Coulda, Woulda, Shoulda: The Relationship Between Ineffective Assistance of Counsel, Due Diligence, and the "Could Have Been Raised Earlier" Bar in Postconviction Litigation

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Prisoners sometimes discover something seriously wrong with their conviction, such as new evidence or constitutional error, after their trials and direct appeals have ended. But to obtain a new trial after the conclusion of direct review, a prisoner faces the daunting obstacle of the "shoulda, coulda" rule, which requires that any claim that could be discovered with due diligence either be raised in direct review proceedings, or lost forever. To avoid this restriction, habeas petitioners may add to their newly discovered claims an additional claim of ineffective assistance of counsel, based on the failure of trial and/or appellate counsel to find the newly discovered claim earlier. This ineffectiveness claim is generally not subject to the "shoulda, coulda" rule. In response, state courts sometimes deny both the direct claim as procedurally barred by the "shoulda, coulda" rule, and the ineffective assistance of counsel claim as without merit.

These resolutions are difficult to reconcile. The application of the procedural bar implies a finding that the newly discovered claim could have

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been raised earlier through due diligence, which generally means that a reasonably competent attorney would have discovered the claim earlier. Yet that level of reasonableness is the standard required for effective attorney performance, and therefore the finding of lack of due diligence would seem to imply that counsel's performance was deficient. This Note explores whether there is middle ground between deficient performance of counsel and diligence and concludes that, on the facts of individual cases, a middle ground is difficult to justify.

I. INTRODUCTION

Kenneth Fults is a death-sentenced Georgia prisoner. One of his jurors was a man named Thomas Buffington. Eight years after the trial, Fults's postconviction counsel interviewed all of the trial jurors. Buffington had this to say in a sworn affidavit:

> 2. I served as a juror in the capital sentencing trial of Kenneth Fults in May 1997.
> 3. I have been on a jury before, but this was my first capital trial.
> 4. I don't know if he ever killed anybody, but that nigger got just what should have happened.
> 5. Once he pled guilty, I knew I would vote for the death penalty because that's what that nigger deserved.[1]

Yet Fults remains on death row, after being denied a new trial on his claim of juror bias.[2]

George Cameron Seward is a Maryland prisoner serving a life sentence. Eleven years after his trial, new evidence came to light that establishes a strong alibi, and therefore a high likelihood of innocence.[3] Maryland law had recently changed to provide a new form of appeal — a "writ of actual innocence" — to allow for claims based on newly discovered, material evidence that establishes a substantial likelihood of innocence,[4] if other forms of ap-

1. Fults v. GDCP Warden, 764 F.3d 1311, 1315 (11th Cir. 2014), *cert. denied*, 136 S. Ct. 56 (2015).

2. *Id.* at 1321.

3. Seward v. State (*Seward II*), No. 84 CR 3827, slip op. at 3–4 (Md. Cir. Ct. Balt. Cty. July 30, 2012), *available at* https://perma.cc/Y5BS-5G86.

4. 2009 Md. Laws. 4105-07 (codified as amended at MD. CODE ANN. CRIM. PROC. § 8-301 (West 2014)). It may seem odd that actual innocence was not a ground for postconviction relief in Maryland until 2009. Yet the traditional rule, still in force in some states, as well as on non-capital federal habeas, is that postconviction relief exists as a ground to correct defective procedures, not defective results — unless the prisoner can point to a procedural problem with the trial, no relief is available. *See* Herrera v. Collins, 506 U.S.

peal would be untimely. Yet Seward, too, was denied a new trial by Maryland's intermediate appellate court, although his case is under review by the Maryland Court of Appeals.[5]

Fults and Seward have in common that their attorneys were apparently too good to be ineffective, but too bad to be diligent — reasonable attorneys would have found the new evidence sooner, but their attorneys were not ineffective despite their failure to meet the reasonable attorney standard.[6]

Kenneth Fults, by his own admission, committed horrible crimes — malice murder, burglary, and kidnapping with bodily injury.[7] But the life or death question went to a sentencing jury.[8] That jury, with Thomas Buffington as a member, recommended death.[9] Eight years later, new lawyers for Fults interviewed Buffington,[10] and obtained the affidavit.[11] Yet the courts have denied Fults's claim of juror bias at every level of postconviction review.[12] According to the courts, Kenneth Fults had not overcome the presumption that the juror's views could have been discovered at the time of direct appeal or trial with ordinary diligence — effectively holding that he should have found the evidence earlier, or at least that he had not shown why he could not have.[13] Because of the holding that he should have discovered the juror bias earlier, he was barred from raising the claim on postconviction review.

But the courts have also rejected any claim that ineffective assistance of counsel provided a sufficient reason for failure to discover the evidence earlier.[14] The net result is that Fults appar-

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390, 400–01 (1993); *but see* McQuiggin v. Perkins, 133 S. Ct. 1924, 1931 (2013) (stating that the Court has never decided the validity of a freestanding actual innocence claim on federal habeas). Even on federal capital habeas, a freestanding actual innocence claim remains of uncertain viability. *See Herrera*, 506 U.S. at 417 (assuming, without deciding, that freestanding actual innocence may be a bar to an execution).

5. State v. Seward (*Seward III*), 102 A.3d 798 (Md. Ct. Spec. App. 2014), *cert. granted*, No. 12, Sept. Term 2015, 2015 WL 827687 (Md. Feb. 20, 2015).

6. *Fults*, 764 F.3d at 1317–19; *Seward III*, 102 A.3d at 810–11.

7. *Fults*, 764 F.3d at 1313.

8. *See generally* GA. CODE ANN. § 17-10-31 (West 2014).

9. *Fults*, 764 F.3d at 1313 (citing Fults v. State, 548 S.E.2d 315, 322 (Ga. 2001)).

10. Petition for Rehearing En Banc at 5, Fults v. GDCP Warden, 764 F.3d 1311 (11th Cir. 2014) (No. 12-13563-P).

11. *Id.*; *see supra* text accompanying note 1.

12. *Fults*, 764 F.3d at 1315, 1319.

13. *Id.* at 1317. This was so even though Mr. Buffington responded at voir dire that he harbored no racist views, although that argument was not pressed in the state courts as a reason why the affidavit could not have been discovered earlier. *Id.* at 1315 n.1.

14. *Id.* at 1318.

ently should have discovered Buffington's racist views earlier with ordinary diligence, but his counsel were not ineffective despite their failure to exercise that apparently ordinary diligence.

