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## COMMENT

### EVIDENTIARY ISSUES AND CERTIFICATES OF APPEALABILITY IN FEDERAL HABEAS CORPUS PETITIONS

*Matthew Hughes*<sup>†</sup>

#### ABSTRACT

*In modern federal habeas corpus proceedings, petitioners must overcome numerous substantive and procedural barriers to relief. To appeal a district court's final order disposing of a habeas petition, habeas petitioners must first obtain permission in the form of a certificate of appealability (COA), which must specify the issues certified for appeal. In the relatively rare event that a court grants a COA, the habeas petitioner might wish to appeal one or more evidentiary rulings. This article argues that evidentiary issues directly related to substantive claims certified for appeal need not be specified in the COA to be appealed. Like the motion for appointment of counsel in the Supreme Court decision *Harbison v. Bell*, evidentiary rulings are nonfinal orders not subject to the COA requirement unless they fall within the scope of the collateral order doctrine. The practical effect of such an interpretation is to force courts of appeal to do what they already have the discretion to do: thoroughly and carefully review every lower court evidentiary ruling related to a substantive claim that has been certified for appeal.*

#### I. INTRODUCTION

It used to be the fashion for high-ranking government officials to arrest their personal and political enemies and hold them indefinitely. In some places, it still is. But people have got hold of two notions: that a person ought not to be punished or imprisoned unless the person has done something wrong, and that even a person who has done wrong cannot be justly punished or imprisoned unless society has made it clear, upfront, that the act in question is wrong and subject to punishment. The idea of the rule of law, an ancient Jewish idea that became stylish eight hundred years ago in England,

was combined with these two notions. Together, they were embodied in the Magna Carta and the writs of habeas corpus.<sup>1</sup>

A writ of habeas corpus is a written, judicial demand—a court order—directing the custodian (jailer) of a person in custody (prisoner) to deliver the body of the prisoner for a particular purpose. Historically, the purpose was generally to investigate whether the authorities imprisoned him<sup>2</sup> lawfully and, if not, to have him released. “Habeas” or “habeas corpus” in the modern federal context refers to a state or federal prisoner (the petitioner) challenging a state or federal conviction or sentence (or both) in federal court by claiming the conviction or sentence (or both) violates the laws, treaties, or Constitution of the United States. Federal prisoners may apply for the writ under 28 U.S.C. § 2255 and state prisoners under 28 U.S.C. § 2254.<sup>3</sup> In rare cases, state and federal prisoners can apply for the writ under 28 U.S.C. § 2241 and thereby escape the strictures of §§ 2254 and 2255. These and related provisions are generally referred to as the Anti-Terrorism and Effective Death Penalty Act (AEDPA).

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1. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 37–38 (1985); see also Phillip D. Kline, *Imprisoning the Innocent: The Knowledge of Law Fiction*, 12 *LIBERTY U.L. REV.* 393, 435 (2018) (citations omitted); *infra* notes 16–22 and accompanying text.

2. For convenience and because the vast majority of federal and state prisoners are males, this article employs masculine pronouns throughout. *Inmate Gender*, FEDERAL BUREAU OF PRISONS (Jan. 25, 2020), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp); Zhen Zeng, *Jail Inmates in 2017*, BUREAU OF JUSTICE STATISTICS (Apr. 2019), <https://www.bjs.gov/content/pub/pdf/ji17.pdf>.

3. This article is exclusively dedicated to federal habeas law. A number of states have habeas corpus laws, and all have some form of postconviction relief, but they are addressed here only in passing.

This article argues that under AEDPA, if a substantive claim has been certified for appeal, evidentiary rulings directly related to the substantive claim may also be appealed even if the court did not expressly specify whether the evidentiary rulings were included in the certificate. This principle applies to all nonfinal habeas orders not covered by the collateral order doctrine. But this article—while drawing on cases that deal with nonfinal orders not dealing with evidentiary matters—argues specifically for the application of this principle to evidentiary rulings.

Tens of thousands of prisoners have litigated AEDPA's complex provisions, but interpreting federal habeas law is an intricate business. In addition to the semantic ambiguity on the fringe of nearly every statute, a critical component of federal habeas procedure under AEDPA remains obscure. *Harbison v. Bell*<sup>4</sup> dealt with federal funds for habeas petitioners, but in order to reach that issue the Court had to decide whether a certificate of appealability was required for the petitioner to appeal that issue.<sup>5</sup> The Court held it was not.<sup>6</sup> The federal courts of appeal are largely unaware that the interpretation of 28 U.S.C. § 2253(c)(1)–(3)<sup>7</sup> underlying *Harbison* applies to the relationship of evidentiary motions to substantive habeas claims on appeal.<sup>8</sup> Legal scholars have failed to explore the issue, and few petitioners

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4. 556 U.S. 180 (2009).

5. *Id.* at 182.

6. *Id.*

7. The provision reads as follows:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c)(1)–(3) (2012).

8. See *infra*, Section II.D.1.

appear to have litigated it.<sup>9</sup> This lack of scholarly treatment is remarkable because habeas petitioners covet additional opportunities to plead their case and present a sympathetic story. Because AEDPA's drafters designed the law to streamline habeas proceedings and bolster the finality of habeas decisions, the statute includes numerous obstacles to relief and to appeals.<sup>10</sup> Any chink in AEDPA's armor, especially a chance to present new evidence, is another chance at freedom.

Part II explains the federal habeas statutory framework, including its provisions on evidentiary matters and appeals. It also discusses the dearth of legal scholarship and the disjointed federal appellate approaches to habeas evidentiary rulings on appeal. Part III notes the decision in *Harbison v. Bell* and the reasons underlying *Harbison's* cursory ruling that where a substantive claim subject to AEDPA is certified for appeal under § 2253(c)(1)–(3), related evidentiary rulings may be appealed even if the certificate does not expressly include them. The remainder of Part III briefly explores the practical benefits of this interpretation to habeas petitioners.

## II. BACKGROUND

In twenty-first-century America, the Suspension Clause of the U.S. Constitution secures the writ: “The 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.”<sup>11</sup> The Suspension Clause secures the writ as it existed in 1789.<sup>12</sup> But the Clause does not, by itself, give courts authority to wield the writ. Instead, it requires Congress to authorize federal courts to grant the writ and allows Congress to decide the exact scope of the writ and the procedures for habeas petitions.<sup>13</sup> The Judiciary Act of 1789 granted federal courts authority to issue writs of habeas corpus.<sup>14</sup> Laws passed in the intervening centuries have modified, supplemented, and reformed federal

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9. See *infra*, Section II.D.2.

10. See John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 59 CORNELL L. REV. 259 (2006); see also *infra* note 101

11. U.S. CONST. art. I, § 9, cl. 2 (emphasis added).

12. *Boumediene v. Bush*, 553 U.S. 723, 746 (2008).

13. *Felkner v. Turpin*, 518 U.S. 651, 664 (1996).

14. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (1789) (subsequently amended and superseded); *Felkner*, 518 U.S. at 659.

habeas law. The most important of these is the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>15</sup>

A. *General Principles of Habeas Corpus*

Modern federal courts recognize three forms of the writ: the writ of habeas corpus *ad subjiciendum*, the writ of habeas corpus *ad testificandum*, and the writ of habeas corpus *ad prosequendum*. The writ of habeas corpus *ad testificandum* directs the prisoner's jailer to bring the prisoner to court to testify.<sup>16</sup> Another interesting species of the genus habeas corpus is the writ of habeas corpus *ad prosequendum*, the proper use of which is to obtain the presence of the erstwhile, imprisoned accused so that he can be tried.<sup>17</sup>

The garden variety of the writ of habeas corpus is the writ of habeas corpus *ad subjiciendum*. By issuing it, a court demands that the body of the prisoner be produced, generally for an evidentiary hearing or release. The writ of habeas corpus *ad subjiciendum* also goes by the moniker of the Great Writ.<sup>18</sup> It is this form of the writ to which the phrase "habeas corpus" typically refers.<sup>19</sup> The writ of habeas corpus *ad subjiciendum* is the subject of this article and the primary version of the writ addressed by AEDPA.

At present, Congress has not extended the writ beyond those to whom it absolutely must. The Suspension Clause is the clause of the Constitution guaranteeing that the writ of habeas corpus may not be suspended unless the public safety requires it on account of war or rebellion.<sup>20</sup> The Suspension Clause applies to those in United States territory.<sup>21</sup> For example, the Suspension Clause applies to prisoners in Michigan and not prisoners in Luxembourg. Less obviously, it applies to detainees at Guantanamo Bay and

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15. Pub. L. No. 104-132 (as codified in part and as amended in scattered subsections of 28 U.S.C. §§ 2244, 2253–2255, and 2261–2266 (2012)). Some portions of the law were designed to deter terrorism. William Diaz, *Dualist, but Not Divergent: Evaluating United States Implementation of the 1267 Sanctions Regime*, 5 LIBERTY U.L. REV. 333, 349 & n.88 (2011).

16. 28 U.S.C. § 2241(c)(5) (2012); *United States v. McGaha*, 205 F. Supp. 949, 950 nn.1–2 (E.D. Tenn. 1962) (citing *Cuckovich v. United States*, 170 F.2d 89, 90 (6th Cir. 1948)).

17. 28 U.S.C. § 2241(c)(5) (2012); *Carbo v. United States*, 364 U.S. 611, 615 (1961).

18. *Stone v. Powell*, 428 U.S. 465, 474 n.6 (1976) (citing *Ex parte Bollman*, 4 Cranch 75, 95 (1807) (Marshall, C.J.)).

19. *Id.*

20. U.S. CONST. art. I, § 9, cl. 2.

21. See *Boumediene v. Bush*, 553 U.S. 723, 753 (2008).

may apply to others in American custody outside the United States based upon a three-factor test.<sup>22</sup>

## B. General AEDPA Provisions

By petitioning for the writ under AEDPA, a petitioner asks a federal court to find that his conviction or sentence (or both)<sup>23</sup> was imposed in violation of the Constitution or a federal law or treaty. The petition must meet several basic procedural requirements and must satisfy specific substantive standards. Petitions by prisoners under a death sentence are subject to special procedures and substantive requirements.<sup>24</sup>

### 1. Jurisdiction

The Supreme Court, any Supreme Court justice, any district court, or any circuit judge may issue writs of habeas corpus “within [their] respective jurisdictions.”<sup>25</sup> A person in custody pursuant to the judgment of a state court<sup>26</sup> must apply to the federal district court for the state in which he is held

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22. *Id.* at 766–71; *see also* Lauren Easter Lynch, Note, *Avoiding Judicial Second-Guessing in a Nontraditional Theatre of War*, 12 LIBERTY U.L. REV. 105, 109–11, 122–23 (2017) (citations omitted); Benjamin S. White, Note, *Al-Aulaqi v. Obama: Must Eliminating Dangerous Terrorists Entail Accepting Dangerous Political Doctrines*, 8 LIBERTY U.L. REV. 411, 432–35 (2014) (citations omitted).

23. The prisoner might accept his conviction but quibble with a lengthy sentence.

24. Sections 2261–2266 apply to death penalty cases. When entertaining an application for the writ of habeas corpus under §§ 2261–2266, the district court may only consider claims raised and decided on the merits in the state courts, unless the failure to raise the claim is the result of state action in violation of the Constitution or laws of the United States, or the result of the Supreme Court’s recognition of a new federal right that is made retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for state or federal post-conviction review. 28 U.S.C. 2264(a) (2012). Claims adjudicated on the merits in state courts are reviewed by the district courts pursuant to the standards in §§ 2254(a), (d), and (e). 28 U.S.C. § 2264(b) (2012). *See* Section II.B.3. The federal court presumes state-court factual findings are correct, but the prisoner may rebut that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e) (2012).

25. 28 U.S.C. § 2241(a) (2012). Bankruptcy courts cannot issue the writ. *In re Kerr*, No. 1530531, 2016 WL 15-78758, at \*2–3 (Bankr. N.D. Ohio April 15, 2016).

26. This includes nearly every state prisoner. But a federal prisoner simultaneously serving both a federal and a state sentence may challenge the state sentence via a petition for federal habeas relief. *See Mays v. Dinwiddie*, 580 F.3d 1136, 1141 (10th Cir. 2009) (citing Supreme Court and Tenth Circuit precedents).

or the district in which he was convicted.<sup>27</sup> A person in federal custody must apply to the federal district court in the district in which he is held.<sup>28</sup> Once the application is taken up by the federal district court, the district court retains jurisdiction but the petition could become moot if the prisoner is released.<sup>29</sup>

## 2. Custody

The person seeking the writ must be “in custody.”<sup>30</sup> “The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty.”<sup>31</sup> A person is in custody if he is subject to conditions that “significantly restrain [one’s] liberty to do those things which in this country free [persons] are entitled to do.”<sup>32</sup> Prisoners are in custody. Parolees are in custody if the government exercises direct control over their movements.<sup>33</sup> Because of the

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27. 28 U.S.C. § 2241(d) (2012). If the prisoner may choose between multiple district courts, the district court that receives his application may, “in the exercise of its discretion and in furtherance of justice,” transfer it to another district court with jurisdiction. *Id.*

28. 28 U.S.C. § 2241(a) (2012). If he applies to the Supreme Court, a Supreme Court justice, or a circuit judge, he must explain why. Section 2241(e), which denied federal courts jurisdiction to hear or consider applications filed by or on behalf of an alien who is an enemy combatant, was declared unconstitutional. *Boumediene v. Bush*, 553 U.S. 723, 792 (2008). There are special limits on the ability of federal courts to issue writs of habeas corpus to illegal aliens. *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018). This area of habeas corpus practice is influenced by current political agitation on the question of immigration and by the intricacies of administrative law. This area of the law is constantly in flux due to decisions overturning statutes, proposed legislation, amendments to existing legislation, and widespread and ongoing appellate litigation.

29. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). The Supreme Court has been quite clear that a petitioner “may not collaterally attack his prior conviction” either through a writ of habeas corpus or through a motion under § 2255, except in cases of violation of the Sixth Amendment by failure to appoint counsel, but he may challenge a sentence enhanced on the basis of a faulty prior conviction or, in some cases, a sentence yet to be served. *Steverson v. Summers*, 258 F.3d 520, 522–24 (6th Cir. 2001) (citing Supreme Court decisions). This is because he is not “in custody” under the prior sentence.

30. 28 U.S.C. §§ 2254(a), 2255(a) (2012). In limited circumstances, next friend habeas petitions are acceptable.

31. *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973).

32. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

33. *See id.* For example, no court of appeals has held that sex offender registration requirements constitute custody. *Hautzenroeder v. Dewine*, 887 F.3d 737, 741 (6th Cir. 2018).

custody requirement, a petitioner may rarely challenge a conviction or sentence under which he is not currently imprisoned.<sup>34</sup>

### 3. Petition

A petition for habeas corpus is a request that the court grant the writ. No federal judge or court is authorized to entertain an application for the writ of habeas corpus except “on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States.”<sup>35</sup> Therefore, a court may only grant the writ on the basis of a claim previously adjudicated on the merits in a *state* court if the adjudication resulted either in a “decision contrary to or involving an unreasonable application of clearly established [f]ederal law, as determined by the Supreme Court of the United States,” or in a “decision based on an unreasonable determination of the facts

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34. Persons detained awaiting state trial are not detained “pursuant to a judgment of a State court,” and may therefore apply for the writ under § 2241. A prisoner who could petition for relief under § 2255 may request the writ of habeas corpus under § 2241 if a motion under § 2255 “appears . . . inadequate or ineffective to test the legality of his detention,” even if he neglected to make a motion under § 2255 or he made the motion and the court denied it. 28 U.S.C. § 2255(e) (2012); *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999). This savings clause applies “only where the petitioner . . . demonstrates ‘actual innocence.’” *Wooten v. Cauley*, 677 F.3d 303, 307 (6th Cir. 2012). An example would be where the Supreme Court narrowly construes a statutory prohibition previously interpreted broadly by the courts of appeal, which allows some prisoners to claim that they are innocent under the new interpretation. Petitions filed solely under § 2241 “are not subject to the heightened standards contained in § 2254(d), [so the court] must conduct a *de novo* review of the state court proceedings.” *Phillips v. Court of Common Pleas*, 668 F.3d 804, 810 (6th Cir. 2012).

35. 28 U.S.C. § 2254(a) (2012).

in light of the evidence presented in the [s]tate court proceeding.”<sup>36</sup> Courts frequently refer to this standard as “AEDPA deference.”<sup>37</sup>

A *federal* prisoner who claims a right to be released because his sentence is subject to collateral attack may move the court which imposed the sentence to vacate, set aside, or correct it.<sup>38</sup> The court must grant relief if the sentencing court lacked jurisdiction, “the sentence imposed was not authorized by law or is otherwise open to collateral attack,” or the judgment is rendered vulnerable to collateral attack by virtue of “a denial or infringement of the [prisoner’s] constitutional rights.”<sup>39</sup> Appropriate relief under the statute consists of vacating, setting aside, or correcting the sentence.<sup>40</sup> Relief is only

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36. 28 U.S.C. § 2254(d) (2012). Ineffective assistance of counsel during federal or state collateral post-conviction proceedings (such as for habeas relief) is not sufficient grounds for relief in a proceeding arising under § 2254. 28 U.S.C. § 2254(i) (2012). “Law is clearly established when Supreme Court precedent unambiguously provides a controlling legal standard.” *Blackston v. Rapelje*, 780 F.3d 340, 348 (6th Cir. 2015) (citation and internal quotation marks omitted). Regarding the phrase “unreasonable application”: “AEDPA does not ‘require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied’ . . . . [E]ven a general standard may be applied in an unreasonable manner.” *Id.* (citation omitted). A decision is “contrary to” clearly established federal law if it “arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law” or “arrives a result opposite” that of a Supreme Court case dealing with facts which are “materially indistinguishable.” *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (O’Connor, J., concurring).

The Supreme Court has held that the second prong “imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.” *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (citation and internal quotations omitted). Federal courts presume that state-court factual findings are correct, but the petitioner may rebut that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Even where a state court violated the prisoner’s constitutional rights, he is not entitled to habeas relief if the error was harmless (i.e., not prejudicial).

37. *E.g.*, *Jimenez v. Walker*, 458 F.3d 130, 133 (2d Cir 2006); *see also* Joseph S. Hamrick, *Florida’s Drug Statute, Mens Rea, and Due Process*, 7 LIBERTY U.L. REV. 175, 178 (2013) (noting the importance of AEDPA deference to comparing federal and state precedent interpreting the Constitution) (citations omitted). If the state court did not rule on the claim’s merits, as happens in rare circumstances, the federal court reviews the claim *de novo*. *Cone v. Bell*, 556 U.S. 449, 472 (2009).

38. 28 U.S.C. § 2255(a) (2012). Several specific grounds for collateral attack are listed in the statute: the sentence was imposed in violation of the Constitution or laws of the United States, the court was without jurisdiction to impose the sentence, and the sentence was in excess of the maximum authorized by law.

39. 28 U.S.C. § 2255(b) (2012).

40. 28 U.S.C. § 2255(a) (2012).

available when “the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice . . . [and] presents exceptional circumstances where the need for the remedy . . . is apparent.”<sup>41</sup>

#### 4. Exhaustion of State Remedies

State prisoners generally must exhaust potential remedies in state court before bringing the claim in federal court. The court must deny the writ unless (1) the applicant has exhausted his state court remedies, (2) no state corrective process is available to the petitioner, or (3) the corrective process would be “ineffective to protect the rights of the applicant.”<sup>42</sup> Because the last two situations are quite rare, the exhaustion requirement is almost universal.<sup>43</sup> If the petitioner did not exhaust all his state remedies, the court may nevertheless deny the application on the merits.<sup>44</sup> In practical terms, the exhaustion requirement almost always bars a state prisoner from raising a ground for federal habeas relief that he did not raise in the state court

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41. *Davis v. United States*, 417 U.S. 333, 346 (1974) (citation and internal quotation marks omitted).

42. 28 U.S.C. § 2254(b)(1)(A)–(B) (2012).

43. Inordinate delay by a state court is one of the rare categories of circumstances the federal courts have found to be an exception to the exhaustion requirement. *See Phillips v. White*, 851 F.3d 567, 574–76 (6th Cir. 2017). The state can only waive or be estopped from asserting the exhaustion requirement by the state’s attorneys expressly waiving it. 28 U.S.C. § 2254(b)(3) (2012).

44. 28 U.S.C. § 2254(b)(2) (2012).

system.<sup>45</sup> The applicant has not exhausted all available state remedies if he raises a question that he has the right to raise under the law of the state.<sup>46</sup>

##### 5. Second or Successive Petitions

A person in custody may file a second or successive application for the writ of habeas corpus in federal court in only exceptional circumstances.<sup>47</sup> The applicant cannot file a second or successive petition under § 2254 (governing petitioners under a state court judgment) without first obtaining an order from the appropriate court of appeals authorizing the district court to consider the application.<sup>48</sup> A circuit judge or district judge may dismiss a

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45. Generally, federal courts cannot consider claims that are procedurally defaulted. *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977). Judgments based on state law grounds, whether substantive or procedural, preclude habeas relief where the state law grounds are “independent of” federal law and are “adequate to support the judgment,” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (*abrogated on other grounds by* *Martinez v. Ryan*, 566 U.S. 1 (2012)), unless the prisoner shows “cause for the default and prejudice from a violation of federal law.” *Martinez*, 566 U.S. at 10. In *Martinez*, the Supreme Court held that procedural default of an ineffective assistance of trial counsel (IATC) claim on account of failure to raise it in state collateral (post-conviction) proceedings could be excused if the petitioner did not have effective assistance of counsel during the collateral proceedings. *Id.* The *Martinez-Trevino* exception applies to IATC claims where the state either “denies permission to raise the claim on direct appeal” or “grants permission but . . . denies meaningful opportunity” for direct review of the claim. *Trevino v. Thaler*, 569 U.S. 413, 429 (2013).

46. 28 U.S.C. § 2254(c) (2012). This rule has also been expressed in the following terms: “The exhaustion requirement is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner’s claims.” *Murphy v. Ohio*, 551 F.3d 485, 501 (6th Cir. 2009) (citation and internal quotation marks omitted). Federal courts “will not review claims that were not entertained by the state court due to . . . the petitioner’s failure to raise those claims in the state courts while state remedies were available.” *Irick v. Bell*, 565 F.3d 315, 323–24 (6th Cir. 2009) (internal quotation marks omitted) (alteration in original).

47. A state prisoner can raise a claim in a second or successive application for the writ of habeas corpus under § 2254 if he shows that his claim relies on a new and previously unavailable rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. 28 U.S.C. § 2244(b)(2)(A) (2012). He can also raise a claim in a successive petition if he proves that he could not have discovered the factual predicate for the claim previously through the exercise of due diligence and that the facts underlying the claim would be sufficient to establish, by clear and convincing evidence, that no reasonable factfinder would have found the applicant guilty apart from constitutional error. 28 U.S.C. § 2244(b)(2)(B) (2012).

48. 28 U.S.C. § 2244(b)(3)(A) (2012). The court must determine the motion 30 days after it is filed and can only grant it if the application makes a prima facie showing that it satisfies

second or successive application for relief by a federal prisoner under § 2255 (governing petitioners under a federal court judgment) if the legality of the detention has already been determined on a prior application.<sup>49</sup> A second or successive motion under either § 2254 or § 2255 can only be heard if the appropriate court of appeals certifies that the motion meets the substantive requirements for second or successive habeas petitions under § 2244.<sup>50</sup>

### C. AEDPA Procedures

A petition institutes a new civil proceeding that is neither a stage in a criminal proceeding nor an appeal from a criminal proceeding.<sup>51</sup> A court's issuing the writ is a legal remedy.<sup>52</sup> Under the Federal Rules of Civil Procedure, the writ of habeas corpus is not available to overturn a federal civil judgment.<sup>53</sup> Unlike a direct appeal and unlike a writ for error *coram nobis*, by which a higher court directs a lower court to take notice of facts previously ignored, the proceeding instigated by an application for the writ of habeas corpus is separate from the proceeding being challenged.<sup>54</sup> The Federal Rules of Civil Procedure generally apply to habeas proceedings, but there are special legislatively enacted rules of habeas procedure. The habeas evidentiary rules are discussed below.

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the substantive requirements. 28 U.S.C. §§ 2244(b)(3)(B)–(C) (2012). If a petitioner has already filed a petition, his subsequent petition is not “second or successive” if the prior application was not disposed of on the merits. *Slack v. McDaniel*, 529 U.S. 473, 489 (2000) (holding that dismissal for failure to exhaust state remedies is not dismissal on the merits and therefore does not render a subsequent petition “second or successive”).

49. 28 U.S.C. § 2244(a) (2012).

50. 28 U.S.C. § 2255(h) (2012).

51. *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 269 (1978) (*superseded on other grounds by* Rules Governing Section 2254 Cases in the United States District Courts (2012), <http://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf>, as recognized in *Ukawabutu v. Morton*, 997 F. Supp. 605 (D.N.J. 1998)).

52. *Adderly v. Wainwright*, 58 F.R.D. 389, 402 (M.D. Fla. 1972).

53. See FED. R. CIV. P. 60(b).

54. Several federal circuit courts have expressly held that if a federal prisoner mislabels his petition as one for the writ of error *coram nobis*, it can be properly treated as a motion for relief under § 2255. *Raines v. United States*, 423 F.2d 526, 528 n.1 (4th Cir. 1970) (*superseded on other grounds by* 28 U.S.C. § 2255, as recognized in *Gonzalez v. United States*, No 3:17-cv-1011(VLB), 2018 WL 5314914 (D. Conn. Oct. 26, 2018)) (citing cases from the Third and Seventh Circuits).

