{147} \textit{Winston v. Kelly}, 592 F.3d 535, 555–56 (4th Cir. 2010) (citation omitted); \textit{see also}
\textit{Drake v. Portuondo}, 321 F.3d 338, 345 (2d Cir. 2003) (remanding for federal discovery
“because the state courts did not permit the development of the factual record”). Profes-
сор Justin Marceau would take this argument further, suggesting not only that a federal
court need not provide § 2254(d) deference to a claim unadjudicated on the merits in
state court, but also that defendants must have a \textit{full and fair} hearing in either state or fed-
eral court; where a claim has not been adjudicated on the merits, the petitioner has not
received this full and fair hearing. Marceau, \textit{supra} note 19, at 62–64.

\textsuperscript{148} \textit{See, e.g.}, Hurst v. Branker, No. 1:10CV725, 2011 U.S. Dist. LEXIS 58910, at *27–28
n.15 (M.D.N.C. June 1, 2011) (quoting petitioner’s argument that review under § 2254(d)
was not appropriate because “the state . . . court’s failure to allow factual development of
this Claim through an evidentiary hearing or other discovery procedures resulted in a
decision that was not ‘on the merits’”); Conway v. Houk, No. 2:07-cv-947, 2011 WL
2119373, at *2 (S.D. Ohio May 26, 2011) (“[N]oting that \textit{Pinholster} prohibits considera-
tion of new evidence only as to claims that the state courts ‘adjudicated’ on the merits, Peti-
tioner argues that the Ohio courts’ rulings on Petitioner’s postconviction claims were not
‘adjudications’ for purposes of § 2254(d)(1).”).

\textsuperscript{149} \textit{Pinholster}, 131 S. Ct. at 1417 (Sotomayor, J., dissenting); \textit{see also} \textit{Winston}, 592 F.3d at
555–56.
well founded. The majority rejected the argument “that § 2254(d)(1) \ldots does not apply when a federal habeas court has admitted new evidence that supports a claim previously adjudicated in state court,” but it did not decide what is required for a claim to be “adjudicated on the merits.”\footnote{\textit{Pinholster}, 131 S. Ct. at 1400. A petitioner in Virginia recently made essentially this argument. \textit{Teleguz v. Kelly}, No. 7:10CV00254, 2011 WL 3319885, at *8 (W.D. Va. Aug. 1, 2011) (“[\textit{Pinholster}] expressly declined to establish how to distinguish claims adjudicated on the merits from \ldots new claims. \textit{Teleguz} contends that \textit{Winston v. Kelly} remains good law in drawing this distinction. He contends that, because the state habeas court refused an evidentiary hearing, the record before it was materially incomplete, and his new evidence thus merits consideration under \textit{Pinholster}.” (citations omitted))).} Thus, \textit{Pinholster} bars one way of overcoming § 2254(d)—the use of new evidence—but it does not speak to when § 2254(d) applies in the first place or to other possible ways of overcoming it.

Further, the Fourth and Tenth Circuit cases cited by Justice Sotomayor did \textit{not} decline to apply § 2254(d) when the state court lacked relevant evidence “through no fault of its own”\footnote{\textit{Pinholster}, 131 S. Ct. at 1417 (Sotomayor, J., dissenting); \textit{see Winston}, 592 F.3d at 555–56.} (such as, for example, when a state court witness becomes more forthcoming in federal court). Although some courts had taken that position,\footnote{See, e.g., \textit{Brown}, 551 F.3d at 429 (“We think that [AEDPA deference does not apply] whenever new, substantial evidence supporting a habeas claim comes to light during the proceedings in federal district court.”); \textit{Monroe}, 323 F.3d at 297 (“AEDPA’s deference requirement does not apply when a claim made on federal habeas review is premised on \textit{Brady} material that has surfaced for the first time during federal proceedings.”).} the cases Justice Sotomayor cited in \textit{Pinholster} specifically limited their holdings to situations in which a state court has refused “proffered non-record evidence”\footnote{\textit{Wilson}, 577 F.3d at 1292.} or has “foreclose[d] further development of the factual record.”\footnote{\textit{Winston}, 592 F.3d at 555.} The key issue under this approach is not the existence of new evidence, but the adequacy of the state court’s fact development procedures.

Nonetheless, even properly understood it seems unlikely that the Court, if it finally clarifies AEDPA’s procedural requirements, will follow this approach. Indeed, the First Circuit, in rejecting the broader (but similar) argument that “a state court has not adjudicated a claim on the merits unless it has given a full and fair evidentiary hearing” asserted that such a holding would “eviscerate” \textit{Pinholster}.\footnote{\textit{Atkins v. Clarke}, 642 F.3d 47, 49 (1st Cir. 2011); \textit{see also infra} notes 204–282 and accompanying text (describing arguments regarding full and fair hearings, due process, and the Suspension Clause).} More concretely, although the Tenth Circuit’s definition of a claim is eminently reason-
able, other, less nuanced approaches may find traction with a Supreme Court seemingly bent on reading AEDPA as restrictively as possible.\textsuperscript{156} AEDPA does not, after all, say that § 2254(d)(1) and § 2254(d)(2) apply only if there was an \textit{adequate} adjudication on the merits, or an adjudication with a complete state-court record.\textsuperscript{157} As one magistrate judge in the Eastern District of California held after \textit{Pinholster}, “An adjudication on the merits is just that regardless of one’s view on the completeness of the record on which the ruling was made.”\textsuperscript{158} This view is consistent with the Supreme Court’s 2011 decision in \textit{Harrington v. Richter}, in which it held that a state court’s one-line denial of relief is an adjudication on the merits.\textsuperscript{159} As the Court observed, “When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.”\textsuperscript{160} 

\textit{Harrington} addresses a different question, of course, and there may be room to argue that a failure to allow fair fact development is an “indication” of a non-merits adjudication. Especially in light of Justice Sotomayor’s explicit rejection of the leading cases adopting this view, however, the Court may be more likely to follow other approaches if forced to finally address AEDPA’s procedural guarantees.

\textsuperscript{156} For an example of a less-nuanced approach, see Teti v. Bender, 507 F.3d 50, 56–57 (1st Cir. 2007) (“A matter is ‘adjudicated on the merits’ if there is a ‘decision finally resolving the parties’ claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.’ . . . [Section] 2254(d) applies regardless of the procedures employed or the decision reached by the state court, as long as a substantive decision \textit{was} reached; the adequacy of the procedures and of the decision are addressed through the lens of § 2254(d), not as a threshold matter.”).

\textsuperscript{157} \textit{See} 28 U.S.C. § 2254(d) (2006) (“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 . . .”).

\textsuperscript{158} Coddington v. Cullen, No. CIV S-01-1290 KJM GGH DP, 2011 U.S. Dist. LEXIS 57442, at *7–8 n.9 (E.D. Cal. May 27, 2011) (“Nor will an assertion—that because the state record was incomplete, there was no adjudication on the merits—operate to avoid the \textit{Pinholster} holding.”); \textit{see also} Valdez v. Cockrell, 274 F.3d 941, 950 (5th Cir. 2001) (noting that the term “adjudication on the merits’ . . . does not speak to the quality of the process”).

\textsuperscript{159} 131 S. Ct. 770, 784–85 (2011).

\textsuperscript{160} \textit{Harrington}, 131 S. Ct. at 784–85.
B. Inadequate State Fact Development as an Unreasonable Determination of the Facts in Light of the Evidence

Another possible way of surmounting inadequate state fact-development procedures in light of Pinholster—one that may be increasingly popular and may again force the Court toward a decision on AEDPA’s procedural boundaries—is to argue that procedural deficiencies and/or the resulting paucity of evidence rendered the state court’s factual determinations “unreasonable . . . in light of the evidence,” thus satisfying § 2254(d)(2). Professor Yackle observes that under § 2254(d)(2), “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.” Indeed, this argument has found some traction. Judge Kozinski has identified four potential types of unreasonable factual determinations that result from procedural flaws: situations when state courts fail to make a finding of fact, when courts mistakenly make factual findings under the wrong legal standard, when “the fact-finding process itself is defective,” and when courts “plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner’s claim.” The most relevant of these claims after Pinholster is the third—when the factfinding process is flawed.