George Cameron Seward is an African-American male[15] convicted of first degree rape and assault with intent to murder.[16] The sole evidence against him at trial consisted of a cross-racial eyewitness identification,[17] which statistical studies show is among the most unreliable types of eyewitness identifications.[18] DNA evidence was not available at the time of the trial,[19] and Seward did not match any of the fingerprints at the scene.[20] Most importantly though, his employer's payroll records put Seward at work during the period of the crime — an extremely strong defense, if only the records had been found and produced at the trial. Despite repeated requests from Seward, the State, and the Court to look for the records,[21] the employer was unable or unwilling to produce them. Seward was convicted.[22] Eleven years later, the records were found thanks to a new investigation by postconviction counsel and the cooperation of the employer.[23]

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15. *See* Brief of Appellee and Motion to Dismiss Appeal at 8, *Seward III*, 102 A.3d 798 (No. 2294, Sept. Term, 2012).

16. *Seward III*, 102 A.3d 798, 800 (Md. Ct. Spec. App. 2014), *cert. granted*, No. 12, Sept. Term 2015, 2015 WL 827687 (Md. Feb. 20, 2015).

17. Brief of Appellee and Motion to Dismiss Appeal, *supra* note 15, at 6.

18. *See, e.g.*, Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1834 (2003) (noting that psychological studies show that eyewitnesses are fifty-six percent more likely to wrongly identify someone if that person is from a different race); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 210 (2001); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984). Eyewitness misidentifications are among the primary causes of a large percentage of mistaken convictions. *See The Causes of Wrongful Conviction*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes-wrongful-conviction [http://perma.cc/WCD7-YWV3] (last visited Nov. 17, 2015) (noting that 72% of those exonerated by the Innocence Project were convicted in part due to an eyewitness misidentification).

19. DNA evidence was not used for identification purposes until after Seward's trial, which took place in 1985. *See Seward III*, 102 A.3d at 801; Melissa Duncan, Comment, *Finding a Constitutional Right to Access DNA Evidence: Postconviction*, 51 S. TEX. L. REV. 519, 522 & n.15 (citing NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996)). When postconviction DNA testing became available in Maryland, Seward requested that the DNA from the scene be tested, but the DNA had by then been destroyed. *Seward III*, 102 A.3d at 803.

20. Brief of Appellee and Motion to Dismiss Appeal, *supra* note 15, at 6.

21. *Id.* at 7, 23.

22. *Seward III*, 102 A.3d at 799.

23. *See Seward II*, No. 84 CR 3827, slip op. at 4–7 (Md. Cir. Ct. Balt. Cty. July 30, 2012), *available at* https://perma.cc/Y5BS-5G86.

Yet Seward too had a trial lawyer who did not exercise due diligence in finding these payroll records, but also was not ineffective.[24] Therefore, according to Maryland's intermediate appellate court, his newly discovered evidence could not be considered,[25] since Maryland's writ of actual innocence provision has a requirement that the prisoner exercise due diligence in discovering the exculpatory evidence.[26] Even though the only court that has ever considered Seward's evidence on the merits has found him likely innocent, he remains in prison on a life sentence.[27]

Perhaps the outcomes of these cases are not shocking. Ineffectiveness claims are notoriously difficult to win, and due diligence is a seemingly high bar for any person to meet. The standard that attorneys must meet in the ineffectiveness context, however, is only that of the reasonably competent attorney. In other contexts, courts have equated failure to meet the reasonableness standard in the ineffectiveness inquiry to the civil negligence standard in malpractice cases, which also is based on the reasonably competent attorney.[28] And due diligence is generally defined as the state of exercising ordinary care — the strict opposite of negligence. There would therefore seem to be a syllogism: if simple negligence is equivalent to deficient performance, and if due diligence is generally defined as the opposite of negligence, then deficient performance and due diligence are direct opposites. Nonetheless, Fults and Seward lost their cases because they had reasonable attorneys who failed to exercise due diligence, which would appear to be holdings in significant tension, if not outright contradiction. *Seward III* (Seward's actual innocence proceeding in Maryland's intermediate appellate court), *Fults*, and similar cases find room between deficient performance and due diligence, and there is some language in the Supreme Court's ineffectiveness cases to support that result. But those attempts seem to create a troublesome and incoherent situation: the attorneys at

24. *Seward III*, 102 A.3d at 812–14.

25. *Id.* at 813–14.

26. MD. CODE ANN., CRIM. PROC. § 8-301(a)(2) (West 2015); Md. RULE 4-332(d)(6); Jackson v. State, 86 A.3d 97, 107 (Md. Ct. Spec. App.), *cert. denied*, 93 A.3d 289 (Md. 2014).

27. *See Inmate Locator*, STATE OF MARYLAND, http://www.dpscs.state.md.us/inmate/search.do?searchType=detail&id=78328 [http://perma.cc/X465-L3TR] (last visited Nov. 17, 2015).

28. There are limited exceptions. *See infra* note 84 and accompanying text.

issue must simultaneously be deemed both reasonable and unreasonable on identical, and sometimes undisputed, facts.

This Note is organized in three main parts. Part II examines the relationship between due diligence and ineffective assistance of counsel based on the general principles underlying each. Part III explores the few cases that have directly confronted the relationship between a lack of diligence sufficient to cause a violation of the "shoulda, coulda" rule and deficient performance. Some courts have declared the two largely equivalent, while others have attempted to find room between them. Particular attention is placed on the *Seward III* decision,[29] discussed earlier in this Introduction, which is the most factually troubling decision appearing to reject any equivalence between ineffectiveness and lack of diligence. Part IV contains this Note's suggestions about the best way to resolve the tension in the cases between the diligence required by "shoulda, coulda" rules and the standard for ineffective assistance of counsel, and how the arguments may present themselves on habeas corpus review in future cases. The Note concludes that when the relationship between diligence and ineffectiveness is cleanly presented in a case, current doctrine generally requires that a newly discovered claim be decided on its merits, regardless of the quality of counsel's performance.

II. THE "SHOULDA, COULDA" RULE IN HABEAS CORPUS AND ITS RELATIONSHIP TO INEFFECTIVE ASSISTANCE OF COUNSEL

The *Fults* and *Seward III* decisions are both examples of the "shoulda, coulda" rule in operation. The "shoulda, coulda" rule, present in most states, generally requires all claims of error that were reasonably available to the defense to have been raised by the time of trial or direct appeal.[30] This Part examines the rule, and its close relationship with ineffective assistance of counsel claims. Part II.A discusses the "shoulda, coulda" rule and its variations between the states. Part II.B then discusses ineffective assistance of counsel as relevant to the "shoulda, coulda" rule. Particular attention is placed on the Supreme Court's mandate that courts apply a "strong presumption" that counsel's perfor-

29. *Seward III* is the appellate decision holding that Seward's evidence of innocence cannot be considered. *See supra* notes 16–25 and accompanying text.