### 1. Applicability of Federal Rules of Civil Procedure

Federal Rules of Civil Procedure govern habeas proceedings only to the extent that habeas proceedings have generally adhered to civil litigation practices and to the extent that federal law, the Rules Governing Section 2254 Cases, and the Rules Governing Section 2255 Proceedings do not provide otherwise.<sup>55</sup> A district court explained the decisions on the applicability of the Federal Rules of Civil Procedure in the context of class actions:

Habeas class actions are an appropriate procedural vehicle in certain limited situations. Although habeas actions are not strictly governed by the Federal Rules of Civil Procedure and therefore the class action provisions of the rules do not automatically apply to habeas actions, a court retains the power to fashion for habeas actions appropriate means of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.<sup>56</sup>

The procedures governing the writs of habeas corpus are specified in part in the Federal Rules of Civil Procedure, the Rules Governing Section 2254 Cases, the Rules Governing Section 2255 Proceedings, and several provisions of §§ 2241–2255 and 2261–2266. The federal civil rules govern motions to vacate, set aside, or correct under § 2255, but the procedures governing writs of habeas corpus govern applications for the writ under the savings clause<sup>57</sup> in § 2255.

### 2. General procedures

A person applying for the writ must apply in a “writing signed and verified by the person” seeking relief or “by someone acting on his behalf.”<sup>58</sup> The writing must allege the facts concerning the petitioner’s custody, the name of

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55. FED. R. CIV. P. 81(a)(4); *Browder*, 434 U.S. at 269 (*superseded on other grounds by* Rules Governing Section 2254 Cases in the United States District Courts (2012), <http://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf>, *as recognized in* *Ukawabutu v. Morton*, 997 F. Supp. 605 (D.N.J. 1998)).

56. *Wang v. Reno*, 862 F. Supp. 801, 811 (E.D.N.Y. 1994) (citations and internal quotation marks omitted); *see also* *Bijeol v. Benson*, 513 F.2d 965, 968 (7th Cir. 1975).

57. *See supra* note 34 and discussion therein.

58. 28 U.S.C. § 2242 (2012).

his custodian, and, if known, the grounds on which he is held.<sup>59</sup> The petitioner may amend or supplement the petition under Rule 15 of the Federal Rules of Civil Procedure.<sup>60</sup> A statute of limitations of one year applies to state and federal prisoners applying for federal habeas relief.<sup>61</sup> The period is tolled while a properly filed application for state post-conviction or other collateral review is pending and can also be tolled for equitable reasons.<sup>62</sup>

Unless it is evident from the application itself that the petitioner is not entitled to relief, the judge must immediately grant the writ or order the respondent to show why it should not be granted.<sup>63</sup> The judge must issue the writ or order to the custodian, who has three days to file a return showing why the petitioner is detained.<sup>64</sup> The court may grant leave to amend the return before or after it is filed.<sup>65</sup> The respondent, variously described as the jailer or the custodian, must also promptly file certified copies of the indictment, plea of the petitioner, and the judgment, to the extent that the copies are relevant and the petitioner did not include them in his petition.<sup>66</sup>

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59. *Id.*

60. *See id.*

61. 28 U.S.C. §§ 2244(d)(1); 2255(f)(1)–(4) (2012). The period and its triggers are identical for federal and state prisoners. The period begins on the date of the last of four possible events. First, the period may begin on the date on which the judgment became final by the conclusion of direct review or when the time for seeking direct review expired. 28 U.S.C. §§ 2244(d)(1)(A); 2255(f)(1). Second, if the prisoner was prevented from applying by state actions in violation of the Constitution or laws of the United States, then the period begins on the date the impediment caused by those actions is removed. 28 U.S.C. §§ 2244(d)(1)(B); 2255(f)(2). Third, if the right that forms the basis for the challenge has been newly recognized by the Supreme Court and made retroactively applicable to all cases on collateral review, the period begins on the date the right was initially recognized by the Supreme Court. 28 U.S.C. §§ 2244(d)(1)(C); 2255(f)(3). Fourth, the period may begin on the date on which the factual predicate for the claim could have been discovered by exercising due diligence. 28 U.S.C. §§ 2244(d)(1)(D); 2255(f)(4).

62. 28 U.S.C. § 2244(d)(2) (2012). In one case, the period was tolled for nine and a half years on this basis. *Wall v. Kholi*, 562 U.S. 545, 549 (2011); *see also* *Holland v. Florida*, 560 U.S. 631, 649 (2010). The Sixth Circuit refused to toll the period of limitations for one applicant, who missed the deadline by five days, despite a litany of delays and hindrances. *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745 (6th Cir. 2011); *cf.* *Sherwood v. Prelesnik*, 579 F.3d 581 (6th Cir. 2009) (granting equitable tolling where petitioner conducted his post-conviction proceedings in state court in reliance on precedent that was later overturned).

63. 28 U.S.C. § 2243 (2012).

64. *Id.*

65. *Id.*

66. 28 U.S.C. § 2249 (2012).

The judge may stay any state proceeding against the petitioner that concerns any matter involved in the habeas proceeding.<sup>67</sup> The federal court may even stay the execution of a death sentence if the petitioner applies for appointment of counsel in federal court under 18 U.S.C. § 3599(a)(2).<sup>68</sup> Any stayed proceeding is void if carried on despite the stay.<sup>69</sup>

### 3. Evidentiary Motions

AEDPA and the legislatively enacted rules of habeas procedure contemplate three means of obtaining and presenting evidence: evidentiary hearings, discovery, and expanding the record. AEDPA contains provisions on evidentiary hearings, but motions for discovery and to expand the record are governed by legislatively enacted rules. The Federal Rules of Civil Procedure apply only if the district court authorizes discovery.

Under AEDPA, “evidentiary hearings are not mandatory.”<sup>70</sup> Federal prisoners applying for the writ under § 2255 face a low bar. The court *must* grant a hearing “[u]nless the motion and the files and records of the case conclusively show” that the petition should be denied.<sup>71</sup> But for petitions filed under § 2254 by state prisoners, the court should grant an evidentiary hearing only if “such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.”<sup>72</sup> In exercising its discretion on the question of an evidentiary hearing,<sup>73</sup> the district court must consider the statutory standards for granting a hearing.<sup>74</sup> The district courts rarely grant evidentiary motions.<sup>75</sup>

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67. 28 U.S.C. § 2251(a)(1)–(2) (2012).

68. 28 U.S.C. § 2251(a)(3).

69. 28 U.S.C. § 2251(b).

70. *Johnson v. Mitchell*, 585 F.3d 923, 934 (6th Cir. 2009) (quoting *Vroman v. Brigano*, 346 F.3d 598, 606 (6th Cir. 2003)).

71. 28 U.S.C. § 2255(b) (2012).

72. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

73. *Ryan v. Gonzalez*, 568 U.S. 57, 74 (2013).

74. *Cullen v. Pinholster*, 563 U.S. 170, 183 (2011). A district court’s decision to grant or refuse an evidentiary hearing under § 2255(b)—which the district court “must” grant if the statutory standard is met—is reviewed for abuse of discretion. *E.g.*, *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014); *United States v. Cavitt*, 550 F.3d 430, 435 (5th Cir. 2008).

75. *But see United States v. Shields*, Nos. 12-cr-00410-BLF-1 & 17-cv-03978-BLF, 2020 WL 353550, at \*1 (N.D. Cal. Jan. 21, 2020) (denying the habeas petitioner’s motion for an

Federal courts reviewing claims decided on the merits in state courts can consider only “the record that was before the state court that adjudicated the claim on the merits.”<sup>76</sup> Under § 2254(e), the court will hold an evidentiary hearing for a petitioner who neglected to properly develop the factual basis of the claim in state court if 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.”<sup>77</sup> The petitioner will generally not receive a hearing unless he also demonstrates that his claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court and that was previously unavailable, or on a factual predicate that could not have been previously discovered through the exercise of due diligence.<sup>78</sup>

If the court grants a hearing, the petitioner still faces an uphill battle. Factual determinations made in the original state court proceedings are presumed correct, but that presumption may be rebutted by clear and convincing evidence.<sup>79</sup> The petitioner must produce the part of the record proving his claim, or if he is unable, the federal court must order a state official to produce the pertinent part of the record.<sup>80</sup> If neither the petitioner nor the state can produce it, the federal court must decide under the existing circumstances what weight to accord to the state court’s factual determinations.<sup>81</sup>

The court may grant discovery or direct the parties to expand the record. The court may grant discovery for “good cause.”<sup>82</sup> The petitioner may request

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evidentiary hearing but granting his motion to supplement the record); *Lockett v. Clark*, No. 3:18CV325, 2020 WL 201049, at \*8 (E.D. Va. Jan. 13, 2020).

76. *Cullen*, 563 U.S. at 181.

77. 28 U.S.C. § 2254(e)(2)(B) (2012); *Williams v. Taylor*, 529 U.S. 420, 432–33 (2000).

78. 28 U.S.C. § 2254(e)(2)(A).

79. 28 U.S.C. § 2254(e)(1). Sections 2245–2250 and the Rules Governing Section 2254 Cases contain additional evidentiary rules.

80. “A copy of the official records of the [s]tate court, duly certified by the clerk of such court as a true and correct copy of the finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.” 28 U.S.C. § 2254(g).

81. 28 U.S.C. § 2254(f).

82. Rules Governing Section 2254 Cases in the United States District Courts R. 6(a) (2012) <http://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section->

discovery, including interrogatories, requests for admission, and requests for production of documents.<sup>83</sup> Discovery by state prisoners must be conducted under the Federal Rules of Civil Procedure,<sup>84</sup> but the court may allow federal prisoners to conduct discovery “in accordance with the practices and principles of law.”<sup>85</sup> This allows flexibility for the court to authorize discovery according to the traditional practices relating to motions to vacate, set aside, or correct a sentence. The court may also “direct the parties to expand the record.”<sup>86</sup> Letters written before the motion was filed, exhibits, answers to interrogatories, and affidavits may be included in the record if the judge so orders.<sup>87</sup> The petitioner may move the court to direct that the record be expanded.<sup>88</sup>

D. *AEDPA’s Certificate of Appealability Requirement*

In habeas proceedings, the petitioner may appeal the district court’s decision.<sup>89</sup> In order to appeal, the petitioner must first obtain a certificate of appealability (COA) from the district court or the court of appeals, but the government can appeal without one.<sup>90</sup> The Federal Rules of Appellate Procedure, as well as the local rules and internal operating procedures of the courts of appeal, govern the mechanics of the petition, appeal, and COA.<sup>91</sup>

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2255-proceedings.pdf (hereinafter “28 U.S.C. § 2254 R. 6”); Rules Governing Section 2255 Cases in the United States District Courts R. 6(a) (2012) <http://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> (hereinafter “28 U.S.C. § 2255 R. 6”).

83. 28 U.S.C. § 2254 R. 6(b); 28 U.S.C. § 2255 R. 6(b).

84. 28 U.S.C. § 2254 R. 6(a); 28 U.S.C. § 2255 R. 6(a).

85. 28 U.S.C. § 2255 R. 6(a).

86. 28 U.S.C. § 2254 R. 7(a); 28 U.S.C. § 2255 R. 7(a). It is important to distinguish between evidentiary rulings at the district court and, for instance, motions to expand the record on appeal. See *McIntire v. Gray*, No. 19-3770, 2019 WL 7882541, at \*1, \*5 (6th Cir. Nov. 20, 2019).

87. 28 U.S.C. § 2254 R. 7(b); 28 U.S.C. § 2255 R. 7(b).

88. The motion may be made either to the district court before relief is granted or denied or to the appellate court during an appeal. See *United States v. Shields*, Nos. 12-cr-00410-BLF-1 & 17-cv-03978-BLF, 2020 WL 353550, at \*1 (N.D. Cal. Jan. 21, 2020); *McIntire*, at \*1,\*5.

89. 28 U.S.C. § 2253(a) (2012).

90. 28 U.S.C. § 2253(c)(1)–(3).

91. FED. R. APP. P. 22.

### 1. AEDPA Appeals in General

The standards of review for habeas petitions on appeal are the same as those applied in typical cases—conclusions of law *de novo*, and findings of fact for clear error: “We review *de novo* the district court’s legal conclusions in granting or denying a petition for a writ of habeas corpus; we review its factual findings for clear error.”<sup>92</sup> Because of this standard, prisoners bringing habeas petitions under § 2254 in a federal court of appeal must overcome the two hurdles of deference. The first hurdle is deference to state courts. Federal courts defer to the not unreasonable factual and legal findings of state courts, meaning that § 2254 determinations can only be overturned if the legal findings are contrary to or are an unreasonable application of clearly established federal law, or if the factual findings are unreasonable.<sup>93</sup> The second hurdle is deference to the district courts. While the court reviews legal conclusions *de novo*, all factual findings are reviewed for clear error.

“If this standard is difficult to meet, that is because it was meant to be.”<sup>94</sup> Combined, these two hurdles seriously impede petitions for the writ of habeas corpus relying on grounds decided on the merits in state court. Claims not considered on the merits by state courts are subject to *de novo* review,<sup>95</sup> but in such cases, the federal district court’s findings of fact are reviewed only for clear error. The upshot is that many habeas claims are reviewed, at least in part, under two levels of highly deferential review.<sup>96</sup>

### 2. Motions Treated Identically to Habeas Petitions

Motions that are not habeas petitions under either § 2254 or § 2255 may be subject to the requirements of AEDPA. In particular, motions under Rule 60(b) that are substantially similar to habeas petitions are subject to the COA

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92. *Irick v. Bell*, 565 F.3d 315, 319 (6th Cir. 2009).