Several circuit courts followed this course prior to Pinholster, holding that certain state procedural violations (“flawed fact-finding” under Judge Kozinski’s framework) result in unreasonable determinations under § 2254(d)(2). The Ninth Circuit has, predictably, gone the farthest, holding that if a defendant establishes any of the factors in a state court proceeding identified as necessitating a federal evidentiary hearing in Townsend v. Sain, “then the state court’s decision was based on an unreasonable determination of the facts and the federal court can independently review the merits of that decision by conducting an evi-

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161 See, e.g., Wood v. Allen, 465 F. Supp. 2d at 1211, 1242 (M.D. Ala. 2006) (finding an unreasonable determination of the facts and granting habeas relief where the state court adopted verbatim the state’s proposed findings of fact), rev’d in part, 542 F.3d 1281 (11th Cir. 2008), aff’d, 130 S. Ct. 841 (2010) (concluding that the state court’s factfinding was not unreasonable but refusing to reach “the questions of how and when § 2254(e)(1) applies in challenges to a state court’s factual determinations under § 2254(d)(2)”; see also Brief for the ACLU and the ACLU of Alabama as Amici Curiae Supporting Petitioner, supra note 46, at 25–26 (discussing the district court’s holding).

162 Yackle, supra note 17, at 141.

163 Taylor v. Maddox, 366 F.3d. 992, 1000–01 (9th Cir. 2004).

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The Townsend factors include a range of state fact development deficiencies, including, among others, where “the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing,” “the material facts were not adequately developed at the state-court hearing,” or, most broadly, “for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.”

The Third Circuit has similarly observed:

The extent to which a state court afforded a defendant adequate procedural means to develop a factual record—whether the defendant was afforded a “full and fair hearing,” to put it in the parlance of the pre-AEDPA statute—may well affect whether a state court’s factual determination was “reasonable” in “light of the evidence presented in the State court proceeding . . . .”

This position is fairly satisfying from a textual standpoint, and others, like Yackle, have subscribed to it. The trouble arises, though, in AEDPA’s statutory history. Prior to the 1996 amendments, § 2254(d) afforded state court factual findings deference only if they “met several tests for procedural regularity and substantive accuracy [which] essentially tracked the Townsend criteria.” These requirements were, of course, omitted in AEDPA, and, as the Fifth Circuit noted in rejecting a full-and-fair-hearing prerequisite to AEDPA deference, “[t]o reintro-

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165 Earp v. Ornoski, 431 F.3d 1158, 1167 (9th Cir. 2005).
166 Townsend, 372 U.S. at 313. The Ninth Circuit has also held, after Pinholster, that a state court’s fact-development procedures were “fundamentally flawed” when the court refused to conduct an evidentiary hearing and offered the petitioner no other “opportunity . . . to develop his claim.” Hurles v. Ryan, 650 F.3d 1301, 1311 (9th Cir. 2011).
168 See Marceau, supra note 19, at 58 (describing the “alternative approach” to § 2254(d)(2), which is “to recognize that a state process is ‘unreasonable’ for purposes of § 2254(d)(2) where ‘the process employed by the state court is defective.’” (quoting Taylor, 366 F.3d at 999)). Professor Marceau notes that Judge Kozinski also endorses this view. Id. (citing Hertz & Liebman, supra note 65, § 20.2c, at 923 n.78) (noting that Judge Kozinski, Randy Hertz, and James Liebman endorse this view).
169 A second issue arises from the interaction of § 2254(e)(1), which provides a presumption of correctness for state court factual findings, and § 2254(d)(2). See supra note 46.
170 Yackle, supra note 17, at 139.
duce a full and fair hearing requirement . . . would have the untenable result of rendering the amendments enacted by Congress a nullity." 171

Nonetheless, a court need not “nullify” AEDPA by importing the *Townsend* factors in order to find a procedural component in § 2254(d)(2). Perhaps the best reading of the statute is that, just as § 2254(d)(1) lowered but did not eliminate review of state court legal decisions, § 2254(d)(2) lowered but did not eliminate procedural prerequisites to deference to state court factual determinations. Thus, a state court decision (or procedural rule) barring fact development that is merely wrong would not satisfy § 2254(d)(2), but an *unreasonably wrong* decision (or rule) would. 172

If this is correct, then a test for whether fact development is required is needed as a benchmark—unreasonableness, in the abstract, is not a workable standard. Using *Townsend* as this benchmark is the obvious solution; the case speaks directly to the circumstances in which a federal evidentiary hearing is required and was clearly the basis for AEDPA’s predecessor statute. 173

C. New Claims Under § 2254(e)(2)

When a state court has failed to adjudicate a claim, its decision may not only be an unreasonable determination of the facts; the petitioner also may have a new claim in federal court. 174 Both the majority

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171 Valdez, 274 F.3d at 949–50. The Seventh Circuit has similarly held that state court determinations, even if not resulting from a “hearing on the merits of [the] factual issue,” must receive AEDPA deference. Mendiola v. Schomig, 224 F.3d 589, 592–93 (7th Cir. 2000). *But see supra* note 19 (describing arguments in the literature to the contrary).

172 Cf. Williams v. Taylor, 529 U.S. 362, 410 (2000) (establishing an “objectively unreasonable” standard for § 2254(d)(1)). Somewhat similarly, § 2254(d)(1) could, arguably, be satisfied by a showing that the state court fact development failed to satisfy due process requirements and thus involved an “unreasonable application of federal law.” This argument is taken up in Part III. *See infra* notes 204–282 and accompanying text. It would be, if possible, far preferable to make this claim via 42 U.S.C. § 1983 (although the results of the two approaches are somewhat different): under § 2254(d)(1), a petitioner would be forced to overcome AEDPA deference in addition to achieving the formidable task of establishing a postconviction due process violation.

173 Indeed, Professor Marceau proposes that *Townsend* not only offers a framework for deciding when a hearing is required, but also provides a “landmark for understanding the constitutional content” of the hearing, which he argues must be “full and fair.” Marceau, *supra* note 19, at 16. Fundamental fairness under the Due Process Clause of the Fourteenth Amendment would be another possibility, but, as discussed in Section III.B., *infra* notes 250–282 and accompanying text, a state’s failure to provide procedural due process in postconviction review is likely subject to challenge via § 1983.

174 Often, this may be a difficult distinction to make. *See Pinholster*, 131 S. Ct. at 1401 n.10 (declining to “draw the line between new claims and claims adjudicated on the mer-
and dissent in *Pinholster* recognized that new evidence could, under some circumstances, give rise to new claims for relief potentially not subject to § 2254(d).175 Although this may allow some petitioners saddled with an underdeveloped state-court record access to federal discovery, for most, it likely will not. At the least, this type of argument will—as will those in Sections A and B of Part III176—force the Court toward a decision on federal habeas courts’ necessary deference to facts that state courts simply did not address or addressed through a deficient process.

AEDPA requires that state prisoners exhaust their state court remedies.177 Exhaustion, in turn, requires presenting to the state court both the legal and factual178 bases of a claim; unexhausted claims must be dismissed.179 Petitioners may sometimes be able to return to state

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175 See *Pinholster*, 131 S. Ct. at 1401 n.10 (suggesting that Justice Sotomayor’s hypothetical, involving a petitioner who discovers undisclosed *Brady* material following state post-conviction review, “may well present a new claim”); *id.* at 1417–18 (Sotomayor, J., dissenting) (describing two scenarios—one in which a petitioner raises a *Brady* claim in state postconviction review and after completion of the review discovers exculpatory *Brady* material, and another in which the petitioner does not raise a *Brady* claim in state court and then discovers *Brady* material—and arguing that the petitioner will only have a new claim under AEDPA in the latter scenario).