30. Ineffective assistance of counsel claims are generally exempt from the "shoulda, coulda" rule. *See infra* note 59.

mance was reasonable when deciding an ineffectiveness claim,[31] and how that presumption has been treated in cases. Part II.C discusses the implications of the "shoulda, coulda" rule and related claims of ineffective assistance of counsel on federal habeas corpus.

A. THE REQUIREMENT TO RAISE CLAIMS AT THE EARLIEST POSSIBLE TIME

Although there are variations in the states of the form of "shoulda, coulda" rules, they are generally quite similar in operation.

In nearly all states, all defense claims — except those of ineffective assistance of counsel[32] — that could be raised in the direct review phase are required to be so raised, at least by the time of direct appeal,[33] and, in most states, by the time of trial.[34] Noncompliance with this rule can and frequently will lead to having a claim denied on procedural grounds in the state postconviction proceedings.[35]

Most states define claims that "could" or "should" have been raised earlier as those that were known or reasonably available — claims that would have been found and been presented earlier

31. Strickland v. Washington, 466 U.S. 668, 689 (1984).

32. *See infra* note 59.

33. *See* John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 447 & n.65 (2011) (citing State v. Curtis, 912 P.2d 1341, 1342 (Ariz. Ct. App. 1995) ("Defendants are precluded from seeking postconviction relief on grounds that were adjudicated, or could have been raised and adjudicated, in a prior appeal or prior petition for post-conviction relief. . . ."); People *ex rel.* McNair v. Bantum, 507 N.Y.S.2d 275, 275 (N.Y. App. Div. 1986) ("[P]ostjudgment collateral relief [is not] available to review issues which could have and should have been raised on an earlier appeal."); State v. D'Ambrosio, 652 N.E.2d 710, 713 (Ohio 1995) (explaining that a claim that was raised or could have been raised on direct appeal is not cognizable in postconviction proceedings)); 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 3.5(a)(6) at 216 (6th ed. 2011).

34. *See, e.g.*, ALA. R. CRIM. P. 32.2(a)(3) (barring claims that could have been raised at trial subject to very limited exceptions).

35. It can actually be worse than that for the prisoner: at least in some states, the State merely pleading that the rule has been violated puts the burden on the prisoner to show why the rule does not apply. Examples of these States include Alabama, *see* ALA. R. CRIM. P. 32.3, and Georgia, *see* GA. CODE. ANN. § 9-14-48(d) (West 2014). Therefore, even if the rule is not actually violated, the rule can be applied to bar a claim if the prisoner does not make a showing of why the rule is inapplicable.

through the exercise of ordinary diligence.[36] This Note calls them "shoulda, coulda" rules because they generally apply to bar a claim if the defense should have, or could have, raised the claim earlier. Assuming the defense did not actually know about a particular claim,[37] the key question becomes what the defense could or should have known. The following table describes the rule in selected states:

State	Rule
Alabama	Claims are defaulted by court rules[38] where counsel knew or reasonably could have discovered the factual basis for the claim at the time of trial or appeal.[39]
California	Claims are defaulted under common-law doctrines requiring all claims that through diligence could be brought at trial or appeal to be so brought.[40] Standard governing diligence is what

36. Even in states that use the language of "could," as opposed to "should," "could" is generally defined in the sense of what a reasonable lawyer would have known about, and seems to be not much different from "should" in this context. *See, e.g.*, cases cited note 50.

37. There are interesting and difficult issues about whether the defendant can personally be held to have knowledge of a matter, even if his counsel does not. While it would seem to be grievously unfair to a non-legally trained defendant to procedurally default a claim that he factually knew about, even though he may not have appreciated the legal significance of those facts, it is unclear to what extent courts and statutes are sympathetic. *See, e.g.*, 28 U.S.C. § 2254(e)(2)(ii) (2012) (barring new claims brought for the first time in federal habeas unless the "factual predicate . . . could not have been previously discovered through the exercise of due diligence"). Section 2254(e)(2)(ii) therefore would bar any claim within the factual knowledge of the defendant, even if the legal significance of those facts was unknown. This can be particularly problematic when the right at issue is the right to be informed of a particular right, or knows something that he cannot prove — for instance, presumably the defendant factually "knows" that a violation of *Miranda v. Arizona*, 384 U.S. 436 (1963), has taken place, or "knows" that he is innocent. Yet a strict reading of these rules would bar any such claim. In any event, this Note is primarily concerned with matters that were not known either to trial and/or direct appeal counsel, or to the defendant himself, leaving for another day the problems associated with claims the defendant, but not counsel, "knew" the factual basis for.

38. ALA R. CRIM. P. 32.2(a)(3); ALA R. CRIM. P. 32.2(a)(5).

39. *Ex parte* Burgess, 21 So. 3d 746, 754 (Ala. 2008).

40. *See In re* Harris, 855 P.2d 391, 395–98, nn.3–7 (Cal. 1993); *In re* Seaton, 95 P.3d 896, 900 (Cal. 2004).

	the defendant could "reasonably discover."[41]
Federal (prisoners convicted in federal court)	The "cause and prejudice" standard governs.[42]
Florida	Claims are defaulted by court rule[43] where claim could through "due diligence" have been raised at trial or direct appeal.[44]
Georgia	The federal "cause and prejudice" standard governs.[45]
Illinois	Claims are defaulted under common-law doctrine requiring all claims that are able to be brought on direct appeal to be so brought.[46] Matters outside the record can be brought on a first postconviction petition without being subject to the rule.[47]
Maryland	Many errors can be defaulted, however, certain serious errors can be defaulted only if they are intelligently and knowingly waived by the defense.[48]

41. *Seaton*, 95 P.3d at 900.

42. *See, e.g.*, McCleese v. United States, 75 F.3d 1174, 1177–78 (7th Cir. 1996). While the "cause and prejudice" standard is notoriously complicated, suffice it to say here that it generally requires a prisoner to demonstrate why the claim could not have been raised earlier and that the claimed error caused the defense sufficient prejudice to warrant upsetting a conviction. Reasons why the claim could not have been raised earlier can include ineffective assistance of counsel or a claim not being discoverable despite the exercise of due diligence. For more on "cause and prejudice," *see infra* Part II.C.2.