93. Federal courts reviewing claims decided on the merits in state courts can consider only “the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

94. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

95. *Gumm v. Mitchell*, 775 F.3d 345, 360 (6th Cir. 2014); *Murphy v. Ohio*, 551 F.3d 485, 494 (6th Cir. 2009).

96. In *Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015), the Sixth Circuit carefully laid out the facts and thoughtfully analyzed several claims of ineffective assistance of counsel and the special considerations due such cases.

requirement.<sup>97</sup> Rule 59(e) motions based on the merits of a prior habeas claim should be construed as second or successive habeas petitions.<sup>98</sup> Other motions that are essentially requests for habeas relief or that could be used to circumvent AEDPA's requirement to achieve the equivalent of habeas relief can be subject to AEDPA provisions, including the certificate of appealability requirement.<sup>99</sup>

### 3. Certificate of Appealability

To appeal a federal district court's denial of a claim for habeas relief, the petitioner must first obtain a COA.<sup>100</sup> The requirement is designed to preserve judicial resources and prevent endless habeas litigation.<sup>101</sup> The relevant statute states, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals" either from "the final order in a habeas corpus proceeding" under § 2254 or from "the final order in a proceeding under [§] 2255."<sup>102</sup> This does not include the very rare habeas petitions filed under 28 U.S.C. § 2241.<sup>103</sup>

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97. *Gonzalez v. Crosby*, 545 U.S. 524, 531–32 (2005); *see also Spitznas v. Boone*, 464 F.3d 1213, 1215–16 (10th Cir. 2006). For a discussion of motions under Federal Rule of Civil Procedure 60(b)(6) in habeas cases, *see Andrew P. Lopiano, Comment, Dumplings Instead of Flowers: An Argument for a Case-by-Case Approach to FRCP 60(b)(6) Motions Predicated on a Change in Habeas Corpus Law*, 15 LIBERTY U.L. REV. (2020).

98. *See Rishor v. Ferguson*, 822 F.3d 482, 492 (9th Cir. 2016); Cory Wilson, Note, *Rishor v. Ferguson: The Ninth Circuit Erred in Holding that Rule 59(e) Motions are not Subject to the Restrictions of AEDPA When Those Motions Do not Present Entirely New Claims for Habeas Corpus Relief*, 51 CREIGHTON L. REV. 641, 642 (2018).

99. *Gonzalez*, 545 U.S. at 531–32.

100. *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

101. Congress had good reason to create powerful barriers to endless and fruitless habeas litigation. One case from the Ninth Circuit is illustrative:

Thirty-eight years ago, on May 26, 1980, Payton raped Pamela Montgomery and stabbed her to death with a butcher knife. During the frenzied attack, he also attempted to kill Patricia Pensinger and her young son. Both survived and identified Payton as the attacker. . . . Nearly forty years later, the parties are still litigating Payton's conviction and sentence.

*Payton v. Davis*, 906 F.3d 812, 813–14 (9th Cir. 2018) (footnote omitted).

102. 28 U.S.C. § 2253(c)(1) (2012).

103. *E.g., Phillips v. Court of Common Pleas*, 668 F.3d 804, 810 (6th Cir. 2012). Persons detained awaiting trial in a state court are not detained "pursuant to a judgment of a State court," and may therefore apply for the writ under § 2241. *See* 28 U.S.C. 2254(a) (2012). A

The statute then specifies that a COA “may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right,”<sup>104</sup> and that the COA “shall indicate which specific issue or issues” on which a satisfactory showing has been made.<sup>105</sup> “Despite the language of [the statute], . . . Rule 22(b) [of the Federal Rules of Appellate Procedure] permits a district judge to issue a COA.”<sup>106</sup> If the district court denies a COA, the petitioner may petition the court of appeals for one.<sup>107</sup> The court of appeals lacks jurisdiction to consider the substantive claims unless either it or the district court first issue a COA.<sup>108</sup> The government is not required to obtain a COA to appeal a district court’s grant of habeas relief, and if the government appeals, the petitioner may defend the favorable judgment with alternative arguments and arguments rejected below without obtaining a COA.<sup>109</sup> District courts routinely deny COAs on all claims and courts of appeal rarely grant or expand COAs.<sup>110</sup>

#### E. *Certificates of Appealability and Evidentiary Motions*

The language of § 2253(c) and the Supreme Court’s decision in *Harbison v. Bell* demonstrate that a COA is required only for the substantive claims

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person authorized by § 2255 to apply for relief may apply for a writ of habeas corpus under § 2241 if a motion under § 2255 “appears inadequate or ineffective to test the legality of his detention,” even if he neglected to make a motion under § 2255 or he made the motion and the court denied it. 28 U.S.C. § 2255(e) (2012); *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999). This savings clause applies “only where the petitioner . . . demonstrates ‘actual innocence.’” *Wooten v. Cauley*, 677 F.3d 303, 307 (6th Cir. 2012) (citations and internal quotation marks omitted). An example would be where the Supreme Court narrowly construes a statutory prohibition previously interpreted broadly by the courts of appeal, which allows some prisoners to claim that they are innocent under the new interpretation.

104. 28 U.S.C. § 2253(c)(2) (2012).

105. 28 U.S.C. § 2253(c)(3) (2012).

106. Ryan Hagglund, Comment, *Review and Vacatur of Certificate of Appealability Issued After the Denial of Habeas Corpus Petitions*, 72 U. CHI. L. REV. 989, 997 (2005). See FED. R. APP. P. 22(b).

107. 28 U.S.C. § 2254 R. 11(a) (2012), 28 U.S.C. § 2255 R. 11(a) (2012).

108. *Buck v. Davis*, 137 S.Ct. 759, 774 (2017).

109. *Jennings v. Stephens*, 574 U.S. 271, 282–83 (2015).

110. Compare *Gonser v. Braman*, No. 19-1770, 2020 WL 207138, at \*1–2 (6th Cir. Jan. 8, 2020), with *Von Tobel v. Benedetti*, No. 18-15892, 2020 WL 110514, at \*1, \*3, (9th Cir. Jan. 9, 2020), and *O’Neill v. Baker*, No. 3:11-cv-00901-MMD-CLB, 2020 WL 60235, at \*1 (D. Nev. Jan. 6, 2020).

denied in the district court's final order,<sup>111</sup> but neither legal scholars nor the federal courts of appeal have recognized this. *Harbison* held that a COA "pursuant to [§ 2253(c)] is not required to appeal an order denying a request for counsel under [18 U.S.C.] § 3599 because § 2253(c)(1)(A) governs only *final orders* that dispose of a habeas corpus proceeding's merits."<sup>112</sup> Underlying *Harbison*'s cursory treatment of the COA question are several significant arguments bolstering the Supreme Court's interpretation of the statute. Therefore, although few circuits have recognized it,<sup>113</sup> a COA is not required to appeal evidentiary rulings related to a claim for which a COA has been granted.<sup>114</sup> Legal scholars have not addressed the applicability of AEDPA's COA requirement to evidentiary motions directly related to substantive claims certified for appeal, but the courts of appeal have. Some of the courts of appeal have correctly applied *Harbison* to COAs for evidentiary rulings, while others have not. Several have issued rulings that contradict their own precedents. Most have cited *Harbison* for other propositions, but none seem to be entirely clear on the implications for evidentiary rulings of *Harbison* and its interpretation of § 2253(c).

### 1. Courts of Appeal

The federal courts of appeal have adopted—and, after *Harbison*, retained—interpretations of the COA requirement inconsistent with *Harbison* or have not yet fully implemented its holding.<sup>115</sup> For instance, the Ninth Circuit is well aware of the *Harbison* decision: the Court of Appeals for

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111. See *Harbison v. Bell*, 556 U.S. 180, 183 (2009).

112. *Harbison*, 556 U.S. at 181 (emphasis added).

113. See *infra* Section II.E.1.

114. 28 U.S.C. § 2254 R. 6(a), R. 7(a) (2004); R. 8(a) (2009), 28 U.S.C. § 2255 R. 6(a), R. 7(a) (2004); R. 8(a) (2009). These rules provide for three main methods to produce evidence in habeas proceedings: discovery, evidentiary hearings, and expansions of the record.

115. An important clarification on sources is appropriate here. The author has made the most thorough exploration of the question that is possible given the current state of legal research. However, it is inevitable that some decisions have been overlooked, if for no other reason than that—as the sources cited in this section demonstrate—so many opinions address this question neither directly nor expressly. The author was forced to resort to indirect methods of searching for circuit and district court opinions, as well as many a magistrate judge's Report and Recommendation. Hence, after reviewing thousands of cases and continually reviewing the most recent habeas decisions at all levels of the federal judiciary, this summary seems to be the most accurate and representative summary of the current approach of federal courts to evidentiary issues in habeas appeals. It is certainly the most comprehensive summary to date of which the author is aware.

the Ninth Circuit and its district courts have cited *Harbison* in more than sixty decisions.<sup>116</sup> The Ninth Circuit has acknowledged that the *Harbison* holding must mean that a modification of a protective order does not require a COA because the modification order is not a final order.<sup>117</sup> Notably, the Federal Rules of Appellate Procedure do not expressly address the question.<sup>118</sup>

The First Circuit has yet to cite *Harbison*, and neither the Second nor the Third Circuit applied its holding to evidentiary rulings. The First Circuit has held that a COA as to whether a habeas petition was barred as untimely necessarily included the issue of whether “discovery of [an] alleged error . . . is a ‘factual predicate’ for the purposes of the AEDPA statute of limitations” because the disputed issue of law had to be resolved before the court could resolve the claim being appealed.<sup>119</sup> The Second Circuit considered an evidentiary ruling on appeal even though only the substantive claim was certified.<sup>120</sup>

A Third Circuit decision from 2015 noted that the court had expressly included “the issues of whether the District Court erred in denying an evidentiary hearing and [the petitioner’s] request for discovery.”<sup>121</sup> The same court recently granted a COA on a substantive issue and remanded for an evidentiary hearing, but the issue certified for appeal was the legal question of “whether the District Court erred in determining that [the petitioner] was not in custody when he filed his habeas petition.”<sup>122</sup> The District of New

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116. These decisions frequently cite *Harbison* for its holding respecting appointment of counsel. *E.g.*, *Samayoa v. Davis*, 928 F.3d 1127, 1129 (9th Cir. 2019).

117. *Lambright v. Ryan*, 698 F.3d 808, 817 n.2 (9th Cir. 2012); *see also Ghent v. Wong*, 371 F. App’x 782, 784 n.1 (9th Cir. 2010); *but see United States v. Winkles*, 795 F.3d 1134, 1141–42 (9th Cir. 2015).

118. *See* FED. R. APP. P. 22(b).

119. *Holmes v. Spencer*, 685 F.3d 51, 58 (1st Cir. 2012); *see also Owens v. United States*, 483 F.3d 48, 56, 61 (1st Cir. 2007) (reversing and remanding for an evidentiary hearing without discussing whether the evidentiary issue was certified for appeal).

120. *Riley v. Noeth*, No. 18-770, 2020 WL 556380, at \*1 (2d Cir. Feb. 4, 2020).

121. *United States v. Manamela*, 612 F. App’x 151, 154 (3rd Cir. 2015) (citing the joint appendix of the case and indicating that this COA was granted after August 12, 2013).

122. *Johnson v. Warden McDowell FCI*, No. 18-1241, 2019 WL 6321087, at \*1 (3d Cir. Nov. 26, 2019) (lacking any indication that the evidentiary ruling was specified in the COA); *see also United States v. Jackson*, No. 17-2647, 2020 WL 550731, at \*1 & n.1 (3d Cir. Feb. 4, 2020); *Wharton v. Vaughn*, 722 F. App’x 268, 270 (3d Cir. 2018) (granting a COA and

Jersey denied all seven grounds of the petitioner's habeas petition, including a ground seeking an evidentiary hearing, and then denied a COA as to the entire petition.<sup>123</sup>

The Fourth Circuit has applied *Harbison's* holding on COAs in a variety of contexts. According to the Fourth Circuit, a district court's decision on a motion to proceed in forma pauperis need not be certified for appeal.<sup>124</sup> Neither does a district court order dismissing a petition or motion as an unauthorized second or successive petition.<sup>125</sup> The Fourth Circuit has recognized that the following are also nonfinal orders that do not require a COA to be appealed: (1) orders construing Rule 60(b) motions as second or successive habeas petitions and denying them as barred by the statute of limitations; (2) orders denying motions to alter or amend a habeas order; (3) orders denying motions for transcripts at the government's expense; (4) orders denying motions for appointment of counsel; (5) orders denying petitions as untimely; (6) orders denying petitions for failure to exhaust state remedies; (7) orders denying motions for recusal; (8) orders denying motions to reconsider a habeas petition; and (9) orders denying motions for mootness.<sup>126</sup> The Fourth Circuit reviewed the logic of *Harbison* in some depth in 2015, showing that the Fourth Circuit clearly understands its

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remanding for an evidentiary hearing), *affg in part and vacating in part and remanding for an evidentiary hearing* No. 01-6049, 2012 WL 3535868 (E.D. Pa. Aug. 16, 2012). In *Wharton*, the Third Circuit granted a COA and remanded for an evidentiary hearing, but the decision of whether to grant or deny a COA is separate from the decision on the legal issue for which a COA might be granted or denied.