176 See infra notes 204–282 and accompanying text.


179 See, e.g., *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (holding that “a district court must dismiss habeas petitions containing both unexhausted and exhausted claims”); *Griffin v. Rogers*, 399 F.3d 626, 632 (6th Cir. 2005) (acknowledging the Supreme Court’s pre-AEDPA directive to dismiss petitions with both exhausted and unexhausted claims, which allowed petitioners to return to state court to “exhaust their remaining state claims,” and noting that AEDPA’s one-year limitations period makes re-filing difficult (citing *Rose*, 455 U.S. at 522)); see also supra note 65 and accompanying text (describing the stay-and-abeyance procedure for petitions with exhausted and unexhausted claims, which is an alternative to dismissal); cf. *Duncan v. Walker*, 533 U.S. 167, 182–83 (2001) (Stevens, J., concurring in part) (“First, although the Court’s pre-AEDPA decision in *Rose v. Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies.”).
court to exhaust their claims (as happened in \textit{Pinholster}), but such claims are frequently barred under state procedural rules against “piecemeal” litigation.\textsuperscript{180} In these circumstances, the lack of available state remedies satisfies the exhaustion requirement because the petitioner has raised and the state court has addressed the claims (by denying them),\textsuperscript{181} but petitioners must still overcome the procedural default doctrine. Under this “corollary to the habeas statute’s exhaustion requirement . . . federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds.”\textsuperscript{182} In this scenario, the state court, having procedurally barred a petitioner’s claims under its rules against piecemeal litigation, has addressed the claims—thus exhausting them—but also has caused the claims to be procedurally defaulted.\textsuperscript{183} There is a narrow “equitable exception” to the doctrine, however, when a habeas applicant can demonstrate either cause and prejudice from the procedural default or that the petitioner is actually innocent or factually ineligible for the death penalty.\textsuperscript{184}

With respect to procedural default, although “the Court has not yet supplied an ‘exhaustive catalog of . . . objective impediments to compliance with a procedural rule,’”\textsuperscript{185} (a catalog that may be necessary after

\textsuperscript{180} Hoffstadt, \textit{supra} note 44, at 1161; \textit{see also supra} note 65. If the petitioner successfully returns to state court to exhaust his claims, these claims may still be deemed untimely when he again reaches federal court. Jason Mazzone, \textit{When the Supreme Court Is Not Supreme}, 104 Nw. U. L. Rev. 979, 1016–17 (2010) (“[U]nless the district court holds a mixed petition [(a petition containing exhausted and unexhausted claims)] in abeyance in order to permit exhaustion of the unexhausted claims, the statute of limitations may have expired by the time the petitioner returns to federal court.” (footnote omitted)).

\textsuperscript{181} Hoffstadt, \textit{supra} note 44, at 1161–62 (citing Coleman v. Thompson, 501 U.S. 722, 732 (1991)).


\textsuperscript{183} \textit{See} Hoffstadt, \textit{supra} note 44, at 1162.

\textsuperscript{184} Dretke, 541 U.S. at 393. Additionally, “to the extent that state postconviction remedies are ‘ineffective to protect the rights of the applicant’ . . . such remedies need not be exhausted as a predicate to federal habeas corpus review.” Freedman, \textit{supra} note 116, at 1093 n.79 (quoting 28 U.S.C. § 2254(b)(1)(B)(ii) (2000)).

\textsuperscript{185} Hertz & Liebman, \textit{supra} note 65, § 26.3b (alteration in original) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).
Pinholster), inadequate state fact development procedures have not, of themselves, been held to amount to “cause.” ¹⁸⁶ Deficient procedures may, however, provide the foundation for a petitioner’s claim that the ‘factual or legal basis’ for the claim ‘was not reasonably available,’ and thus that the petitioner had cause for procedural default in state court. ¹⁸⁷

The Court’s recent decision in Martinez v. Ryan ¹⁸⁸ provides some support for this position, at least with respect to ineffective assistance of trial counsel claims in states that require them to be raised for the first time in a collateral proceeding. ¹⁸⁹ In Martinez, the Court held that a lack of effective counsel in such an “initial-review” collateral proceeding amounts to cause for a procedural default of an ineffective trial assistance claim. ¹⁹⁰ Although Martinez is narrowly focused on the right to effective trial counsel, its holding is based, inter alia, on the fact that a “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.” ¹⁹¹ Unfair fact development procedures, of course, raise the same concern for Strickland, Brady, and other claims involving evidence outside the trial record. Martinez says nothing directly about the issue, but it does at least note in passing that in states that allow ineffective trial assistance claims to be raised on direct appeal, “[a]bbreviated deadlines to expand the record on direct appeal may not allow adequate

¹⁸⁶ See id. (omitting inadequate state fact-development procedures from a list of reasons for which courts have found “cause”). Alternatively (or additionally), a petitioner could argue under § 2254(b)(1)(B)(ii) that the court could grant habeas relief without requiring exhaustion because “circumstances exist that render [the state] process ineffective to protect the rights of the applicant.”

¹⁸⁷ Hoffstadt, supra note 44, at 1163 (quoting Murray, 477 U.S. at 488). In the exhaustion context, a petitioner could similarly argue under AEDPA that the deficient procedures rendered the state process “ineffective to protect the rights of the applicant,” and thus that he need not exhaust the claim in state court before seeking federal habeas relief. 28 U.S.C. § 2254(b) (1)(B)(ii) (2006). Unless the state process is inadequate on its face, however, this approach may not succeed. See infra notes 250–282 and accompanying text (discussing due process challenges to state postconviction procedures and the unresolved questions of individual versus general fairness). In cases in which a state postconviction court improperly held that a claim was procedurally barred, of course, the petitioner also will find relief from default (and from Pinholster’s evidentiary bar). See, e.g., James, 659 F.3d at 876, 878–79, 892 (reversing a state court determination that petitioner’s Strickland claim was procedurally defaulted, determining that Pinholster therefore did not apply, allowing the court to consider evidence developed by petitioner’s federal habeas counsel, and remanding the case to grant the writ).


¹⁸⁹ Id. at 1314–15.

¹⁹⁰ Id. at 1315.

¹⁹¹ Id. at 1317.
time for an attorney to investigate the ineffective-assistance claim.”

In any case, if this theory is accepted, a federal court could hold an evidentiary hearing on whether the petitioner has demonstrated cause and prejudice (which largely mirrors the merits inquiry), thereby circumventing the inadequate state fact-development procedures.

Even if courts are willing to expand the definition of “cause” in this way—and this might be the type of “distortion of . . . the law on 'cause and prejudice'” foretold by Justice Alito in his prediction of Pinholster’s effect on the jurisprudence—there remain significant reasons to doubt that it will provide a meaningful remedy for petitioners prevented from developing the factual bases for their claims in state court. First and most importantly, presenting a new claim based on new evidence requires, by definition, that the petitioner already possess the new evidence. Petitioners, most of whom lack counsel and do not know what evidence to look for or where they would find it, typically will have few options to locate new evidence. For obvious reasons, then, it is not an ideal solution for the problem of inadequate access to discovery.

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192 Id. at 1318 (citing Eve Brensike Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims, 92 CORNELL L. REV. 679, 689, 689 n.57 (2004)).

193 The Court has not set a uniform standard for prejudice resulting from procedural default, but it probably requires at least “a showing that the defaulted claim was meritorious and would probably have resulted in a different verdict or sentence.” Hoffstadt, supra note 44, at 1163–64.

194 See Cristin v. Brennan, 281 F.3d 404, 413, 415–16 (3d Cir. 2002) (reasoning that § 2254(e)(2)’s limitation ordinarily should not apply to the facts supporting a petitioner’s attempt to show cause and prejudice for a state court procedural default, because the court “cannot generally expect petitioners to present in state court facts they may only need under federal law in a later federal proceeding to excuse a procedural default”); Catherine T. Struve, Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules, 103 COLUM. L. REV. 243, 315 (2003) (“[C]urrent law limits the circumstances under which the petitioner can obtain an evidentiary hearing in a federal habeas proceeding on ‘the factual basis of a claim.’ This limitation, however, arguably should not apply to the facts relevant to show cause for, and prejudice from, a procedural default.”); see also Hertz & Lieberman, supra note 65, § 26.3e.

195 Pinholster, 131 S. Ct. at 1411 (Alito, J., concurring in part).

196 See, e.g., Sok v. Substance Abuse Treatment Facility, No. 1:11-cv-00284-JLT HC, 2011 U.S. Dist. LEXIS 54014, at *6–7 (E.D. Cal. May 19, 2011) (“The normal procedure for petitioners in federal habeas courts is first to be in possession of facts that support the petitioner’s habeas claims, and then to present those claims to this Court, not the other way around.”).