43. FLA. R. CRIM. P. 3.850(c).

44. FLA. R. CRIM. P. 3.850(b)(1).

45. *See, e.g.*, Head v. Ferrell, 554 S.E.2d 155, 160 (Ga. 2001). For more on the definition of "cause and prejudice," *see infra* Part II.C.2.

46. People v. Mahaffey, 742 N.E.2d 251, 261 (Ill. 2000), *overruled on other grounds by* People v. Wrice, 962 N.E.2d 934 (Ill. 2012).

47. *Id.*

48. Hunt v. State, 691 A.2d 1255, 1262–63 (Md. 1997); *see* MD. CODE ANN., CRIM. PROC. § 7-106(b)(1)(i) (West 2014).

New York	Courts are permitted, although not required, to deny postconviction claims when facts underlying the claim could have been discovered at trial or on direct appeal through due diligence.[49]
Texas	Claims are defaulted under common-law doctrine requiring all claims that should have been raised at trial or on direct appeal to be so brought.[50]
Virginia	Claims are defaulted under common-law doctrine so long as prisoner had a full and fair opportunity to litigate claim on direct review.[51]

Surprisingly, there are few cases that discuss the standard for avoiding invocation of these rules as a matter of state law.[52] However, "knew or should have known" and "reasonably available" are phrases that imply an objective reasonable person standard, absent some indication to the contrary. Most states define these terms as requiring due diligence from a defendant.[53]

Another context in which a similar rule applies is in the context of newly discovered evidence. Generally, motions for relief based on new evidence are limited to evidence that could not have been discovered at the time of trial through due diligence.[54] There are more cases that discuss the due diligence required for these motions, and those cases generally define due diligence in

49. N.Y. CRIM. PROC. LAW § 440.10(3)(a).

50. *See, e.g.*, *Ex parte* Cruzata, 220 S.W.3d 518, 520 (Tex. Crim. App. 2007); *Ex parte* Richardson, 201 S.W.3d 712, 713 (Tex. Crim. App. 2006).

51. Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974).

52. This Note will address potential arguments to avoid invocation of these rules on federal habeas corpus in Part II.C, *infra*.

53. Some courts differ in the terminology, and the terms "due diligence," "ordinary diligence," "reasonable diligence," and "diligence" can all be used in this context interchangeably. "Due diligence" is defined generally as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Due Diligence*, BLACK'S LAW DICTIONARY (10th ed. 2014). This Note will use "due diligence" except inasmuch as a court uses a different term.

54. *See, e.g.*, ALA. R. CRIM. P. 32.1(e)(1); United States v. Lafayette, 983 F.2d 1102, 1105 (D.C. Cir. 1993); Davis v. State, 26 So.3d 519, 526 (Fla. 2009); Bharadia v. State, 774 S.E.2d 90, 92 (Ga. 2015).

terms of the familiar reasonable person standard.[55] Functionally, the due diligence required by the "shoulda, coulda" rule and the due diligence required in the new trial context are identical, although the new trial context does differ from the "shoulda, coulda" rule in other respects.[56]

In order for a court to apply a "shoulda, coulda" rule, it must find that the prisoner, and under most circumstances, his attorney, failed to comply with the due diligence standard.[57] This implies that they were negligent in failing to bring the claim sooner, as "due diligence" and related terms are generally defined as the opposite of negligence.[58] The relationship between negligence, diligence, and ineffective assistance of counsel is discussed in the next Part.

B. INEFFECTIVE ASSISTANCE CLAIMS AND THE "SHOULDA, COULDA" RULE

This Part examines the standards for proving ineffective assistance of counsel as directly relevant to the "shoulda, coulda" rule.[59] Particular attention is placed on the "strong presumption"

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55. *See, e.g.*, United States v. Maldonado-Rivera, 489 F.3d 60, 69 (1st Cir. 2007) ("As a general proposition, however, the movant must exercise a degree of diligence commensurate with that which a reasonably prudent person would exercise in the conduct of important affairs.") (citing United States v. Cimera, 459 F.3d 452, 461 (3d Cir.2006); United States v. LaVallee, 439 F.3d 670, 701 (10th Cir. 2006)).

56. These differences include that new trial motions are generally subject to different time limits than habeas petitions and that newly discovered evidence is not by itself sufficient to allow federal habeas relief, at least outside of the capital context. *See supra* note 4.

57. This is true at least absent a different state rule that enables invocation of the "shoulda, coulda" rule for failure to disprove its applicability. *See supra* note 35.

58. *See* 65 C.J.S. NEGLIGENCE §§ 86, 114 (2015); Nat'l Cas. Co. v. Lockheed Martin Corp., 764 F. Supp. 2d 756, 758 (D. Md. 2011) ("[I]t is no surprise that courts across the nation . . . routinely use the terms negligence and lack of due diligence interchangeably in a wide range of different legal contexts.") (citing Woods-Leber v. Hyatt Hotels of P.R, Inc., 124 F.3d 47, 50 (1st Cir. 1997); Oriente Commercial, Inc. v. The M/V Floridian, 529 F.2d 221, 223 (4th Cir. 1975); United States v. Mendoza, 530 F.3d 758, 764–65 (9th Cir. 2008); Fin. Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276, 1289 (11th Cir. 2007)). *See also Negligence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

59. Ineffective assistance of counsel claims are frequently exempt from the "shoulda, coulda" rule for their own unique reasons, at least as far as permitting ineffectiveness claims to be raised for the first time postconviction. While trial counsel represents the prisoner, an ineffectiveness claim based on his conduct is obviously difficult to litigate. *See, e.g.*, White v. Kelso, 401 S.E.2d 733 (Ga. 1991) ("[A]n attorney cannot reasonably be expected to assert or argue his or her own ineffectiveness."). And even if new counsel represents a prisoner on direct appeal, ineffectiveness claims are frequently fact-intensive and often require evidentiary development outside the record already available on appeal.

that an attorney has performed reasonably that courts must indulge in the ineffectiveness context, as that presumption turns out to be critical in determining the relationship between diligence and ineffectiveness. After scrutinizing the standard for ineffective assistance of counsel, the relationship between ineffective assistance of counsel and due diligence is discussed based on the broader principles underlying current doctrine.

1. *The Standard for Proving Ineffective Assistance of Counsel and its Relationship to "Shoulda, Coulda" Rules*

Ineffective assistance of counsel claims have their modern origin from the case of *Strickland v. Washington*,[60] which creates a two-part standard for proving ineffective assistance of counsel claims.