123. *Chippero v. Attorney Gen. of New Jersey*, No. 3:15-cv-6272, 2020 WL 205947, at \*26-27 (D.N.J. Jan. 14, 2020) (unpublished).

124. *E.g.*, *Jackson v. Lewis*, 771 F. App'x 316, 316 (4th Cir. 2019).

125. *E.g.*, *United States v. Barnes*, 752 F. App'x 161, 161 (4th Cir. 2019).

126. *E.g.*, *Morley v. Clarke*, 773 F. App'x 769, 769-70 (4th Cir. 2019); *United States v. Courtney*, 773 F. App'x 704, 704-05 (4th Cir. 2019); *United States v. Ruffin*, 740 F. App'x 363, 363 (4th Cir. 2018); *Cleveland v. Adger*, 740 F. App'x 356, 357 (4th Cir. 2018); *Garvin v. William*, 740 F. App'x 348, 348 (4th Cir. 2018); *Miller v. Nohe*, 740 F. App'x 378, 378 (4th Cir. 2018); *United States v. Day*, 746 F. App'x 212, 213 (4th Cir. 2018). All of these decisions are designated as unpublished and reported in the Federal Appendix, but nonetheless show the Fourth Circuit's approach to COAs. According to the Fourth Circuit, dismissal of a petition for failure to prosecute, failure to comply with a court order, or failure to pay a filing fee are also nonfinal orders not subject to the COA requirement.

implications.<sup>127</sup> However, it appears to have never directly applied *Harbison* to the applicability of the COA requirement to evidentiary rulings. At least one Fourth Circuit district court—exercising laudable attention to detail but neglecting to properly interpret § 2253(c)(1)–(3)—expressly granted a COA on an evidentiary issue.<sup>128</sup>

The Fifth Circuit has held that no COA is required to appeal the denial of an evidentiary ruling as long as the evidentiary ruling is directly related to a certified substantive claim.<sup>129</sup> However, in one case it inexplicably reviewed the denial of an evidentiary hearing in the process of denying a COA on the related substantive claim.<sup>130</sup> It was not until 2017 that a three-judge panel of the Fifth Circuit Court of Appeals applied the *Harbison* decision to district court evidentiary rulings.<sup>131</sup> But the very next year, another three-judge panel—including one of the same judges—expressly discussed denying a COA on an evidentiary ruling.<sup>132</sup> Other Fifth Circuit decisions held that other nonfinal orders do not require COAs because they do not dispose of the litigation on the merits and leave nothing but execution of the judgment.<sup>133</sup> Nevertheless, in December 2019, the Northern District of Texas adopted a magistrate judge’s recommendation, denied requests for an evidentiary hearing and appointment of counsel, and then denied a COA without indicating whether that COA would have included the requests for a hearing and for appointment of counsel.<sup>134</sup> That same month, a federal magistrate

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127. See *United States v. McRae*, 793 F.3d 392 (4th Cir. 2015); see also *Farmer v. Booker*, 791 F. App’x 415, 415 (4th Cir. 2020) (denying a COA as unnecessary because the habeas petitioner did not challenge the basis of the district court’s decision and therefore forfeited all his potentially effective arguments).

128. *Buhs v. Florida Dep’t of Corr.*, No. 17-14117-CIV-ROSENBERG/MAYNARD, 2018 WL 10323507, at \*4 (Mar. 14, 2018).

129. *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016) (holding so without explaining the basis for its decision).

130. *Segundo v. Davis*, 831 F.3d 345, 351–52 (5th Cir. 2016) (holding that petitioner was not entitled to an evidentiary hearing on his ineffective assistance of counsel claim and did not make a sufficient showing to warrant a COA on that claim).

131. See *Washington v. Davis*, 715 F. App’x 380, 383 (5th Cir. 2017); see also *LaFlamme v. Davis*, No. 19-40484, 2020 WL 897124, at \*1 (5th Cir. Feb. 24, 2020) (per curiam) (explaining that a COA is not needed to appeal an evidentiary ruling).

132. *Milam v. Davis*, 733 F. App’x 781, 787 (5th Cir. 2018).

133. *E.g.*, *United States v. Fulton*, 780 F.3d 683, 687–88 (5th Cir. 2015).

134. *Lopez-Parker v. Hale County Sheriff*, No. 5:19-CV-00143-M-BQ, 2019 WL 6829048, at \*1–2 (N.D. Tex. Dec. 13, 2019).

judge in Louisiana recommended denying a COA as to “the rulings set forth in this Report and Recommendation,” which included a ruling denying an evidentiary hearing.<sup>135</sup> But in early 2020, the Southern District of Texas properly applied *Harbison* in refusing to consider whether a COA should issue for the voluntary dismissal of a habeas petition.<sup>136</sup>

The Sixth Circuit has not applied *Harbison* to an evidentiary ruling in any reported opinion. The court has expanded a COA “to include the issue of whether the district court erred in denying [petitioner’s] request to depose his postconviction appellate counsel,” but it did not specify the legal standard for its decision.<sup>137</sup> The Sixth Circuit has previously granted a motion to expand a COA to include the district court’s denial of a motion to expand the record, but this occurred before the *Harbison* decision.<sup>138</sup> Another Sixth Circuit case implied that a COA is required to appeal the denial of an evidentiary hearing.<sup>139</sup> In yet another case, the Sixth Circuit applied the substantive standard of § 2253(c)(1)–(3) to determine whether a COA should issue as to the petitioner’s motions for sanctions and to expand the record.<sup>140</sup>

In a current habeas proceeding in the Sixth Circuit, the court denied a motion to expand the COA or clarify its scope.<sup>141</sup> The court appears to have implicitly held that the COA did not include the evidentiary rulings.<sup>142</sup> The court also denied the motion to expand the COA and either affirmed the district court’s denial of a COA as to the evidentiary rulings or outright

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135. *United States v. Miller*, No. 10-102-JWD-EWD, 2019 WL 7584763, at \*1, \*4 (M.D. La. Dec. 31, 2019).

136. *Rosillo v. Davis*, No. 7:18-MC-1090, 2020 WL 806661, at \*2 & n.3 (S.D. Tex. Jan. 13, 2020) (relying on *Harbison* to dismiss a prisoner’s “Motion for Bench Warrant”—which the prisoner later claimed was filed on his behalf by mistake—without deciding whether a COA should issue).

137. *Young v. Westbrooks*, 702 F. App’x 255, 256–57 (6th Cir. 2017).

138. *Jeffries v. Morgan*, 446 F. App’x 777, 780 (6th Cir. 2011).

139. *McKinney v. Warden, London Corr. Inst.*, No. 17-3723, 2018 WL 3414128, at \*1 (6th Cir. 2018).

140. *Hillman v. Warden, Chillicothe Corr. Inst.*, No. 16-4280, 2017 WL 5485454, at \*3 (6th Cir. 2017).

141. *Order Denying Motion to Expand and/or Clarify the Scope of a Certificate of Appealability*, *Broom v. Shoop*, No. 19-3356, \*3–4 (6th Cir. Sept. 3, 2019), ECF No. 16-2.

142. *Id.* at \*4 (denying the motion to expand the COA but ignoring the alternative request to clarify the scope of the COA as including the evidentiary rulings).

affirmed the evidentiary rulings.<sup>143</sup> A few months earlier, the Sixth Circuit issued a ruling that considered an evidentiary issue on appeal even though only the substantive claim had been certified.<sup>144</sup> A few months later, the Sixth Circuit denied a COA and denied motions for an evidentiary hearing and appointment of counsel as moot,<sup>145</sup> which implies that the court might have considered those motions if it had granted the COA. In February 2020, the Sixth Circuit expressly refused to order an evidentiary hearing even though the habeas petitioner's COA was "limited to counsel's failure to object" to the court's decision to have certain testimony offered in closed court.<sup>146</sup> None of these decisions cited either *Harbison* or the "final order" language of 28 U.S.C. § 2253(c)(1)(A)–(B).

In one recent case, the Eastern District of Michigan denied an evidentiary hearing and several substantive claims but granted a COA without specifying whether it included the evidentiary hearing.<sup>147</sup> A very recent decision from the Eastern District of Kentucky denied an evidentiary hearing and several substantive claims for relief, then ambiguously denied a COA "as to all issues."<sup>148</sup> In decisions in September and October 2019, the Sixth Circuit expressly denied COAs for district court evidentiary rulings.<sup>149</sup>

The only Seventh Circuit case to cite *Harbison* is a district court decision from early 2019 examining whether *Harbison's* holding applied to a denial of bail.<sup>150</sup> A Seventh Circuit decision from 2005 reversed and remanded for an evidentiary hearing without clarifying whether the COA specified the evidentiary issue.<sup>151</sup> The Eighth Circuit has cited *Harbison* for propositions

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143. *Id.* at \*2–4. The order is not sufficiently explicit to hazard a guess with reasonable certainty.

144. *Willoughby v. White*, 786 F. App'x 506, 509–10 (6th Cir. 2019), *aff'g sub nom* *Willoughby v. Simpson*, No. 08-179-DLB, 2014 WL 4269115 (E.D. Ky. Aug. 29, 2014).

145. *Caraway v. Green*, No. 19-5851, 2019 WL 7834329, at \*1, \*3 (6th Cir. Dec. 12, 2019).

146. *Williams v. Burt*, No. 18-1461, 2020 WL 625193, at \*3, \*9 (6th Cir. Feb. 11, 2020).

147. *Bennett v. Warren*, No. 5:12-cv-12054, 2017 WL 1344775, at \*13–14 (E.D. Mich. Apr. 12, 2017).

148. *United States v. Thomas*, No. 6:16-cv-00262-GFVT-CJS, 2019 WL 6702550, at \*2 (E.D. Ky. Dec. 9, 2019).

149. *Snowden v. Bracy*, No. 19-3739, 2019 WL 7834653, at \*1–2; *Parkin v. Rewerts*, No. 19-1672, 2019 WL 6869683, at \*3 (6th Cir. Sept. 16, 2019) (per curiam).

150. *United States v. Tartareanu*, No. 2:12-CR-175-PPS-APR, 2019 WL 92600, at \*1 (N.D. Ind. Jan. 3, 2019).

151. *Dalton v. Battaglia*, 402 F.3d 729, 739 (7th Cir. 2005).

not related to certificates of appealability.<sup>152</sup> It has also noted that *Harbison* applies to COAs for rulings on motions for funds to conduct a mental examination.<sup>153</sup> In 2013, the Eighth Circuit granted a COA for an evidentiary motion.<sup>154</sup> It recently remanded a § 2255 petition for an evidentiary hearing after asserting jurisdiction under § 2253 but said nothing about a COA.<sup>155</sup>

Neither the Court of Appeals for the Ninth Circuit nor its district courts have applied the *Harbison* holding to evidentiary rulings. Before 2009, the Ninth Circuit ruled on an evidentiary issue for which a COA had expressly and specifically been granted<sup>156</sup> and implied it had the power to expand a COA to include evidentiary rulings by the district court.<sup>157</sup> After the *Harbison* decision, district courts in the Ninth Circuit have continued to issue COAs that expressly include evidentiary rulings.<sup>158</sup> At least one Ninth Circuit decision found that a specific evidentiary issue was “encompassed” within the COA despite it not having been specifically mentioned in the COA.<sup>159</sup> In fact, at least two Ninth Circuit decisions reversed and remanded the respective district courts for an evidentiary hearing after granting a COA solely for the

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152. *E.g.*, *McGehee v. Hutchinson*, No. 4:17-cv-00179-KGB, 2017 WL 1399554, at \*13 (E.D. Ark. Apr. 15, 2017).

153. *Edwards v. Roper*, 688 F.3d 449, 462 (8th Cir. 2012).

154. *Purkey v. United States*, 729 F.3d 860, 862 (8th Cir. 2013); *see also Rhodes v. Smith*, No. 18-3581, 2020 WL 873252, at \*2 (8th Cir. Feb. 24, 2020) (noting that the district court granted a COA as to its denial of the petitioner’s request for an evidentiary hearing).

155. *Dat v. United States*, 920 F.3d 1192, 1193 (8th Cir. 2019).

156. *Collier v. McDaniel*, 253 F. App’x 689, 691–92 (9th Cir. 2007).

157. *Lilly v. Lewis*, 151 F. App’x 579, 582 (9th Cir. 2005); *Tuggle v. Campbell*, 261 F. App’x 56, 58 (9th Cir. 2007); *see also Harris v. Sharp*, 941 F.3d 962, 1011–12 (10th Cir. 2019).