Second, as observed by Justice Sotomayor in dissent, even when it is available, new evidence will frequently not give rise to a new claim under the Court’s exhaustion precedent;\textsuperscript{198} indeed, to do so it must “fundamentally alter the legal claim already considered by the state courts.”\textsuperscript{199} Thus, a petitioner who discovers stronger proof of, for example, his lawyer’s failure to conduct an adequate investigation following a state court decision, will have no new claim on which to attempt to obtain a hearing (and ultimately relief).\textsuperscript{200}

Recognizing this problem, some petitioners have suggested that federal courts could allow discovery which would then form the basis of new state claims.\textsuperscript{201} As one magistrate judge noted, this approach “turns the entire federal habeas process on its head,”\textsuperscript{202} and courts, which apply the exhaustion doctrine with “extraordinary rigidity,”\textsuperscript{203} are unlikely to welcome this approach.

Together, all of the AEDPA challenges to deficient state proceedings assume that courts—which will likely face many more of these types of claims after Pinholster—read a minimal procedural guarantee into AEDPA. Despite the impressive scholarly record and many court decisions supporting this interpretation, the current trajectory of the Roberts Court’s AEDPA jurisprudence, and particularly the Court’s rejection of an extremely plausible textual argument for federal fact development under § 2254(d)(1) in Pinholster, suggests that that reading is on uncertain ground. AEDPA’s text, however, is not the only possible

\textsuperscript{198} Pinholster, 131 S. Ct. at 1418 (Sotomayor, J., dissenting).
\textsuperscript{200} Pinholster, 131 S. Ct. at 1417–18 (Sotomayor, J., dissenting). Justice Sotomayor provides a hypothetical example of a petitioner who “diligently attempted in state court to develop the factual basis” of a Brady claim for unconstitutionally withheld exculpatory evidence. See id. at 1417. She notes that if the state court denied relief on this claim but later ordered the disclosure of new evidence of exculpatory witness statements in response to a petitioner’s public records act request, a federal court could not consider this new evidence. Id. at 1417–18. If, on the other hand, the petitioner had not raised the Brady claim below he could bring in the new evidence if he showed cause and prejudice under AEDPA. Id. at 1418. Pinholster, in other words, may punish defendants who diligently raised claims in state court and discover new evidence after the state court decision. Id.; see also Ruffin v. Dir. Nev. Dep’t of Corr., No. 2:07-cv-00721-RLH-PAL, 2011 U.S. Dist. LEXIS 62946, at *11–12 n.10 (D. Nev. June 13, 2011) ("[N]ew evidence might not render a federal claim unexhausted under Vásquez v. Hillery, but the federal court nonetheless would be precluded from considering the new evidence under Cullen v. Pinholster in applying 28 U.S.C. § 2254(d).”).
\textsuperscript{201} E.g., Coddington, 2011 U.S. Dist. LEXIS 57442, at *8–9.
\textsuperscript{202} Id. at *10 (concluding that “[r]equiring full development of all issues in state court before arriving at federal court is the goal of exhaustion and AEDPA”).
\textsuperscript{203} Yackle, supra note 113, at 372.
source of relief for inadequate state fact-development procedures. When the Court does decide the issue—as it will have to after Pinhol ster—it will do so in the shadow of a looming Suspension Clause chal lenge and the critical questions such a challenge would raise.

III. The Ill-Defined Right to Fair Postconviction Review

Petitioners seeking a remedy for curtailed fact development in state postconviction proceedings are not limited to the text of AEDPA. If the Court refuses to find a guarantee of fairness in the statute, the Court’s 2008 decision in Boumediene v. Bush\textsuperscript{204} will provide the basis for a Suspension Clause challenge, explored in Section A.\textsuperscript{205} Independent of future developments in federal habeas, state prisoners can also bring due process challenges, addressed in Section B,\textsuperscript{206} to state postconviction review procedures under District Attorney’s Office v. Osborne\textsuperscript{207} and Skinner v. Switzer\textsuperscript{208}—and will likely do so more frequently after Pinhol ster. Resolving either of these sets of claims would require addressing long-unanswered questions about the nature of the right to a fair hearing in postconviction litigation.

A. A Right to a Fair Adjudication of a Federal Claim Under the Suspension Clause

Despite a fuller treatment in recent cases arising from the detention of “enemy combatants” in Guantanamo Bay, the scope and content of the Suspension Clause remain somewhat ambiguous. To address a Suspension Clause challenge to a reading of AEDPA that is indifferent to the fairness of the state proceedings, the Court would have to first decide whether the Suspension Clause extends to state prisoners and, if it does, to determine what constitutes a “full and fair opportunity”\textsuperscript{209} to litigate constitutional claims.

The Suspension Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,”\textsuperscript{210} and has ancient

\textsuperscript{204}553 U.S. 723 (2008).
\textsuperscript{205}See infra notes 209–249 and accompanying text.
\textsuperscript{206}See infra notes 250–282 and accompanying text.
\textsuperscript{207}129 S. Ct. 2308, 2320 (2009).
\textsuperscript{208}131 S. Ct. 1289, 1298 (2011).
\textsuperscript{209}Marceau suggests that “full and fair” and “fundamentally fair” as used in Osborne and Medina are synonymous. See Marceau, supra note 19, at 24 & n.107.
\textsuperscript{210}U.S. Const. art. I, § 9, cl. 2.
roots in English law. The Writ was then, as it is now, an important means to challenge unlawful custody; suspension, by removing the remedy, effectively eliminates the federal right against unlawful imprisonment. As the Supreme Court has observed, “Simply because [unconstitutional] detention . . . is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed.”

The Supreme Court upheld AEDPA’s limits on “second or successive” habeas petitions against a Suspension Clause challenge in 1996 in Felker v. Turpin, a case that provided limited guidance as to the Court’s likely approach under other, more specific Suspension Clause challenges. In holding that “the added restrictions which the Act places on second [federal] habeas petitions . . . do not amount to a ‘suspension’ of the writ contrary to Article I, § 9,” the Court assumed, as it has at other times, that the Suspension Clause protects the right of state prisoners to federal habeas rather than merely “the writ ‘as it ex-

211 See Andrew Franz, “Shall Not Be Suspended, Unless . . .”: A Tale of Habeas Corpus, CRIM. L. BULL., Summer 2007, at 330, 331 (2007) (explaining that, following Darnel’s Case, where five knights were imprisoned without cause for refusing to pay mandatory loans to Charles I, “Lord Coke convinced the House of Commons to unanimously adopt three resolutions concerning habeas corpus as a matter of right” and “[i]n 1679, the first Habeas Corpus Act was passed” (citation omitted)); see also Samuel Wiseman, Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause, 36 FORDHAM URB. L.J. 121, 124–25 (2009) (describing Darnel’s Case).

212 But see Hoffman & King, supra note 16, at 795 (citing to recent Suspension Clause decisions, experience with AEDPA, and “continuing failures in indigent defense” in arguing that, “[a]lthough there were important reasons to support a system of duplicative post-conviction litigation during the incorporation controversies of the 1960s and 1970s, those justifications are no longer compelling”).

213 The Court began its habeas analysis in Boumediene by tracing the English roots that inspired the founders’ inclusion of the Suspension Clause in the Constitution in holding that the clause applied to individuals in custody at Guantanamo Bay. Boumediene, 553 U.S. at 742–43, 771. The Court observed that England’s history of cyclical suspension and denial of the writ for political or other reasons “was known to the Framers” and that “the Framers considered the writ a vital instrument for the protection of individual liberty.” Id. at 741–43. In addition to its liberty protections, the Court emphasized that the “writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.” Id. at 765. The government may not “switch the Constitution on or off at will” — including the Suspension Clause—by, for example, arguing that it has sovereignty over certain areas but not others. Id.


216 Id. at 664.


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isted in 1789,” which protected only federal prisoners. Pinholster will force a square decision on this matter, however: state defendants, faced with inadequate state factfinding procedures and barred from any federal fact development, likely will argue that habeas has been suspended, not just limited as it was under AEDPA. In light of the Court’s past assumption that state prisoners may access the right, and the weight of scholarly authority supporting this assumption, the Court is likely to hold that the Suspension Clause extends to state prisoners, though the question is far from beyond doubt. The Court would then have to decide the more difficult question of the nature of the fair proceeding that the Suspension Clause requires—an issue only recently introduced in the Court’s most thorough discussion of the Suspension Clause, found in Boumediene.