First, the prisoner must prove "deficient performance."[61] The legal standard for attorney performance is "reasonableness under prevailing professional norms."[62] However, to gain relief, the prisoner, according to the Court, must make a perhaps greater showing: he must demonstrate that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance,"[63] "*indulging . . . [a] strong presumption* [that counsel has] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[64] The reasonableness standard is equally applicable to a claim that counsel did not discover something that he should have: "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent

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Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2609 (2013) ("Because ineffective assistance of trial counsel claims are often predicated on what trial attorneys failed to do, they frequently require extrarecord development."). Appellate courts generally cannot handle the required factual development for these claims, and although they sometimes can adjudicate ineffectiveness claims based solely on the record in front of them, most states now require or prefer that ineffectiveness claims, both those based and not based on the record, to be brought in a postconviction proceeding. *See generally* Massaro v. United States, 538 U.S. 500, 508 (2003) (explaining that most states either require or strongly prefer that claims regarding ineffectiveness of counsel be brought in postconviction proceedings) (citing Pennsylvania v. Grant, 813 A.2d 726, 734–38 & n.13 (Penn. 2002)).

60. 466 U.S. 668 (1984).
61. *Id.* at 687.
62. *Id.* at 688.
63. *Id.* at 690.
64. *Id.* (emphasis added).

that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[65] This duty comes with the same "heavy measure of deference to counsel's judgments" required in all ineffectiveness cases.[66]

The Supreme Court has repeated language requiring a "strong presumption" in numerous cases post-*Strickland*, and has repeatedly described its effect as demanding "highly deferential" review of an attorney's performance.[67] However, even after repeating this language, the Court does not generally make it decisive, or even explain its effect on the result of the case. In *Strickland* itself, the court explicitly held the performance of counsel reasonable without resort to the presumption.[68] Perhaps the most detailed explanation the Supreme Court has provided of the presumption is from the case of *Cullen v. Pinholster*.[69] After vigorously criticizing the court of appeals for failing to apply the presumption,[70] the Court described the effect of the presumption as requiring a reviewing court to "affirmatively entertain the range of possible 'reasons [defendant's] counsel may have had for proceeding as they did.'"[71] How this differs from the objective standard already mandated by *Strickland* is mysterious — the objective standard requires that counsel's performance be compared to a hypothetical reasonable attorney, and the subjective motivations that counsel actually had are generally irrelevant.[72] The mechanics of the highly deferential review of counsel's performance apparently required by the "strong presumption" are not

65. *Id.* at 691.

66. *Id.*

67. *See, e.g.*, Harrington v. Richter, 562 U.S. 86, 105 (2011) ("Even under *de novo* review, the standard for judging counsel's representation is a most deferential one . . . . It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)); Bell v. Cone, 535 U.S. 685, 698 (2002) ("judicial scrutiny of [ ] counsel's performance must be highly deferential" (quoting *Strickland*, 466 U.S. at 689)).

68. Strickland v. Washington, 466 U.S. 668, 699 (1984).

69. 131 S. Ct. 1388 (2011).

70. *Id.* at 1407.

71. *Id.* (quoting Pinholster v. Ayers, 590 F.3d 651, 692 (Kozinski, C.J., dissenting), *rev'd sub. nom.* Cullen v. Pinholster, 131 S. Ct. 1388 (2011)).

72. Harrington v. Richter, 562 U.S. 86, 110 (2011) ("*Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.") This is not to say that facts known to the attorney are irrelevant; the objectively reasonable attorney still acts based on the facts known to him, including facts outside the trial record.

greatly illuminated by the *Pinholster* explanation. In other cases, the Court has seemed to ignore the presumption entirely, to the point of not even mentioning it in several landmark ineffectiveness cases,[73] which can only contribute to the confusion surrounding its impact.

Although the "strong presumption" has not been clarified in the context of direct ineffective assistance of counsel claims, it has been implicated with somewhat more frequency in the context of civil malpractice lawsuits against attorneys for poor representation in criminal cases. In this "criminal malpractice"[74] litigation, federal courts sitting in diversity, and many state courts, have held that the *Strickland* standard for attorney performance is largely equivalent to state law negligence standards.[75] These courts then generally go on to apply issue preclusion[76] against the prisoner-turned-plaintiff if he has previously failed in a postcon-

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73. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510 (2003) (granting habeas relief on ineffectiveness grounds without mentioning "strong presumption" required by *Strickland*); Rompilla v. Beard, 545 U.S. 374 (2005) (same).

74. "Criminal malpractice" is the term used for civil attorney malpractice suits arising out of representation in a criminal matter.

75. *See, e.g.*, Praxair, Inc. v. Hinshaw & Culbertson, 235 F.3d 1028, 1031 (7th Cir. 2000) (Posner, J.) (Illinois law) ("Negligent legal representation is a failure to meet minimum professional standards, and is thus equivalent to what in Sixth Amendment cases is called ineffective assistance of counsel.") (internal citations omitted); Rantz v. Kaufman, 109 P.3d 132, 138–40 (Colo. 2005) (en banc) (citing Sanders v. Malik, 711 A.2d 32, 34 (Del. 1998); Barrow v. Pritchard, 597 N.W. 2d 853, 857 (Mich. Ct. App. 1999); and Krahn v. Kinney, 538 N.E.2d 1058, 1062 n.8 (Ohio 1989), all for the proposition that the standard for ineffective assistance of counsel and malpractice are identical, without mention of the presumption of competence); Wiley v. Bugden, 318 P.3d 757, 764 & n.8 (Utah Ct. App. 2013) (noting that Alaska, California, Connecticut, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Maine, Michigan, Missouri, New York, Ohio, Pennsylvania, Tennessee, and Texas all appear to hold that the standard for deficient performance in a malpractice action are identical, and that both turn on whether the lawyer's performance was reasonable in light of prevailing professional norms); Purdy v. Zeldes, 337 F.3d 253, 258–59 (2d Cir. 2003) (applying Vermont law); Alevras v. Tacopina, 226 F. App'x 222, 232–33 (3d Cir. 2007) (applying Pennsylvania law); *see also* Parris v. United States, 45 F.3d 383 (10th Cir. 1995) (dismissing Federal Tort Claims Act claim against prisoner's public defenders as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), which would imply that succeeding on negligence action would be sufficient to demonstrate ineffective assistance of counsel); *but see Rantz*, 109 P.3d at 140 (holding that ultimate conclusion of whether performance was negligent is not identical to deficient performance standard); Sanjines v. Ortwein and Associates, 984 S.W.2d 907, 910–11 (Tenn. 1998) (holding elements of ineffective assistance of counsel and legal malpractice are different); Kerkman v. Varnum, Riddering Schmidt & Howlett, 519 N.W.2d 862, 863–64 & n.2 (Mich. 1994) (Levin, J., dissenting) (stating that standard for ineffective assistance of counsel is harder for the prisoner than the standard for malpractice due to the strong presumption of competence in the ineffectiveness context).