158. *E.g.*, *Love v. Scribner*, No. 06cv640, 2010 WL 1031302, at \*2 (S.D. Cal. Mar. 18, 2010) (granting a COA on the district court’s ruling on admission of an interview transcript under Habeas Rule 7); *Graves v. Swarthout*, 471 F. App’x 768, 773 (9th Cir. 2012) (“The remaining certified issue is whether the district court abused its discretion by not holding an evidentiary hearing on the other two certified issues.”); *Floyd v. Baker*, No. 2:06-cv-0471, 2014 WL 7240060, at \*5 (D. Nev. Dec. 17, 2014) (holding that the petitioner met the standard for a COA for the denial of a prior motion for an evidentiary hearing).

159. *Kemp v. Ryan*, 638 F.3d 1245, 1259 n.9 (9th Cir. 2011).

substantive claim<sup>160</sup> and a third decision expressly noted the possibility of doing so.<sup>161</sup>

However, as late as September 2018, the United States District Court for the Southern District of California, citing the Supreme Court habeas decision *Ayestas v. Davis*, chose “in an abundance of caution” to grant COAs on its denials of various evidentiary rulings, including requests for discovery and evidentiary hearings.<sup>162</sup> In December 2019, the Southern District of California denied a substantive claim and a request for appointment of counsel, and then denied a COA without noting whether the COA it denied would have covered the request for appointment of counsel as well.<sup>163</sup> In August 2019, a federal magistrate judge of the Western District of Washington expressly recommended denying a COA for a request for an evidentiary hearing.<sup>164</sup> Another late 2019 case expressly denied a COA “as to . . . the requests for factual development, record expansion, and an evidentiary hearing.”<sup>165</sup> And in January 2020, after a district court denied substantive relief and an evidentiary hearing but granted a COA on multiple substantive claims,<sup>166</sup> the Ninth Circuit—addressing only one claim—denied relief but reconsidered the evidentiary ruling in considerable detail.<sup>167</sup>

A three-judge panel of the Tenth Circuit recently granted a COA on whether a habeas petitioner was entitled to an evidentiary hearing on his claims,<sup>168</sup> but another panel simultaneously denied a COA on a substantive

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160. *Kon v. Sherman*, No. 18-55401, 2020 WL 507936, at \*1 (9th Cir. Jan. 31, 2020), *opinion withdrawn and superseded on denial of rehear’g* 787 Fed. App’x 460, 462 (9th Cir. 2019) (reversing and remanding for an evidentiary hearing); *Cuevas Espinoza v. Spearman*, 661 F. App’x 910, 914–15 (9th Cir. 2016) (reversing and remanding for an evidentiary hearing).

161. *Floyd v. Filson*, No. 14-99012, 2020 WL 579189, at \*6 n.3 (9th Cir. Feb. 3, 2020).

162. *Jurado v. Davis*, No. 08cv1400, 2018 WL 4405418, at \*159 (S.D. Cal. Sept. 17, 2018) (citing *Ayestas v. Davis*, 138 S. Ct. 1080, 1088 n.1 (2018)).

163. *Maraglino, v. Espinoza*, No. 19cv0109 LAB (KSC), 2019 WL 6829262, at \*1, \*30–32 (S.D. Cal. Dec. 12, 2019).

164. *Zellmer v. Holbrook*, No. C17-1776 RSM-BAT, 2019 WL 6879316, at \*4 (W.D. Wash. Aug. 7, 2019); *see also Duffey v. Uttecht*, No. 3:19-CV-5694-RBL-DWC, 2019 WL 6829052, at \*2 (W.D. Wash. Nov. 20, 2019).

165. *Catlin v. Davis*, No. 1:07-cv-01466-LJO-SAB, 2019 WL 6885017, at \*278 (E.D. Cal. Dec. 17, 2019).

166. *Cook v. Kernan*, 948 F.3d 952, 957 (9th Cir. 2020), *aff’g in part* No. C 15-06343 WHA, 2017 WL 4516837 (N.D. Cal. Oct. 10, 2017).

167. *Cook*, 948 F.3d at 970.

168. *Harmon v. Sharp*, 936 F.3d 1044, 1055 (10th Cir. 2019).

claim and affirmed the district court's denial of an evidentiary hearing on that claim.<sup>169</sup> A few days after declining to issue a COA in one breath and affirming the district court's denial of an evidentiary hearing in the next,<sup>170</sup> the Tenth Circuit dealt with a request for a COA on, inter alia, the district court's denial of a motion to object, compel, and sanction. Citing *Harbison* equivocally, the court held the following as alternative bases for denying relief: the district court did not abuse its discretion, the standard for a COA was not met, and "even if a COA were not required, . . . [there was] no error."<sup>171</sup> Another Tenth Circuit decision expressly discussed its decision to deny a COA on the petitioner's claim that the district court erred by refusing to grant an evidentiary hearing.<sup>172</sup> Another recent decision reversed and remanded a petition to the district court for an evidentiary hearing.<sup>173</sup> Two decisions at the end of 2019 denied a COA on all claims and additionally denied "petitioner's requests to conduct an evidentiary hearing and to appoint counsel."<sup>174</sup> The Tenth Circuit has also expressly denied a COA as to an evidentiary hearing.<sup>175</sup>

The Tenth Circuit has thus, in one year, held that a COA must specifically and expressly include evidentiary rulings, then seemingly decided that it need not, then, after discovering the guiding star of *Harbison*, got into a muddle and could not make up its mind. But in early 2020, the Tenth Circuit expressly recognized *Harbison*'s key decision by relying on *Harbison* to hold that "[a]n order denying recusal is a collateral order that does not require a COA for appeal,"<sup>176</sup> nor does an "order denying [a] motion to disqualify on the merits" nor an order denying reconsideration of a denial of a Rule 59(e)

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169. *Tafoya v. Martinez*, 787 F. App'x 501, 502, 505 (10th Cir. 2019).

170. *Rippey v. Utah*, 783 F. App'x 823, 824–28 (10th Cir. 2019). In June 2019, another panel of the Tenth Circuit denied a COA and at the same time affirmed the district court's denial of an evidentiary hearing. *Glasser v. McCall*, 780 F. App'x, 564, 566 (10th Cir. 2019).

171. *Phipps v. Raemisch*, No. 18-1396, 2019 WL 5801698, at \*1, \*3, \*6 n.9, \*10–11 (10th Cir. Nov. 7, 2019) (citing *Harbison v. Bell*, 556 U.S. 180, 183 (2009)).

172. *Gay v. Foster*, 791 F. App'x 748, 752–53 (10th Cir. 2019) (denying a COA on the petitioner's second question—whether the petitioner was entitled to an evidentiary hearing to develop the factual basis for one of his substantive claims—and applying the reasonable jurist standard).

173. *Harris v. Sharp*, 941 F.3d 962, 1012 (10th Cir. 2019).

174. *May v. Heimgartner*, No. 19-3206, 2019 WL 6358286, at \*5 (10th Cir. Nov. 27, 2019); *Collum v. Benzon*, 788 F. App'x 586, 589 (10th Cir. 2019).

175. *Borden v. Bryant*, 786 F. App'x 843, 846–47 (10th Cir. 2019).

176. *Vreeland v. Zupan*, No. 19-1244, 2020 WL 402271, at \*3 (10th Cir. Jan. 24, 2020).

motion.<sup>177</sup> It remains to be seen when the Tenth Circuit will recognize *Harbison*'s specific relevance to evidentiary rulings on appeal.

The Eleventh Circuit recently denied habeas relief on appeal after considering two issues that had been certified by the district court, one of which was "whether the district court abused its discretion in denying Davis's request to employ [a] stay and abeyance procedure."<sup>178</sup> The district court had granted the petitioner's motion to expand the COA to specifically include the stay and abeyance.<sup>179</sup> Another district court in the Eleventh Circuit, after having "determined that the [moving party] is not entitled to relief on the merits," ambiguously denied a COA as to all other "issues presented" in the petition, potentially including the petitioner's request for an evidentiary hearing.<sup>180</sup> But in another Eleventh Circuit case, the magistrate recommended denying relief and a COA,<sup>181</sup> the district court affirmed in part and denied an evidentiary hearing but granted a COA on a substantive claim,<sup>182</sup> and a panel of the Eleventh Circuit expressly reviewed the district court's ruling denying an evidentiary hearing.<sup>183</sup> Interestingly, the Southern District of Florida routinely cites *Harbison* for the comparatively mundane proposition that habeas petitioners must obtain a COA to appeal.<sup>184</sup>

The Federal Circuit and the District of Columbia have cited *Harbison* for propositions related to statutory interpretation.<sup>185</sup> In the recently issued opinion in the case *In re N.H.M.*, the D.C. Circuit applied *Harbison* to "orders

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177. *United States v. Rice*, No. 19-6149, 2020 WL 729533, at \*2 (10th Cir. Feb. 13, 2020).

178. *Davis v. Sellers*, 940 F.3d 1175, 1179 (11th Cir. 2019).

179. *Id.* at 1185.

180. *Diaz v. United States*, No. 16-CIV-24126-ALTONAGA, 2018 WL 10150923, at \*7 (S.D. Fla. Jan. 2, 2018).

181. *Gaines v. Florida Comm'n on Offender Review*, No. 4:14-cv-588-RH-GRJ, 2018 WL 3242698, at \*9-10 (N.D. Fla. Mar. 2, 2018).

182. *Id.* at \*2.

183. *Gaines v. Attorney Gen.*, 788 F. App'x 623, 627-29 (11th Cir. 2019).

184. *See, e.g., Mack v. United States*, No. 17-23791-CV-SCOLA, 2019 WL 7834002, at \*9 (S.D. Fla. Nov. 27, 2019); *Demosthene v. United States*, No. 18-22314-CIV-ALTONAGA, 2018 WL 10398361, at \*18 (S.D. Fla. July 2, 2018). Numerous habeas opinions from the Southern District of Florida have a COA section (generally a paragraph) near the very end of the opinion that appears to be basically copied and pasted from opinion to opinion.

185. *Kingdomware Techs., Inc. v. United States*, 754 F.3d 923, 935 n.2 (Fed. Cir. 2014) (Reyna, J., dissenting); *Wyeth v. Kappos*, 591 F.3d 1364, 1370 (Fed. Cir. 2010); *Abraxis Bioscience, LLC v. Kappos*, 10 F. Supp. 3d 53, 87-88, 88 n.27 (D.D.C. 2014).

defining the scope of paid representation.”<sup>186</sup> The court applied the collateral order doctrine and decided to review an order denying compensation to an indigent petitioner’s attorney.<sup>187</sup> The D.C. Circuit recognized that COAs are not required for nonfinal orders<sup>188</sup> but apparently has not applied *Harbison* to evidentiary rulings.

Of the circuits that have applied *Harbison* outside of the context of federal funds for indigent petitioners, only one has applied its holding to evidentiary rulings. Even that court—the Fifth Circuit—has issued contradictory rulings on the applicability of the COA requirement to evidentiary rulings. The Ninth Circuit seems aware that its COA jurisprudence may not be in line with Supreme Court precedent, but has not resolved its confusion. In summary, nearly every federal circuit court of appeals and its district courts are confused on this question or have yet to realize that a petitioner may appeal an evidentiary ruling if the related substantive claim has been certified for appeal.

## 2. Legal Scholarship

Some scholarly articles have cited *Harbison* for propositions relating to indigent defense.<sup>189</sup> More have cited it in discussions of statutory interpretation.<sup>190</sup> Few have cited it for its holding on COAs, and most of those scholars have cited it only for the narrow proposition that no COA is

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186. See *In re N.H.M.*, Nos. 16-FS-1289 & 16-FS-1290, 2020 WL 579001, at \*3 (D.C. Feb. 6, 2020) (citing *Harbison v. Bell*, 556 U.S. 180, 182–83 (2009); *Clark v. Johnson*, 278 F.3d 459 (5th Cir. 2002), *abrogated on other grounds by Harbison*, 556 U.S. 180).

187. *Id.* at \*2–3.

188. *Id.* at \*3.

189. E.g., Angela A. Allen-Bell, *A Prescription for Healing a National Wound: Two Doses of Executive Direct Action Equals a Portion of Justice and a Serving of Redress for America & the Black Panther Party*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 1, 62–63, 63 n.285 (2015); Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 89 n.139 (2011); Leah M. Litman, *Officiating Removal*, 164 U. PA. L. REV. Online 33, 40 n.48 (2015).