Boumediene, which held that the Suspension Clause applied to individuals in custody at Guantanamo Bay, did not address state prisoners’ habeas rights. Nonetheless, Boumediene provides important guidance for a post-Pinholster Suspension Clause challenge to AEDPA. After holding that Guantanamo Bay prisoners were “entitled to the privilege of habeas corpus to challenge the legality of their detention,” Boumediene asked whether the Detainee Treatment Act of 2005 (DTA), the statute that suspended the writ for Guantanamo prisoners, “provided

218 Felker, 518 U.S. at 663–64.

219 See Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty 9–11 (2003) (arguing that Ex Parte Bollman, which held that section 14 of the Judiciary Act of 1789 (granting federal courts habeas powers) did not apply to state convictions, was wrongly decided, and that “[t]he Bollman-derived idea that the federal writ of habeas corpus was not originally available to state prisoners should be discarded”); Hoffman & King, supra note 16, at 839 (“Based on this jurisprudence, we believe that when squarely presented with this issue, the Court will acknowledge that the Suspension Clause provides at least some level of constitutional protection for federal judicial review of the constitutional rights of persons serving state sentences.”); Jordan Steiker, Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?, 92 Mich. L. Rev. 862, 868 (1994) (arguing that the Suspension Clause, together with the Fourteenth Amendment, “mandate[s] federal habeas review of the convictions of state prisoners”); cf. Francis Paschal, The Constitution and Habeas Corpus, 1970 Duke L.J. 605, 605, 607 (arguing that the “Constitution’s habeas corpus clause is a directive to all superior courts of record, state as well as federal, to make the habeas privilege routinely available,” but noting Justice John Marshall’s belief that the privilege is not available to state prisoners).

220 See 553 U.S. at 771.

221 Id.

222 Id. at 733–34 (noting that the petitioners in Boumediene were detained subject to federal law).

223 Id. at 771.
adequate substitute procedures for habeas corpus.” The Court explained that “any constitutionally adequate habeas corpus proceeding” must, at a minimum, “entitle[] the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law” and give the habeas court “the power to order the conditional release of an individual unlawfully detained.” Beyond these general principles, “the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings.”

Accordingly, the Court looked to the procedures employed in the Combatant Status Review Tribunals (CSRTs) used to adjudicate enemy combatant status and found “considerable risk of error in the tribunal’s findings of fact.” In light of this, the Constitution required that the habeas court have the power to assess the sufficiency of the evidence against the prisoner and “consider relevant exculpatory evidence that was not introduced during the earlier proceeding.” The DTA, however, did not allow the introduction of new evidence or give the reviewing court the authority to order a prisoner’s release, and the Court therefore held that it was not an adequate habeas substitute.

As Joseph Hoffman and Nancy King have noted, “The Court was careful . . . to distinguish the statutory scheme in Boumediene from judicial review of detention based on a criminal conviction.” Significantly for post-Pinholster Suspension Clause challenges, however, the distinction was predicated on the existence of a convicted prisoner’s prior “full and fair” opportunity to develop the factual basis of his claims:

By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. In other contexts, e.g., in post-trial habeas cases where the prisoner already has had a full and fair opportunity to de-

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224 Id. at 771–72. The government argued that the DTA, which granted detainees a hearing before a Combatant Status Review Tribunal and a limited review by the United States Court of Appeals for the D.C. Circuit, provided adequate process and an adequate substitute for habeas. Id. at 733, 735, 771–72.

225 Boumediene, 553 U.S. at 779 (internal quotation marks omitted).

226 Id. at 781.

227 Id. at 785.

228 Id. at 786.

229 Id. at 787–92.

230 Hoffman & King, supra note 16, at 840.
velop the factual predicate of his claims, similar limitations on the scope of habeas review may be appropriate. See Williams v. Taylor, 529 U.S. 420, 436–37 (2000) (noting that § 2254 “does not equate prisoners who exercise diligence in pursuing their claims with those who do not”).

There is, then, a strong argument under Boumediene that AEDPA cannot constitutionally foreclose the consideration of new evidence in federal court when petitioners have been denied a full and fair hearing at the state level. Even so, Boumediene leaves unresolved under the Suspension Clause the same question left unresolved in postconviction due process: whether a prisoner is entitled to a fair hearing on factual issues in his particular case, or whether it is sufficient that the state’s procedures are fair on their face or fair as generally applied. Put another way, does the Suspension Clause provide the right to a fair hearing, or merely the “right to a right to” a fair hearing?

This critical ambiguity is evident in a recent exchange among leading scholars. In arguing for reduced federal habeas jurisdiction, Hoffman and King assume that systemic fairness is all that is required: they suggest that Suspension Clause challenges would take place on a state-by-state, rather than a case-by-case, basis. In their response, Professors John Blume, Sheri Lynn Johnson, and Keir Weyble take the position that the Suspension Clause requires an individualized inquiry, pointing out the Court’s reliance, recognized in Boumediene, on individual savings clauses when upholding habeas substitutes in prior cases.

Not surprisingly, then, the precedent does not provide an obvious answer. Requiring “a full and fair opportunity to develop the factual

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231 Boumediene, 553 U.S. at 790–91.
232 Professor Marceau reaches the same conclusion under the Due Process Clause, locating a due process right to a “full and fair hearing” in Moore v. Dempsey, 261 U.S. 86, 91 (1923); Frank, 237 U.S. at 335; and more recent cases such as Panetti v. Quarterman, 551 U.S. 930, 948–49 (2007); Stone v. Powell, 428 U.S. 465, 494 (1976); and Townsend, 372 U.S. at 312–13, 318. See Marceau, supra note 19, at 7–20.
233 For a discussion of postconviction due process, see supra Section II.C, notes 174–203 and accompanying text.
234 Hoffman & King, supra note 16, at 845–46 ("We recognize that any statutory restriction of habeas review will prompt prisoners seeking habeas relief to challenge the new habeas statute under the Suspension Clause . . . [The burden on federal courts created by additional Suspension Clause litigation], however, should diminish quickly as the Supreme Court decides whether the review processes in various states are such that the proposed new habeas restrictions comply with the Suspension Clause." (footnotes omitted)).
235 Blume et al., supra note 118, at 463–64 (citing Boumediene, 553 U.S. at 776; Swain v. Pressly, 430 U.S. 372 (1977); and United States v. Hayman, 342 U.S. 205 (1952)).
predicate of [a petitioner’s] claims”\(^{236}\) recalls *Townsend v. Sain* and its individualized inquiry into the adequacy of the state hearing, under which a federal evidentiary hearing is required if the state did not give the petitioner a full and fair hearing.\(^{237}\) A state hearing is not full and fair under *Townsend* if, inter alia, the material facts were not adequately developed at the state court hearing or there is a substantial allegation of newly discovered evidence.\(^{238}\) The key passage from *Boumediene*, however, also recalls the standard from *Stone v. Powell*.\(^{239}\) In *Stone*, the Court held that “where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim,”\(^{240}\) state prisoners could not be granted federal habeas relief on Fourth Amendment grounds.\(^{241}\)

\(^{236}\) *Boumediene*, 553 U.S. at 790.

\(^{237}\) 372 U.S. at 313. *Townsend* held that under the version of \$ 2254 then in force, a federal evidentiary hearing was required if:

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 fact-finding 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 fact hearing.”

*Id.*; see also Boyd v. Waymart, 579 F.3d 330, 360 (3d Cir. 2009) (en banc) (Sloviter, J., dissenting) (“The Supreme Court has never disavowed or retreated from its decision in *Townsend v. Sain*. The Court cited *Townsend in Boumediene v. Bush*, and placed the constitutional right to habeas corpus above even Congress’ power to emasculate its essential features, such as the right to a hearing.” (citation omitted)).

\(^{238}\) *Townsend*, 372 U.S. at 313.

\(^{239}\) Compare *Boumediene*, 553 U.S. at 790–91 (holding that a detainee must have an opportunity for further factual development when “the underlying detention proceedings lack the necessary adversarial character”), with *Stone*, 428 U.S. at 494 (holding that a state prisoner may not obtain federal habeas corpus relief on the ground that unconstitutionally obtained evidence was used at trial if the state has provided “an opportunity for full and fair litigation”).