76. For more on issue preclusion, also known as collateral estoppel, *see generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 27–29 (1982).

viction claim of ineffective assistance of counsel. Interestingly, many of these decisions also do not mention the "strong presumption" of competence required by *Strickland*, but conclude that negligent legal representation and "deficient performance" under *Strickland* are essentially identical. This is despite the fact that the "strong presumption" must be applied in ineffectiveness claims but not in civil malpractice cases.[77] The application of issue preclusion in these circumstances has been criticized by most of the commentators, who claim that it fails to take into account the effect of the "strong presumption."[78]

While the commentators are concerned about the preclusion of damages suits, they have failed to recognize that these holdings are a blessing in disguise for prisoners claiming ineffective assistance of counsel. If the presumption of reasonableness apparently has no or little impact, as the commentators recognize nearly all the courts considering malpractice claims have concluded,[79] then *Strickland* is a negligence standard — one seemingly far less imposing than its reputation. All of the cases seem to agree that unreasonableness, as determined by generally applicable negligence principles, is at least necessary, and close to sufficient to prove deficient performance[80] — the hard question is what ad-

77. Negligent legal representation, of course, is also determined on an objective reasonably competent attorney standard — therefore the only difference between the two is the "strong presumption."

78. *See* Kevin Bennardo, Note, *A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims*, 5 OHIO ST. J. CRIM. L. 341, 345 (2007) ("Commentators have thoroughly . . . illustrat[ed] that the ineffective-assistance-of-counsel standard . . . has different elements than a criminal malpractice lawsuit) (citing Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1270–73 (2003); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 32–37 (2002); Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY. L. REV. 1011, 1058 (2002); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO J. LEGAL ETHICS 1, 8–9 (1995); David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 551–56 (1981)). *But see* Susan M. Treyz, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 FORDHAM L. REV 719, 724–26 (1991).

79. *See* Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, *supra* note 78, at 35 ("The majority of courts who have considered the issue have incorrectly concluded that the deficient performance requirement of an ineffective assistance of counsel claim and a breach of the standard of care requirement of a criminal malpractice claim involve identical factual issues.").

80. *See generally* RESTATEMENT (SECOND) OF TORTS § 299A (1965) ("[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."); *Praxair*, 235 F.3d at 1031 (citing RESTATEMENT (SECOND) OF TORTS § 299A).

ditional effect the presumption of competence has. Many of the cases seem to say "none" — other cases seem to give some weight to the presumption, but it is not clear how much.

It can be argued that these issue preclusion decisions which read out the presumption can just be explained by a desire to defeat prisoners' claims against their attorneys' rather quickly, but that these decisions, generally from state courts, are not really authoritative interpretations of the *Strickland* standard as it would be applied in the habeas context. However, these holdings cannot be dismissed so easily — given how unclear the "strong presumption" is, the weight of authority is now stating, correctly or not, that it matters for very little. Perhaps a federal court on federal habeas would apply the presumption in a more muscular way than the state courts seem to. But state prisoners have the first opportunity to present their claims in state courts; at least in the states that have claimed the presumption of reasonableness does no work, these cases are binding precedent.

Second, a prisoner claiming ineffective assistance of counsel under *Strickland* must also prove prejudice: "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[81] This standard is generally "difficult to meet."[82] When the issue is failure to discover a meritorious claim, however, *Strickland* prejudice is coextensive with the merits of the claim itself — if the underlying claim is meritorious enough to justify a new trial, then prejudice will likely be present under the *Strickland* standard, as courts are generally not in the business of awarding new trials unless there is a reasonable probability that the result may be different.

2. *The Relationship Between Diligence, Negligence, and Ineffective Assistance of Counsel*

While negligence and deficient performance are at least close cousins, if not equivalent, diligence is generally defined as the opposite of negligence.[83] This clarifies the relationship between

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81. Strickland v. Washington, 466 U.S. 668, 694 (1984).

82. Johnson v. Alabama, 256 F.3d 1156, 1177 (11th Cir. 2001).

83. *See supra* note 58 and accompanying text. Of course, each state is free to define diligence however they would like, but presumably most states are largely equivalent on the definition. Moreover, the federal "cause" definition of diligence probably must take its

ineffective assistance of counsel and due diligence. In the context of a newly discovered meritorious claim, if the presumption of reasonable attorney performance is meaningless, and excluding cases where an intentional strategic decision to not discover something has been made,[84] the failure to exercise diligence is negligent, and therefore constitutes deficient performance. Likewise, a finding of effective representation precludes a finding that counsel was not diligent, since the reasonable attorney is diligent as to highly important matters. If the strong presumption has an effect, then this relationship is less precise; there becomes room between diligence and ineffectiveness.

If the presumption does matter, it leads to the creation of three categories of attorney performance.[85] First is the category of attorney performance that is so unreasonable, even after application of the presumption, that counsel is deemed to have performed deficiently. Second is the category of attorney performance that is reasonable under prevailing professional norms even without the application of the presumption. In the previously unknown but meritorious claim context, the first and second categories would both entitle the prisoner to relief — in the first category on ineffective assistance of counsel grounds, and in the second category because a reasonably effective attorney uses due diligence in attempting to discover highly meritorious claims or compelling evidence of innocence, and therefore the underlying claim should not be barred. Because of the use of due diligence, either the state "shoulda, coulda" rule would not apply, or there would be grounds for avoiding the procedural default in federal court.[86]

Third is the category of attorney performance that, although unreasonable under prevailing professional norms (and thus unreasonable for the purpose of diligence), is, after application of the "strong presumption," deemed to be reasonable for the pur-

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meaning from general principles of diligence, rather than an outlier state definition. *See infra* Part II.C.2.

84. This exception would not include failure to discover a claim because of an attorney's belief that the investigation would be futile or because of lack of sufficient resources. By this caveat I mean cases where an attorney refuses to go down a particular road because it would not affect general trial strategy or would be counterproductive, such as developing evidence that may further incriminate the client.