190. E.g., June M. Besek & Owen W. Keiter, *Capitol Records v. Vimeo: The Peculiar Case of Pre-1972 Sound Recordings and Federal Copyright Law*, 41 COLUM. J. L. & ARTS 559, 582 n.140 (2018); James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 902 n.4 (2011); James N. Duca, *Now Where Did that Mortgage Note Go? A Two-Act Play Under U.C.C. § 3-301 and 11 U.S.C. § 1141(C)*, 16 HAW. B. J. 71, 80 n.42 (2013); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 464–65 n.130 (2013); R. George Wright, *Constitutional Cases and the Four Cardinal Virtues*, 60 CLEV. ST. L. REV. 195, 207 n.79 (2012).

required to appeal the denial of counsel appointed under 28 U.S.C. § 3599.<sup>191</sup> They recognize that *Harbison* is not primarily about federal habeas COAs—it is about federal funding for indigent defense: “[i]n an unusual twist, both parties and all the amici agree[d] that a certificate of appealability was not necessary in this case.”<sup>192</sup> The Court dispensed with the COA question in a very brief section at the beginning of the opinion. That is why so many courts and scholars have failed to realize the significance of *Harbison* to COAs on evidentiary rulings. Other scholarly works that cited *Harbison* discussed COAs and appellate jurisdiction,<sup>193</sup> nonfinal orders other than evidentiary rulings,<sup>194</sup> or other concepts unrelated to COAs for evidentiary rulings.<sup>195</sup>

Of the two scholarly articles that have cited *Harbison* and delved deeply into the intricacies of COAs, both omitted any mention of discovery and motions to expand the record, and both mentioned evidentiary hearings only in passing in a footnote.<sup>196</sup> A student article on *Harbison* written before it was decided focused exclusively on the appointment of counsel issues and expressly disclaimed any intent to discuss the COA requirement.<sup>197</sup> An annually issued piece on habeas corpus law in 2018 cited *Harbison* but did not apply its holding to evidentiary matters.<sup>198</sup> *West’s Federal Forms* includes a “Petition for Certificate of Appealability—Extended Version” that requests a COA on two issues—the second of which is the district court’s denial of

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191. See Carol Garfiel Freeman, *Supreme Court Cases of Interest*, 24 CRIM. JUST. 48, 51 (2009); Kovarsky, *supra* note 189, at 89 n.139; John F. Blevins et al., *United States Supreme Court Update*, 21 APP. ADVOC. 278, 289 (2009); Litman, *supra* note 189, at 40 n.48.

192. Kathy Swedlow, *Can a Federally Appointed Lawyer Represent a Capital Defendant in State Clemency Proceedings?*, 36 PREVIEW U.S. SUP. CT. CASES 242, 243 (2009). This article’s entire discussion of the COA issues consists of a brief paragraph. *Id.*

193. See, e.g., Hagglund, *supra* note 106.

194. David Goodwin, *An Appealing Choice: An Analysis of and a Proposal for Certificates of Appealability in “Procedural” Habeas Appeals*, 68 N.Y.U. ANN. SURV. AM. L. 791, 819 n.118, 832 n.182 (2013).

195. Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 620–21 n.166 (2010).

196. Jonah J. Horwitz, *Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging*, 17 ROGER WILLIAMS U. L. REV. 695, 704 n.39 (2012); Margaret A. Upshaw, Comment, *The Unappealing State of Certificates of Appealability*, 82 U. CHI. L. REV. 1609, 1612 n.25 (2015).

197. See Sarah Rutledge, Note, *Harbison v. Bell*, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 215, 215 n.1 (2009).

198. *Habeas Relief for State Prisoners*, 47 GEO. L.J. ANN. REV. CRIM. PROC. 1045, 1088 n.2868, 1100–01, 1101 n.2916 (2018).

discovery.<sup>199</sup> The *Corpus Juris Secundum* section on COAs does not discuss this issue at all.<sup>200</sup>

Under *Harbison*, no COA is required to appeal an order other than a nonfinal order to evidentiary rulings. No scholarly work has discussed *Harbison*'s impact on COAs for evidentiary rulings. Very few cases have addressed the question of *Harbison*'s impact on COAs outside the context of motions for federally appointed counsel. As indicated above, the Ninth Circuit is confused as to whether COAs must specifically include evidentiary rulings. The First Circuit Court of Appeals has not cited *Harbison*, and the Second and Third Circuit Courts of Appeal have not applied *Harbison* to COAs for evidentiary rulings. The Sixth Circuit has issued contradictory rulings. The courts of appeal that have not already done so should directly apply *Harbison* to hold that a COA is not required to appeal an evidentiary ruling that is directly related to a substantive claim certified for appeal.

### III. THE COA REQUIREMENT

If a petitioner's substantive claim has been certified for appeal, he may appeal related evidentiary rulings even if the COA does not specifically include it. The text of § 2253(c)(1)–(3) demands this interpretation. The Supreme Court's ruling in *Harbison* made explicit what some circuits recognized independently, but none of the courts of appeal have consistently or perfectly applied *Harbison*'s holding to evidentiary issues. Sometimes, the court cannot properly reach the substantive claim without resolving related evidentiary issues. If the courts recognize that no COA is required for evidentiary issues, petitioners will be able to raise additional issues before the appellate courts and therefore have a greater chance of obtaining relief. In light of the barriers and obstacles to relief AEDPA has imposed, this interpretation will serve an important moderating influence.

#### A. *Text of 28 U.S.C. § 2253(c)(1)–(3)*

The best interpretation of AEDPA's COA provision is that it does not require that evidentiary rulings be specifically certified to be appealed. Despite the provision's requirement that a COA "indicate which specific

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199. 1C WEST'S FED. FORMS, COURT OF APPEALS § 6:5 (6th ed.).

200. 39A C.J.S. Habeas Corpus § 487 (Feb. 2020); *see also id.* at § 509 (discussing the power of federal courts of appeal to remand to the district courts for evidentiary hearings but relying mostly on cases that pre-date AEDPA).

issue or issues” is certified for appeal,<sup>201</sup> the language of the statute supports this interpretation. Only “final order[s]” need to be certified for appeal,<sup>202</sup> and to obtain a COA the petitioner must make a “substantial showing [that he has been denied] a constitutional right.”<sup>203</sup> Neither of these requirements makes sense when applied to evidentiary rulings and other nonfinal orders. The relevant part of the statute reads as follows:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).<sup>204</sup>

1. “Final Order”

Citing § 2253(c)(1)(A), the Supreme Court in *Harbison* held that since a motion to appoint counsel or to enlarge the authority of counsel is not a “final order,” the petitioner did not need a COA to appeal it.<sup>205</sup> The *Harbison* Court’s interpretation was based on a straightforward application of the “final order” language of the statute to the order being appealed. A final order “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”<sup>206</sup> In habeas proceedings, a final order is an order

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201. 28 U.S.C. § 2253(c)(3) (2012).

202. 28 U.S.C. § 2253(c)(1)(A)–(B) (2012) (emphasis added).

203. 28 U.S.C. § 2253(c)(2) (2012).

204. 28 U.S.C. § 2253(c)(1)–(3) (2012).

205. *Harbison v. Bell*, 556 U.S. 180, 183 (2009).

206. *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int’l Union of Operating Eng’rs and Participating Emp’r*, 571 U.S. 177, 183 (2014).

disposing of a petition on the merits.<sup>207</sup> Other orders and rulings do not require a COA, including orders appointing or denying appointment of counsel<sup>208</sup> and orders denying motions for a bizarre writ “to order state officials not to interfere with the gathering of information in support of clemency.”<sup>209</sup>

Evidentiary rulings are typically not final orders. An evidentiary ruling is a final order only if the district court intended that the matter be practically closed or if the district court had nothing left to do to resolve the case,<sup>210</sup> but this circumstance probably is not even possible and has likely never occurred. However, the collateral order doctrine applies in habeas cases.<sup>211</sup> The collateral order doctrine allows certain orders that do not dispose of a claim on the merits to be appealed by construing “final order” to include orders that do not dispose of a case but “conclusively resolv[e]” claims collateral to the “rights asserted in the action.”<sup>212</sup> For example, a district court’s order denying a motion to reconsider its protective order restricting the use of certain evidence in a habeas proceeding is a collateral order.<sup>213</sup>

Although an evidentiary ruling can be issued in a final or collateral order and thus be subject to the COA requirement, most evidentiary orders are neither final nor collateral. Like motions to appoint or enlarge the authority of counsel, they do not dispose of the case on the merits and they do not resolve claims collateral to the rights asserted in the petitioner’s substantive claims. The *Harbison* Court applied a straightforward interpretation of the provision. The matter was so clear that both parties and the United States as amicus conceded that no COA was required.<sup>214</sup> This straightforward interpretation requires the same result for nonfinal and non-collateral evidentiary rulings.

## 2. “Denial of Constitutional Right”

The statute says that “[t]he certificate of appealability . . . shall indicate [the] specific issue or issues” on which “the applicant has made a substantial

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207. *Swanson v. DeSantis*, 606 F.3d 829, 832 (6th Cir. 2010).

208. *Harbison*, 556 U.S. at 183.

209. *Baze v. Parker*, 632 F.3d 338, 340–41 (6th Cir. 2011).

210. *See Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1178 (9th Cir. 2008).

211. *See, e.g., Ghent v. Wong*, 371 F. App’x 782 (9th Cir. 2010).

212. *Will v. Hallock*, 546 U.S. 345, 349 (2006) (citation omitted).

213. *Osband v. Woodford*, 290 F.3d 1036, 1037–38 (9th Cir. 2002).

214. *Rutledge*, *supra* note 197, at 215 n.4.

showing of the denial of a constitutional right.”<sup>215</sup> This language is inconsistent with the typical standard of review for evidentiary rulings, which is abuse of discretion.<sup>216</sup> Nearly every circuit applies the abuse of discretion standard to habeas evidentiary rulings but reviews the district court’s substantive analysis *de novo*.<sup>217</sup> A district court’s denial of a COA is also reviewed *de novo*.<sup>218</sup> By applying these distinct standards of review, the circuits therefore recognize that evidentiary rulings are separate and distinct from the underlying substantive claims on which a COA must be obtained.<sup>219</sup>

Additionally, it would be odd to deny appellate review of an evidentiary ruling based on the petitioner’s failure to make a substantial showing that the district court, by denying his evidentiary motion, violated one of his constitutional rights. Denying an evidentiary motion might conceivably violate a petitioner’s constitutional rights in rare circumstances, but generally does not. A few cases have applied a paraphrase of this standard: whether reasonable jurists would agree with the district court’s decision.<sup>220</sup> Although this judicially crafted test sounds *apropos* when applied to determining whether a COA should issue as to an evidentiary ruling, the language of the statute governs. Just because a reasonable jurist might disagree with the

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215. 28 U.S.C. § 2253(c)(2)–(3) (2012).

216. Even though the district court “*must*” grant an evidentiary hearing to federal prisoners petitioning under § 2255 unless the record conclusively shows that the prisoner is not entitled to relief, the court’s decision to hold or refuse such a hearing is reviewed for an abuse of discretion. *E.g.*, *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014); *United States v. Cavitt*, 550 F.3d 430, 435 (5th Cir. 2008). District court rulings that dispose of a claim on the merits for procedural rather than substantive reasons are reviewed under a modification of the reasonable jurist standard. Under this modified standard, a COA will issue if a reasonable jurist would debate both the procedural ruling and the merits of the substantive claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

217. *E.g.*, *Dat v. United States*, 920 F.3d 1192, 1193 (8th Cir. 2019); *Cornwell v. Bradshaw*, 559 F.3d 398, 405, 410 (6th Cir. 2009). Another example: “We review the district court’s denial of an evidentiary hearing for an abuse of discretion,” but denial of the substantive claims is reviewed *de novo*. *Black v. Carpenter*, 866 F.3d 734, 742, 743 (6th Cir. 2017). *Et cetera*, *ad infinitum*. Or, as the Bluebook would have it, *see, e.g.*, *Muniz v. Smith*, 647 F.3d 619, 622, 625 (6th Cir. 2011).

218. *See Slack*, 529 U.S. at 483–84.

219. The Eleventh Circuit recently considered a habeas petition for which the district court had committed the very rare error of applying the reasonable jurist standard to a nonfinal order. *Davis v. Sellers*, 940 F.3d 1175, 1185 (11th Cir. 2019) (noting that the district court granted a motion to expand a COA to include a motion for a stay and abeyance).

220. *See Collier v. McDaniel*, 253 F. App’x 689, 691–92 (9th Cir. 2007).

district court's evidentiary ruling does not mean that the district court probably violated the petitioner's constitutional right and therefore satisfied the standard in § 2253(c). For instance, denying a procedural motion does not necessarily result in a deprivation of constitutional rights. The same is true of another judicial paraphrase of the standard: whether the "the issues presented [are] adequate to deserve encouragement to proceed further."<sup>221</sup> This judicially crafted paraphrase is helpful in applying the substantive standard, but, without reference to the text of § 2253(c)(1)–(3), it can mislead courts—or clerks fresh from law school upon whom judges rely extensively for legal research and drafting opinions—to believe that evidentiary or other issues might need separate consideration for a COA.

The Supreme Court has ruled that the reasonable jurist standard applies to procedural rulings if the district court dismissed the petition solely on procedural grounds.<sup>222</sup> At first glance, this standard would seem as inappropriate to procedural issues as to evidentiary issues. It might be inferred that since this standard can apply to procedural issues, it can also reasonably apply to evidentiary issues. However, the Supreme Court reasoned that the "substantial showing" language of § 2253(c)(2)—for which the reasonable jurist test is a paraphrase and supplement—was designed by Congress to codify the judicially created standard for granting a certificate of probable cause under the habeas scheme that existed before AEDPA was enacted.<sup>223</sup> Under the prior standard, evidentiary rulings were reviewed for abuse of discretion and procedural rulings that prevented the district court from reaching the merits of a habeas claim received a COA based upon the "substantial showing" standard and its supplementary paraphrase, the reasonable jurist test.<sup>224</sup> Also, the district court may issue a final order based solely on a procedural ruling alone but never on an evidentiary ruling alone. It is therefore appropriate that procedural rulings can be subject to the COA requirement, but evidentiary rulings are not.