\(^{240}\) *Stone*, 428 U.S. at 494. In so doing it partially adopted the “process model” of habeas long advocated by Professor Paul Bator. See Yackle, supra note 39, at 1014–19, 1026 (discussing the roots of the process model and arguing (in critique of the process model) that federal review is premised on a “general right” to a federal forum to address federal claims rather than ensuring a minimal amount of process). *Stone* can also be seen as an adoption of the “claims-based approach to federal habeas review in which some constitutional rights are cognizable on federal habeas while others are not.” Primus, supra note 35, at 25 (citing Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 Duke L.J. 947, 1013–23 (2000)).

\(^{241}\) *Stone*, 428 U.S. at 494. The exact relationship between *Stone* and *Townsend*, to which *Stone* gave a “cf.” citation, remains unclear. Hertz & Lieberman, supra note 65, \$ 27.3a; see Yackle, supra note 39, at 1054–55 (“It is not at all clear . . . whether the full and fair hearing idea from *Townsend*—a case about factfinding in habeas—can be of help in determining
Courts have long been uncertain as to the interpretation of “opportunity” in *Stone.* “Opportunity” could mean simply that a petitioner’s failure to litigate the claim in state court prevents federal habeas consideration, but it could also mean that a petitioner, however diligent and deserving, need not actually receive an adequate hearing so long as the state’s procedures provided an opportunity for one. There is a longstanding circuit split on the key issue: how much scrutiny, if any, should the process actually provided in the case (as opposed to the process theoretically due under state law) receive? On one hand, the Eleventh Circuit has held that the *Stone* bar does not apply unless the state court “fully and fairly” considered the claim, which requires “at least one evidentiary hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute.” The Fifth Circuit, on the other hand, looks only to see if “state processes routinely or systematically are applied in such a way as to prevent the actual litigation of Fourth Amendment claims.” In between, the majority of the circuits appear to hold that if a state’s procedures are generally adequate, only an egregious or “unconscionable” error in an individual case will overcome *Stone.*

whether the state courts accorded a litigant an opportunity for full and fair litigation of a substantive Fourth Amendment claim within the meaning of *Stone.*” (internal quotation marks omitted)).


243 See id. (“[T]he Courts of Appeals have divided as to the meaning of the phrase ‘an opportunity for full and fair litigation.’”); Bravo v. Hedgepeth, No. CV 10-2687-PSG(E), 2011 U.S. Dist. LEXIS 24259, at *16–18 (C.D. Cal. Mar. 7, 2011); Hertz & Liebman, supra note 65, § 27.3a; see also Marceau, supra note 19, at 36–38.

244 See id. (“[T]he Courts of Appeals have divided as to the meaning of the phrase ‘an opportunity for full and fair litigation.’”); Bravo v. Hedgepeth, No. CV 10-2687-PSG(E), 2011 U.S. Dist. LEXIS 24259, at *16–18 (C.D. Cal. Mar. 7, 2011); Hertz & Liebman, supra note 65, § 27.3a; see also Marceau, supra note 19, at 36–38.

245 Tukes v. Dugger, 911 F.2d 508, 513 (11th Cir. 1990).

246 Lawhorn v. Allen, 519 F.3d 1272, 1287 (11th Cir. 2008) (internal quotation marks omitted).

247 Janecka v. Cockrell, 301 F.3d 316, 321 (5th Cir. 2002); see also Marceau, supra note 19, at 37–38 (arguing that the Fifth Circuit’s approach is inconsistent with due process).

248 See, e.g., Cabrera v. Hinsley, 324 F.3d 527, 531 (7th Cir. 2003) (“*Stone* would not block habeas review if the [state review] mechanism was in some way a sham. For instance, *Stone* would not block habeas review if the judge had his mind closed to the necessity of a hearing, or was bribed . . . or in some other obvious way subverted the hearing.”); Sanna v. Dipaolo, 265 F.3d 1, 9 (1st Cir. 2001) (holding that *Stone* bars relief unless “the petitioner can show an irretrievable breakdown in the process provided by the state,” and emphasizing that this is an exception that is “a rule of last resort, to be applied sparingly”); Willett v. Lockhart, 37 F.3d 1265, 1272 (8th Cir. 1994) (en banc) (“[W]ith a state court mechanism for consideration of [Fourth Amendment] claims in place, we think that it will be the rare case where there is a failure of that mechanism that reaches constitutional dimensions.”); Capellan v. Riley, 975 F.2d 67, 70 (2d Cir. 1992) (holding that the *Stone* bar is overcome “if the state has provided a corrective mechanism, but the defendant was precluded from
Even if the Court decides that the Suspension Clause guarantees only that habeas petitioners have access to one generally fair fact development process for their constitutional claims—as the majority of courts have suggested—the Clause may still provide a remedy for some, though far fewer, petitioners if AEDPA is construed after *Pinholster* to bar federal fact development regardless of the state procedures employed. As discussed below, some state postconviction regimes may be facially inadequate. But regardless of how AEDPA or the Suspension Clause is interpreted, state prisoners may—and after *Pinholster* increasingly will—challenge state postconviction procedures under the Due Process Clause. These challenges, too, will require the resolution of lingering questions.

**B. A Due Process Right to a Fundamentally Fair State Postconviction Proceeding**

The Supreme Court’s recent decisions have affirmed state prisoners’ right to bring due process challenges to state postconviction proceedings in federal courts through § 1983. In light of the increased importance of developing the state record after *Pinholster*, these claims will likely proliferate independent of any developments in the law of federal habeas. In due process challenges, unlike those brought under the Suspension Clause, *Pinholster*'s bar on a federal hearing does not itself cause the constitutional violation. Rather, defendants have an independent constitutional right under the Due Process Clause to a fundamentally fair proceeding in the state postconviction process. These claims, like those under the Suspension Clause, will implicate fundamental questions about the nature of the right at issue.

To succeed in a due process argument, the petitioner must first clearly define the federal due process rights that attach to state postconviction proceedings. A showing that a state court failed to comply with its own procedural rules will not typically be adequate. Instead, the petitioner must point to a result of a process that makes the peti-

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249 See infra notes 250–260 and accompanying text.
250 See infra note 255 and accompanying text.
252 Even a federal constitutional violation that occurs within the state process is not adequate grounds for habeas relief. The procedural due process error must have affected “the judgment which provides the basis for [petitioner’s] incarceration.” See United States...
tioner’s custody unconstitutional. Further, a § 1983 claim must not “necessarily imply the invalidity of [a] conviction.” Nonetheless, two recent Supreme Court decisions strongly suggest that state postconviction procedures will be subject to procedural due process challenges under § 1983.

All fifty states, although not required to offer postconviction review, have chosen to do so. Having made that choice, they have cre-

v. Dago, 441 F.3d 1238, 1248 (10th Cir. 2006) (quoting Sellers v. Ward, 135 F.3d 1333, 1339 (10th Cir. 1998)).

See, e.g., Thomason v. Ludwick, No. 2:09-11012, 2011 U.S. Dist. LEXIS 74679, at *34–35 (E.D. Mich. July 12, 2011) (holding that in denying a post-Penholster claim, a state hearing violated due process and was an unreasonable application of federal law, and noting that “[w]hether or not the Michigan courts complied with the procedural requirements of Michigan law is not a matter for this court to decide on a petition for habeas corpus relief,” but “[r]ather, in terms of granting habeas relief, the relevant inquiry is only whether the state court decision was in violation of [Petitioner’s] federal constitutional rights” (quoting Hayes v. Prelesnik, 193 F. App’x 577, 584 (6th Cir. 2006))).