85. This assumes a complete factual record — for what happens when the facts are more uncertain, *see infra* Part IV.A.

86. *See supra* Part II.A; infra Part II.C.

pose of the ineffective assistance of counsel inquiry.[87] Only in this third category is no relief available — the direct claim would be barred because the "strong presumption" only applies in the ineffectiveness context, and not the diligence context. At the same time, the ineffective assistance of counsel claim would also fail, because for that purpose the attorney's performance is deemed to be reasonable. The following chart shows the three categories:

Attorney Reasonableness Spectrum

(First Category) Unreasonable performance (even after application of the presumption of reasonable performance) *Prisoner wins*	**(Third Category)** Unreasonable performance for establishing due diligence but deemed to be reasonable performance for ineffectiveness purposes only because of the presumption. *State wins*	**(Second Category)** Reasonable performance, even without application of the presumption. *Prisoner wins*

More Deficient ⟷ *More Diligent*

The third category is hard to justify, at least as a matter of fairness: the prisoner with the really unreasonable attorney gets relief, the prisoner with the reasonable attorney gets relief, and the prisoner who had an unreasonable but not too unreasonable attorney does not. The distinction between the three categories in terms of whether the prisoner is deserving of relief is hard to fathom. Of course, fairness-based arguments only go so far (frequently, not far at all) in habeas corpus litigation.[88]

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87. Of course, this trichotomy ignores the potential that the attorney's error fails to be prejudicial. However, for this purpose, I am assuming that the claimed error would be prejudicial; therefore ineffective assistance would flow directly from deficient performance.

88. *See* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 794 (2002) ("An array of procedural barriers to habeas corpus review has been crafted carefully, while basic questions of fairness and justice go unexamined. Although it would be comforting to believe that habeas corpus and other court processes guard against unjust executions, the sad reality is that the review procedures in capital cases are unmoored by any enduring com-

Nonetheless, the chart shows that the third category is entirely dependent on the effect of the presumption. Part III examines the width of the third category in the cases truly presenting both an ineffectiveness and diligence question, to help determine if any cases truly are affected by the presumption.

C. "SHOULDA, COULDA" RULES ON FEDERAL HABEAS CORPUS

This Note has previously examined the underlying law governing invocation of "shoulda, coulda" rules that generally should prevail in most states. Unfortunately, state postconviction courts are notoriously inhospitable to prisoners, and may invoke the "shoulda, coulda" rule even in situations where it is perhaps inapplicable. A prisoner may therefore want to vindicate his newly discovered claim on federal habeas corpus review. This can be problematic when a state court denies the claim on procedural grounds. This Part therefore discusses the possibilities for obtaining federal habeas review of a newly discovered claim if the state courts have denied it on procedural grounds.

When a state court denies a claim on the basis of the "shoulda, coulda" rule, the doctrine of "procedural default" is in play on federal habeas corpus review.[89] This Part discusses the possibly controverted aspects of an alleged procedural default resulting from a state court application of the "shoulda, coulda" rule.[90] First, two required elements for a federal court to recognize a procedural default, "actual violation" and "adequacy," are dis-

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mitment to heightened scrutiny or careful deliberation."); Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997) (raising serious concerns about the fairness of habeas corpus litigation especially in light of changes in the law); *see also* Coleman v. Thompson, 501 U.S. 722, 758–59 (1991) (Blackmun, J., dissenting) ("[D]isplaying obvious exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings, the Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims. Because I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights, I dissent.").

89. "Procedural default" doctrine is about whether federal courts can consider claims if a state court has denied it on procedural grounds. If the state court system ignores the procedural problem, and considers the underlying claim on its merits, there is no procedural default cognizable in federal court. *See* 2 HERTZ & LIEBMAN, *supra* note 33, § 26.2[e] at 1461–75.

90. For a more general overview of the requirements of procedural default, adequacy, and "cause and prejudice," *see* 2 HERTZ & LIEBMAN, *supra* note 33, §§ 26.1–26.3.

cussed in light of the "shoulda, coulda" rule. Second, the "cause and prejudice" excuse for procedural default is analyzed, particularly with regard to the standard of diligence that can serve as "cause" in the "cause and prejudice" test. Third, the differences between the "cause and prejudice" and "adequacy" arguments in this context are examined, as they have some similarity but are slightly different in application; the uses of ineffective assistance of counsel as "cause" are also considered.

1. *Relitigating the Alleged Violation of "Shoulda, Coulda" Rules on Federal Habeas Corpus Through the "Adequacy" Doctrine*

For a claim to be procedurally defaulted on federal habeas corpus, the State must prove that the state "shoulda, coulda" rule was violated, and that the rule is "adequate" to support the judgment, among other requirements.[91]

However, arguments on federal habeas corpus that there was no "actual violation" of the "shoulda, coulda" rule as a method to avoid procedural default are of uncertain viability, because those arguments do not clearly present a federal question. The circuits are split on whether it is ever appropriate to review a state court's application of state law procedural rules for compliance with state law.[92] Even the commentators are perhaps in tension — Hertz and Liebman seem to believe that review is available for habeas petitioners who claim they effectively complied with the state procedural rule,[93] while Brian Means seems to believe that federal courts will not revisit the state court's application of its own law to the facts of a particular case, barring obvious error.[94] While both commentators state that plainly erroneous applications of state procedural rules are sometimes not credited by a federal court on habeas review,[95] the grounds on which this is done, and whether a federal question is properly presented by the erroneous state court application, are unclear. But even though theoretically this is an important problem, there may be a way to harmonize the cases and avoid the difficult federal question issue

91. *Id.*
92. *See* BRIAN R. MEANS, FEDERAL HABEAS MANUAL, § 9B.22 (2014 ed.).
93. 2 HERTZ & LIEBMAN, *supra* note 33, § 26.2[c], at 1429–30 & n.16.
94. MEANS, *supra* note 92, § 9B.22.
95. *See supra* notes 93–94.

presented by "actual violation" arguments, at least as to the "shoulda, coulda" rule.

The "adequacy" doctrine requires federal courts to refuse to honor a procedural default based on a state procedural rule unless, among other requirements, the state rule is "firmly established and regularly followed."[96] Unlike the actual violation prong, the "adequacy" requirement does clearly present a federal question.[97] To the extent a prisoner on federal habeas corpus wishes to relitigate a state court's invocation of its "shoulda, coulda" rule for whether the invocation actually complied with state law, arguing that the invocation was inconsistent with the state's previous case law or statutes, on an as-applied basis, may be a path to avoiding a federal court's invocation of procedural default.