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221. *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)) (internal quotation marks omitted).

222. *Id.*

223. *Id.*

224. *Id.* at 484–85. See *Barefoot*, 463 U.S. at 893–94.

### 3. Other Cases Interpreting and Applying § 2253(c)

Although only the Fifth Circuit has applied *Harbison* to evidentiary rulings—and even that court subsequently contradicted itself<sup>225</sup>—most circuits have applied *Harbison* or its underlying interpretation of § 2253(c) to nonfinal orders of some sort. According to the Fourth Circuit, a district court’s decision on a motion to proceed in forma pauperis need not be certified for appeal.<sup>226</sup> Neither does a district court order dismissing a petition or motion as an unauthorized second or successive petition.<sup>227</sup> The Fourth Circuit ruled similarly on a variety of other orders.<sup>228</sup> The Fifth Circuit held that no COA was required to appeal an order transferring a second or successive habeas petition to the court of appeals for authorization.<sup>229</sup> The Sixth Circuit held that no COA is required to appeal the denial of a motion for a bizarre writ “to order state officials not to interfere with the gathering of information in support of clemency.”<sup>230</sup> Three Ninth Circuit cases cited *Harbison* and applied its holding to nonfinal district court orders, including modified protective orders and the denial of a true Rule 60(b) motion for relief from a judgment.<sup>231</sup> Most district court decisions that deny evidentiary motions and grant or deny a COA never mention whether the evidentiary rulings are or need to be separately evaluated for a COA.<sup>232</sup>

Among the circuits, there is considerable confusion but no substantive debate. Most of the circuits recognize that nonfinal orders do not need a COA to be appealed, but few have applied that understanding to evidentiary rulings directly related to substantive claims that have been certified for appeal. The principles that led the circuits to hold as they did in the cases

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225. See *Milam v. Davis*, 733 F. App’x 781, 787 (5th Cir. 2018); *Washington v. Davis*, 715 F. App’x 380, 383 (5th Cir. 2017).

226. E.g., *Jackson v. Lewis*, 771 F. App’x 316, 316 (4th Cir. 2019).

227. E.g., *United States v. Barnes*, 752 F. App’x 161, 161 (4th Cir. 2019).

228. See *supra* note 126 and accompanying text.

229. *United States v. Fulton*, 780 F.3d 683, 684–85, 687–88 (5th Cir. 2015).

230. *Baze v. Parker*, 632 F.3d 338, 340–41 (6th Cir. 2011).

231. *United States v. Winkles*, 795 F.3d 1134, 1141–42 (9th Cir. 2015); *Lambright v. Ryan*, 698 F.3d 808, 817 n.2 (9th Cir. 2012) (holding that a district court’s order on a modified protective order was appealable without a COA); *Ghent v. Wong*, 371 F. App’x 782, 784 n.1 (9th Cir. 2010) (applying the collateral order doctrine to a modified protective order).

232. See, e.g., *United States v. Diggs*, No. 1:15-CR-166, 2019 WL 5445663, at \*1, \*9 (W.D. Mich. Oct. 24, 2019); *Hotton v. United States*, Nos. 12-CR-0649(JS) & 17-CV-4440(JS), 2019 WL 5310673, at \*1, \*12, \*15–16 (E.D.N.Y. Oct. 21, 2019).

cited above should lead them to rule similarly in future habeas cases involving appellate review of evidentiary rulings.

#### 4. COAs Should Not Be Unduly Limited

Because COAs should not be limited unnecessarily, federal courts of appeal should allow petitioners to challenge related evidentiary issues even if the COA does not specifically and expressly include them. Interpreting § 2253(c) as requiring a COA to appeal a final order but not as requiring the COA to specify related evidentiary issues is consistent with the Supreme Court's concern that lower courts are unduly restricting habeas petitions through the COA requirement. AEDPA was enacted to circumscribe the ability of petitioners to waste judicial resources by using federal habeas corpus law to present repeated and non-meritorious claims for postconviction relief. The AEDPA standards were "meant to be" difficult to satisfy.<sup>233</sup> AEDPA contained necessary reforms, but its restrictions justly give rise to concerns for the rights of prisoners. AEDPA's strict requirements and procedural bars make it harder for prisoners to bring petitions and make it easier for judges to deny them.<sup>234</sup>

Because denying petitions is routine and because issuing a COA inherently questions the district court's judgment—and because most habeas petitions should not succeed on the merits—most federal magistrate and district court judges are loath to recommend or to grant a COA. Denying habeas relief in close and questionable cases threatens the treasured right of individual liberty and the panoply of individual constitutional rights against improper criminal prosecution, conviction, and punishment. Because AEDPA effectively bars frivolous habeas petitions and promotes swift termination of non-meritorious claims, it may also make it unduly difficult for petitioners to succeed on meritorious claims. Therefore, district courts and courts of appeal should be more receptive to requests for COAs.

In 2003, the Supreme Court explained that a court "should not [deny] . . . a COA merely because it believes the applicant will not . . ." prevail on appeal.<sup>235</sup> Worried that the lower courts were misinterpreting its holding in *Slack v. McDaniel* in 2000 and unduly restricting COAs, the Court noted that

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233. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

234. *See generally supra*, Sections II.A–D.

235. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

a COA could only be granted where the district court denied the relief and success on appeal was therefore unlikely.<sup>236</sup> The Court went on:

We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.<sup>237</sup>

The Court also warned the lower courts not to deny petitions and then unconsciously allow their opinion on whether the claim should prevail to color their judgment on whether a COA should issue, which is judged by a different standard.<sup>238</sup> Because the lower courts may have unduly limited habeas petitions through the COA requirement, federal courts of appeal should allow petitioners to challenge related evidentiary issues even if the COA does not specifically and expressly include them.

B. *Evidentiary Issues as Included in Substantive Issues*

An alternative basis for concluding that § 2253(c) does not require a COA to expressly and specifically include evidentiary rulings is that at least some evidentiary issues are included in substantive issues. Although the statute says that the COA “shall indicate which specific issue or issues” are included,<sup>239</sup> some of the courts of appeal have held that some issues and arguments are included in other issues. Therefore, a COA need not specify such issues and arguments as certified for appeal. These issues and arguments could relate to evidentiary rulings.

In *Steele v. Randle*, the Sixth Circuit held that arguments that address a claim that has been certified for appeal need not be specified in the COA.<sup>240</sup> Steele filed a petition after the one-year statute of limitations ran, but the respondent failed to raise the issue in its return.<sup>241</sup> The district court *sua sponte* dismissed the petition on the basis of the statute of limitations but

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236. *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

237. *Id.* at 338.

238. *Id.* at 336–37.

239. 28 U.S.C. § 2253(c)(3).

240. *Steele v. Randle*, 37 F. App'x 162, 164–65 (6th Cir. 2002).

241. *Id.* at 164.

issued a COA as to whether the petition was time-barred.<sup>242</sup> On appeal, the respondent claimed that Steele could argue that the petition was not time-barred, but could not argue that the district court did not have the authority on its own initiative to dismiss the complaint as time-barred.<sup>243</sup> The Sixth Circuit reasoned that the district court's "authority to *sua sponte* dismiss a petition as time-barred is inherently intertwined with its decision that the petition did not meet the one-year statute of limitations."<sup>244</sup> In *Phillips v. White*, the Sixth Circuit similarly held that where the district court issues a COA as to a claim of ineffective assistance of counsel, the closely related issue of whether to apply a presumption that the petitioner was prejudiced by the ineffective assistance of counsel<sup>245</sup> is part and parcel of that claim and therefore included in the COA.<sup>246</sup>

The First Circuit has held that a COA as to the timeliness of a petition necessarily included the issue of whether "discovery of [an] alleged error . . . is a 'factual predicate' for the purposes of the AEDPA statute of limitations . . . ."<sup>247</sup> The disputed issue of law had to be resolved before the court could resolve the claim being appealed. Similarly, the Ninth Circuit has held that if a procedural question *must* be resolved before the court can consider the merits of a constitutional claim certified for appeal, and if the district court was silent on the procedural question, the court of appeals "will assume that the COA also encompasses any procedural claims that must be addressed on appeal."<sup>248</sup> In a footnote, another Ninth Circuit case declared that in that case it interpreted a COA to include the denial of a related evidentiary motion but gave no explanation and cited no authority.<sup>249</sup> If a related issue—including an evidentiary issue—*necessarily* must be resolved before the certified issue can be resolved (such as a threshold procedural

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242. *Id.*

243. *Id.* 164–65.

244. *Id.*

245. *See* *United States v. Cronin*, 466 U.S. 648, 649, 666–67 (1984).

246. *Phillips v. White*, 851 F.3d 567, 580–81 (6th Cir. 2017). Petitioners claiming ineffective assistance of counsel must prove that the alleged ineffective assistance prejudiced their defense. *See id.* at 580–81.

247. *Holmes v. Spencer*, 685 F.3d 51, 58 (1st Cir. 2012).

248. *Jones v. Smith*, 231 F.3d 1227, 1231 (9th Cir. 2000).

249. *Kemp v. Ryan*, 638 F.3d 1245, 1259 n.9 (9th Cir. 2011).

issue), or if resolving the related issue is a *necessary* part of resolving the certified issue, then the COA includes the related issue.<sup>250</sup>

### C. *Practical Benefits to Habeas Petitioners*

If the courts apply *Harbison's* interpretation of § 2253(c) to evidentiary rulings, some habeas petitioners will benefit considerably, while others will remain unaffected. Because the courts of appeal can sua sponte expand a COA to include related issues, adopting a different interpretation of § 2254(c) would still leave the courts of appeal the discretion to address evidentiary issues not certified for appeal but which petitioners raise and brief. But under the interpretation advocated in this article, the federal appellate courts could be forced to address evidentiary issues they might otherwise ignore or summarily deny. The government is not required to obtain a COA to appeal a district court's grant of habeas relief, but if the government appeals, the petitioner may employ arguments rejected below to defend the favorable judgment, and need not first obtain a COA.<sup>251</sup> Therefore, this interpretation does not affect petitioners who successfully petition for the writ but whose favorable judgment is appealed by a state or the federal government.

#### 1. Ability to Expand COAs is Unaffected

The court of appeals may expand a COA.<sup>252</sup> The court may do so sua sponte or on a motion by the petitioner.<sup>253</sup> A notice of appeal may be treated as a motion to grant or expand a COA if it includes issues not already certified.<sup>254</sup> The interpretation of § 2253(c) adopted in *Harbison* and advocated here does not affect the ability of the circuit courts to expand or grant COAs. The courts of appeal may continue to issue and expand COAs on motion by the petitioner and to expand COAs sua sponte. On this point, the current procedures would remain unaffected.

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250. See *Panetti v. Stephens*, 727 F.3d 398, 408 n.68 (5th Cir. 2013); *United States v. Howard*, 381 F.3d 873, 877 n.3 (9th Cir. 2004); *Wright v. Sec'y for Dept. of Corr.*, 278 F.3d 1245, 1258 (11th Cir. 2002).

251. *Jennings v. Stephens*, 574 U.S. 271, 282–83 (2015).

252. See *Young v. Westbrook*, 702 F. App'x 255, 256–57 (6th Cir. 2017); *Collier v. McDaniel*, 253 F. App'x 689, 691–92 (9th Cir. 2007).

253. See *Young*, 702 F. App'x at 256–57 (6th Cir. 2017).

254. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (citing *FED. R. APP. P. 22(b)*; *FED. R. CIV. P. 8(f)*; *Hohn v. United States*, 524 U.S. 236, 240 (1998)).

## 2. Right to Raise Issues on Appeal

Habeas petitioners would benefit from the interpretation of § 2253(c) adopted in *Harbison* and advocated here because they would gain the right to force the court of appeals to directly and fully address evidentiary issues related to the substantive claims raised on appeal. Because a COA need not specifically include evidentiary or other nonfinal and non-collateral orders, the petitioner could obtain appellate review of those orders as a matter of right anytime they obtained appellate review of directly related substantive claims. The upshot is that habeas petitioners whose claims are sufficiently meritorious to warrant appellate review would have more issues to appeal and therefore another chance to convince the court to hear favorable evidence, which in turn increases their chances of obtaining relief on a substantive claim. Evidentiary hearings are frequently sought but rarely granted.<sup>255</sup> Under this interpretation of § 2253(c), they could be more frequently obtained.

## IV. CONCLUSION

Deliberately throwing the innocent in jail is no longer fashionable, and our legal system emphasizes the horror of punishing the innocent over the problem of letting the guilty go free. Unfortunately, the system is abused and mistakes happen. Innocent people go to jail, and some of the guilty are imprisoned in violation of their constitutional rights and our nation's common values. The Great Writ, limited as it is under AEDPA, is still a powerful weapon to wield against improper convictions and illegal sentences—against unjust punishment. If the courts of appeal recognize that the language of § 2253(c)(1)–(3) gives petitioners the right to appellate review of evidentiary issues directly related to substantive habeas claims certified for appeal, the truth can be ascertained with greater certainty and more of the innocent will go free. Lady Justice would be proud.

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255. See *supra* note 75 and accompanying text.