Similarly, some petitioners with underlying claims for which the Supreme Court has established procedural requirements may argue that the state court’s failure to follow those procedures violated federal law. In Panetti, for example, the Supreme Court held that the procedure followed by the state court for determining whether the petitioner was competent to be executed was an unreasonable application of federal law as established by Ford v. Wainwright, 477 U.S. 399, 423–24 (1986). Panetti, 551 U.S. at 954; see also Wiley v. Epps, 625 F.3d 199, 211 (5th Cir. 2010) (finding that the court “must consider whether that court’s application of its own standards and precedent resulted in a denial of due process under the federal Constitution” and that “the state court’s departure from its own . . . standards in the face of Wiley’s evidence of retardation failed to provide Wiley with the minimum constitutional protections”); id. at 207 (explaining that although “Atkins [v. Virginia, 536 U.S. 304 (2002)] left to the states the job of implementing procedures for determining who is mentally retarded,” the decision was made against the “backdrop” of federal due process requirements, including Ford’s requirement of a hearing upon a showing of insanity (citing Rivera v. Quarterman, 505 F.3d 349, 358 (5th Cir. 2007))). Similarly, in another post-Penholster case, a petitioner raising a plausible Batson challenge to the jury selection used at his trial diligently sought and was denied a copy of the voir dire transcript. Pao Lo v. Kane, No. 2:05-cv-1754-MCE TJB, 2011 WL 2462932, at *5, *31 (E.D. Cal. June 17, 2011). The Petitioner, who was Asian, argued that many potential jurors of Asian descent were questioned during voir dire, and “[d]espite their availability and otherwise apparent suitability, the prosecutor used peremptory challenges to cause their dismissal” without providing plausible reasons for the challenges. Id. at *28, *31. The court found that the voir dire transcript “was necessary if Petitioner was ever going to prove his stand alone Batson claim as well as his ineffective assistance of appellate counsel claim for failing to raise the Batson issue on direct appeal,” and held that the state court’s refusal to provide the transcript was an unreasonable application of federal law. Id. at *31–32. The magistrate judge, after finding that the state court had not met § 2254(d)(1), then conducted de novo review of the Batson and Strickland ineffective assistance claims and recommended granting the writ. Id. at *32, *46.

See Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 402 (2001) (“[E]ach State has created mechanisms for both direct appeal and state postconviction review, even though there is no constitutional mandate that they do so.” (citations omitted)).
ated a liberty interest protected by the Due Process Clause. This liberty interest is not as strong as the interest that attaches pre-conviction, when the individual is still presumed innocent, but, under the Supreme Court’s recent decision in Osborne, it “begets” limited procedural due process rights.

As established in Osborne, a federal procedural due process violation occurs in a state’s postconviction processes when a state court’s “consideration of [a] claim within the framework of the State’s procedures for postconviction relief ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ or ‘transgresses any recognized principle of fundamental fairness in operation.’” The Court in Osborne did not, however, explain what fundamental fairness in postconviction review requires, instead holding that “[w]hen a State chooses to offer help to those seeking relief from convictions, due process does not dictat[e]...
the exact form such assistance must assume.”\textsuperscript{261} The Court must therefore more clearly define the contours of this right, particularly as \textit{Pinholster} encourages more due process challenges. At a minimum, however, it appears that a petitioner must have a right to present evidence, a meaningful evidentiary hearing if there are disputed material facts, and discovery for good cause.\textsuperscript{262}

Professor Brandon Garrett, observing that “[f]ew rulings address the [necessary] scope of state postconviction procedures,”\textsuperscript{263} has nonetheless expressed guarded optimism for the efficacy of facial challenges to state postconviction DNA testing provisions using the fundamental fairness test. “[S]tatutes in some states that do not grant discovery or testing to those who could reasonably prove innocence may be vulnerable to due process challenges. In a series of states, the \textit{Osborne} ruling could trigger successful challenges to restrictions on access to postconviction discovery.”\textsuperscript{264} Similarly, a scheme like Virginia’s, in which courts will not, under any circumstances, consider evidence not included in an initial habeas petition, may well violate due process under \textit{Osborne}.\textsuperscript{265}

In many states, however, as-applied challenges to the denial of fact development would be more fruitful—and may well be normatively desirable, particularly in light of \textit{Pinholster}. \textit{Osborne} is, however, ambiguous as to whether they are allowed. Most states allow post-trial discovery and/or an evidentiary hearing either for “good cause” or at the court’s discretion.\textsuperscript{266} These statutes are almost certainly constitutional on their face under \textit{Osborne}, but the decisions made under them can be arbitrary in practice.\textsuperscript{267} When fact development of plausible claims for re-

\textsuperscript{261} Id. (second alteration in original) (internal quotations omitted).
\textsuperscript{262} See Brandon L. Garrett, \textit{DNA and Due Process}, 78 \textit{Fordham L. Rev.} 2919, 2941–42 (2010) (noting that the Court in \textit{Osborne} cited to \textit{Wolff v. McDonnell}, 418 U.S. 539 (1974), which, in Garrett’s terms, guarantees “notice, an opportunity to present documentary evidence, and a right to obtain discovery, including by taking witness statements, obtaining documents, and calling witnesses”); see also Marceau, \textit{supra} note 19, at 24 n.107 (equating fundamental fairness with the full and fair hearing requirement); id. at 36 (proposing that “where there are material facts in dispute that cannot be resolved on the record alone, a process that fails to provide a meaningful opportunity to discover and produce evidence, fails to provide an opportunity to confront witnesses where necessary, and fails to make relevant findings of fact will not be full and fair”).
\textsuperscript{263} Garrett, \textit{supra} note 262, at 2940.
\textsuperscript{264} Id. at 2946.
\textsuperscript{265} See Cullen v. Pinholster, 131 S. Ct. 1388, 1418 n.6 (2011) (Sotomayor, J., dissenting) (describing Virginia’s rule).
\textsuperscript{266} See \textit{supra} notes 118 and 121.
\textsuperscript{267} See, e.g., Primus, \textit{supra} note 35, at 19 (explaining that “Oklahoma courts deny virtually all motions to remand cases for evidentiary development of ineffectiveness claims”).
lie is arbitrarily denied or curtailed, an argument can be made under Osborne that the state’s postconviction procedures violate a “recognized principle of fundamental fairness [that is, nonarbitrariness] in operation.” Such an argument is facially consistent with the Osborne majority’s emphasis on Osborne’s alleged failure to seek DNA testing through Alaska’s postconviction discovery procedures or under the Alaska Constitution. Those “procedures are adequate on their face,” the Court stated, “and without trying them, Osborne can hardly complain that they do not work in practice.” Further, the majority noted, if Alaska were to reject a future request by Osborne under those provisions, “it may be for a perfectly adequate reason, just as the federal statute and all state statutes impose conditions and limits on access to DNA evidence.”

The Court’s linking of an “adequate reason” to deny Osborne testing with statutory limits on access to evidence in other jurisdictions, however, suggests a more limited reading. The Alaska state right to DNA testing at issue in Osborne was new, “uncertain[],” and judicially created—thus, any reasoned decision denying Osborne testing would have been a meaningful step towards defining the contours of the right. Arguably, then, the Court’s interest in how the Alaskan regime works “in practice” was rooted not in a concern that the procedures might be arbitrarily applied to Osborne, but in a concern that the procedures themselves, once announced, be categorically fair.

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268 For one example of arguably arbitrary denial of fact development, see Richards v. Quarterman (Richards II), 566 F.3d 553, 559, 563 (5th Cir. 2009) (explaining that the state court hearing on petitioner’s ineffective assistance of counsel claim consisted “only of an affidavit from Richards’s trial counsel” with conclusory statements and sparse explanation).

269 Osborne, 129 S. Ct. at 2320 (quoting Medina, 505 U.S. at 446, 448); see Garrett, supra note 262, at 2949 (“The Court in Osborne did inquire into the state courts’ reasons for denying relief, as well as the adequacy of the state process. If courts interpret state materiality requirements in an arbitrary fashion, then they should be subject to due process scrutiny.”).

270 Osborne, 129 S. Ct. at 2320–21.

271 Id. at 2321.

272 Id. at 2320–21.

274 This reading is also supported by Medina (the source of the “in operation” language), in which the inquiry was limited to the general operation of the statute, not its application to the petitioner. 505 U.S. at 448. More generally, non-arbitrariness is a substantive rather than a procedural due process concept, and Osborne itself rejected the existence of a substantive due process right to postconviction DNA evidence. 129 S. Ct. at 2322. This objection probably misapprehends the nature of the putative claim, which is not to a freestanding right to a postconviction hearing or discovery (although such a right might still be guaranteed by the Due Process and/or Suspension Clauses), but rather a general right to be free from arbitrary
Indeed, the Supreme Court’s recent characterization of Osborne as “reject[ing] the extension of substantive due process” to a prisoner’s request for DNA testing and “le[aving] slim room for the prisoner to show that the governing state law denies him procedural due process” is consistent with a skeptical view of Osborne as a source of review of individual state discovery decisions.275

Between the extremes of facial challenges to state postconviction fact development regimes and challenges based on a singular, arbitrary decision under that regime276 lies a claim that a particular rule, although facially consistent with due process, is unconstitutional as it is generally (or at least frequently) applied. By demonstrating a pattern of, for example, arbitrary denials of meaningful hearings on plausible factual allegations that would give rise to relief, petitioners may be able to convince federal courts that the state procedures are, in practice, fundamentally unfair:277

Osborne, then, can in at least some cases provide the substance of a federal remedy for unfair state postconviction fact development procedures.278 Section 1983, as recently affirmed in Skinner, can provide the procedural vehicle for these challenges.279 Skinner had requested and been denied testing under Texas’s postconviction DNA access statute state action. See, e.g., Nicholas v. Pa. State Univ., 227 F.3d 133, 139 (3d Cir. 2000) (“[A] non-legislative government deprivation that comports with procedural due process may still give rise to a substantive due process claim upon allegations that the government deliberately and arbitrarily abused its power.” (internal quotation marks omitted)); Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 95 COLUM. L. REV. 509, 522–23 & n.79 (1993). Nonetheless, the Supreme Court “has not definitively held that all arbitrary official conduct violates the Constitution,” and further, has frequently abstained from deciding substantive due process issues when they arise from isolated, arbitrary state adjudications of non-fundamental rights. Fallon, supra, at 324.

275 See Skinner, 131 S. Ct. at 1293.
276 Professor Marceau recognizes these extremes, noting that “there are unfair procedures, and then there are fair procedures that are occasionally applied unfairly.” Marceau, supra note 19, at 34.
277 See Fallon, supra note 274, at 347 (noting “the general principle of modern due process law that federal judicial oversight is appropriate in cases involving allegations of pervasive or widespread straying of government outside constitutional bounds”). Petitioners from states that offer counsel on postconviction review also may raise due process claims. Just as states’ choice to offer postconviction review triggers minimum due process requirements, their guarantee of postconviction counsel requires that they not arbitrarily deny counsel. Freedman, supra note 116, at 1095.
278 Nonetheless, the Osborne standard is difficult to meet, and, depending on the test employed, it may be easier for a petitioner to show that the state’s determination of the facts was “unreasonable” under § 2254(d)(2). See supra notes 260–275 and accompanying text. Of course, courts may employ the Osborne test under § 2254(d)(2), if they choose to recognize a procedural component of reasonableness at all.
279 See 131 S. Ct. at 1298.
and brought suit under § 1983 alleging that the statutory scheme denied him procedural due process.\textsuperscript{280} Reversing the Fifth Circuit, the Court held that Skinner’s claim could be brought under § 1983 because “[s]uccess in his suit for DNA testing would not necessarily imply the invalidity of his conviction. While test results might prove exculpatory, that outcome is hardly inevitable; [the] results might prove inconclusive or they might further incriminate Skinner.”\textsuperscript{281} This reasoning applies with equal force to a § 1983 claim for expanded fact development in a state postconviction proceeding: although the plaintiff’s ultimate goal is presumably to vacate his conviction, success in the § 1983 suit is, at best, a step in that direction.\textsuperscript{282}

Taken together, \textit{Osborne} and \textit{Skinner} provide a roadmap to due process challenges to state postconviction fact development procedures, and petitioners facing \textit{Pinholster}’s bar on federal fact development under § 2254(d) will increasingly take this route. Faced with these challenges, the Court will have to decide what type of “fundamental fairness” the Due Process Clause affords.

\section*{Conclusion}

Without the safeguard of federal fact development under § 2254(d), cases of egregious unfairness in state postconviction procedures will demand new solutions. There will undoubtedly be future cases in which the fact development consists of a single, ex parte affidavit produced in active collaboration with the state,\textsuperscript{283} or includes the judge’s independent collection of impeachment evidence from news-

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\item \textsuperscript{280} Id. at 1296.
\item \textsuperscript{281} Id. at 1298.
\item \textsuperscript{282} The Court had “not previously addressed whether due process challenges to state collateral review procedures may be brought under § 1983.” Id. at 1302 (Thomas, J., dissenting). Interestingly, although Justice Ginsberg, writing for the Court in \textit{Skinner}, attempted to limit \textit{Skinner}’s application to postconviction \textit{Brady} claims on the grounds that successful \textit{Brady} claims “necessarily yield[] evidence undermining a conviction,” id. at 1293, 1300 (majority opinion), the dissent is probably right to be skeptical of that claim, at least if taken broadly, see id. at 1303 (Thomas, J., dissenting). Although a § 1983 suit for \textit{Brady} material itself is clearly barred under \textit{Skinner}, an “artfully plead[ed]” attack on the state habeas discovery procedures governing access to potential \textit{Brady} material would seem not to be—because that evidence may not exist. See id. at 1303. \textit{Contra} id. at 1300 (majority opinion). Indeed, at least one post-\textit{Pinholster} § 1983 procedural due process challenge to state fact development has successfully invoked \textit{Skinner}, although the underlying claim was based on \textit{Atkins} rather than \textit{Brady}. See Bedford v. Kasich, No. 2:11-cv-351, 2011 WL 1691823, at *3–4, *6–7 (S.D. Ohio May 4, 2011).
\item \textsuperscript{283} See, \textit{e.g.}, Richards v. Quarterman (\textit{Richards I}), 578 F. Supp. 2d 849, 852 (N.D. Tex. 2008).
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In the wake of Pinholster, then, the Court will be called upon to decide whether federal statutes and the federal Constitution provide a concrete right to a fair hearing on postconviction review or whether those rights (if they exist at all) are more abstract rights to a right to a fair hearing.

These issues represent a crossroads in the law of habeas corpus; their resolution will have a profound impact on the ability of state prisoners held in violation of the federal Constitution to obtain federal habeas relief under AEDPA, and they will also figure largely in determining the viability of proposals to further limit federal habeas. The discussion of these questions in this Article is merely a starting point for their consideration after Pinholster; all clearly require more sustained consideration, and even then clear answers will likely be elusive. At one time, the existence of a federal requirement for fairness in every case, not just the average case, would have seemed a safe bet. The current trajectory of habeas law, however, places the issue in doubt. As the story goes, popular frustration with the perceived excesses of the Warren Court and the high cost of administering individual justice in an era of expanded criminal procedural rights and exploded prison populations has seen federalism, comity, and finality rival, if not eclipse, the vindication of constitutional rights as the primary concern of federal habeas. It is, after all, a key feature of AEDPA that it does not allow a federal court to grant relief if it is merely convinced that the state court’s decision was wrong but not “objectively unreasonable.” Less starkly, the current Court is so concerned with respecting the sovereignty of state courts that it has rejected, without dissent, even the


\[\text{285 See generally Blume et al., supra note 118 (arguing for the importance of federal habeas rights); Hoffman & King, supra note 16 (proposing to abolish federal habeas in most non-capital cases).}\]

\[\text{286 See Yackle, supra note 38, at 544 (explaining that, after Republican bills aimed at restricting habeas by imposing “new procedural requirements for all state prisoners to meet in order to put the merits of their claims before federal courts” failed, the Rehnquist Court “took matters into its own hands” by requiring prisoners to “exhaust all available state avenues for litigating federal claims in order to allow state courts the opportunity to correct their own errors”); id. at 545, 549 (describing how Rehnquist formed the Powell Committee, which “recommended especially state-friendly procedures in capital cases,” and adopted the Teague doctrine, which “usually bars federal habeas courts from considering claims that depend on new rules of federal law”). See generally Hammel, supra note 117 (tracing the development of doctrines that limit federal habeas review).}\]

rather intuitive notion that the goal of avoiding reversal by a federal court might shape state postconviction practices.  

Even so, the odds may still be reasonably good, depending on the stock one places in lofty rhetoric. As the Court reminded us in Boumediene,

Habeas corpus is a collateral process that exists, in Justice Holmes’ words, to “cut through all forms and go to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.”

A petitioner’s right to habeas corpus that is indifferent to manifest unfairness in the individual’s own case would indeed be a right to an empty shell.

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288 See Harrington v. Richter, 131 S. Ct. 770, 784 (2011) (“There is no merit to the assertion that compliance with § 2254(d) should be excused when state courts issue summary rulings because applying § 2254(d) in those cases will encourage state courts to withhold explanations for their decisions. Opinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court.”).