Therefore, any claim that the "shoulda, coulda" rule was not "actually violated" would seemingly be just as compelling under the "adequacy" doctrine, which prevents states from inconsistently applying their procedural rules[98] — it is hard to imagine how a procedural bar can be consistently and yet incorrectly applied.[99]

The "adequacy" doctrine is more capacious than merely requiring state courts to apply their procedural rules consistently — it also requires that the state procedural rules meet minimum standards of fairness, although the precise contours of this fairness standard are nebulous. Accepted types of arguments under the "adequacy" doctrine that could cause a federal court to refuse to enforce a default based on a "shoulda, coulda" rule include "[t]he state rule on its face or as applied did not allow 'a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined by the state court in the circumstances of

96. *See, e.g.*, Ford v. Georgia, 498 U.S. 411, 423–24 (1991).

97. 2 HERTZ & LIEBMAN, *supra* note 33, § 26.2[d], at 1436 n.20 (citing Beard v. Kindler, 558 U.S. 53, 60 (2009) ("The question whether a state procedural ruling is adequate is itself a question of federal law.")).

98. The formal terminology used in the cases is that a state procedural rule must be "firmly established and regularly followed." *E.g.*, Walker v. Martin, 131 S. Ct. 1120, 1127 (2011) (quoting *Beard*, 558 U.S. at 60) ("To qualify as an 'adequate' procedural ground, a state rule must be 'firmly established and regularly followed.'").

99. Perhaps such a case could be possible if an intermediate state court consistently applied a procedural bar in a manner opposed to a decision of the state's highest court, but even then, one would imagine that the state's highest court would eventually intervene to correct the erroneous interpretation. But in normal cases, when a state court applies a procedural bar in a particular way, that application becomes "correct," as state courts are generally the final arbiters of state law. *See* Wardius v. Oregon, 412 U.S. 470, 477 (1973).

this case"'[100] and "[t]he state rule, on its face or as applied, required objection to an error before the error became reasonably apparent."[101] Both types of arguments require the state's "shoulda, coulda" rule to bend to some, admittedly hazy, federal reasonableness principle. Decisions on these "adequacy" points are rare,[102] but they remain potential avenues to attack an alleged procedural default with respect to a newly discovered claim, on the ground that procedurally defaulting a claim even though it could not have been discovered through reasonable diligence is unfair enough to make the state rule inadequate.

2. *The "Shoulda, Coulda" Rule and the "Cause and Prejudice" Exception to Procedural Default*

Even if the "shoulda, coulda" rule cannot be defeated through adequacy arguments, compliance with it may be excused through the "cause and prejudice" test. The "cause and prejudice" test requires that a prisoner show "cause," generally an "objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule,"[103] and "prejudice," a showing that the error was prejudicial.[104] While the "cause and prejudice" standard is notoriously murky,[105] as applied to the "shoulda, coulda" rule, the "cause" and "prejudice" at issue are fairly clear.

The relevant potential objective external factors in the "shoulda, coulda" context are ineffective assistance of counsel (or

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100. 2 HERTZ & LIEBMAN, *supra* note 33, § 26.2[d] at 1446 n.47 and accompanying text (quoting Michel v. Louisiana, 350 U.S. 91, 93 (1955)).

101. *Id.* at n.48 and accompanying text (citing Herndon v. Georgia, 295 U.S. 441, 446–47 (1935) (Cardozo, J., dissenting); Evans v. Sec'y, 645 F.3d 650, 658 (3d Cir. 2011)).

102. Hertz and Liebman's treatise lists fewer than 20 habeas cases that address either of these two points, even tangentially, some of which involve situations where a state procedural rule was not just unreasonable, but actually required clairvoyance on the part of a prisoner. 2 HERTZ & LIEBMAN, *supra* note 33, at n.48 (citing Cola v. Reardon, 787 F.2d 681, 694 (1st Cir. 1986) (holding state court application of procedural rule unreasonable and inadequate when it required objection to errors in an appellate court opinion before the appellate court opinion actually issued)).

103. 2 HERTZ & LIEBMAN, *supra* note 33, § 26.3[b], at 1476 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)).

104. *Id.* § 26.3[c] at 1507–08.

105. *E.g.*, Paul J. Heald, *Retroactivity, Capital Sentencing, and the Jurisdictional Contours of Habeas Corpus*, 42 ALA. L. REV. 1273, 1295 & n.165 (1991) (citing Amadeo v. Zant, 486 U.S. 214, 221 (1988)).

no counsel),[106] or that "[c]ounsel did not know and with reasonable diligence could not have discovered the factual predicate for the claim at the time of the alleged procedural default."[107] The reasonable diligence standard for "cause" is otherwise undefined, but this Note posits that it would be similar to a common law diligence standard.

Exactly what the "actual prejudice" in the "cause and prejudice" test means is difficult to determine, as the Supreme Court has never really clarified the concept — but most courts consider it largely equivalent to *Strickland* prejudice.[108] The prisoner is generally under some obligation to prove that the claimed error actually harmed his trial; for this Note, prejudice will be presumed, although it remains an important issue in the actual litigation of a newly discovered claim.

Another, more subtle, obstacle to use of "cause and prejudice" as a means to excuse a procedural default is that, if the "cause" being claimed is ineffective assistance of counsel, the Supreme Court has held that the ineffective assistance of counsel claim forming the "cause" must be presented to the state judiciary, or the "cause" claim itself becomes procedurally defaulted.[109] Reduced from the jargon, that means that if a prisoner wants to make a "cause and prejudice" argument that uses ineffective assistance of counsel as "cause," he must present the state courts with that ineffectiveness argument first, or else he may not be

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106. This factor generally is limited to ineffective assistance of constitutionally guaranteed counsel, or no counsel at a constitutionally required stage in the proceedings. However, the Supreme Court has recently carved out a limited exception to this rule. *See* Martinez v. Ryan, 132 S. Ct. 1309 (2012) (ineffective assistance of postconviction counsel can serve as "cause" for procedural default of an ineffective assistance of trial counsel claim that is required to be brought in postconviction proceedings); Trevino v. Thaler, 133 S. Ct. 1911 (2013) (extending the holding of *Martinez* to include ineffective assistance claims that as a practical matter could only be brought in postconviction proceedings). Whether this exception will grow to encompass other types of ineffective assistance of counsel or no counsel situations is unclear.

107. 2 HERTZ & LIEBMAN, *supra* note 33, § 26.3[b] at 1482–83 & n.28. While the term "reasonable and diligent investigation" seems to be the operative term in the habeas corpus context, *see* McClesky v. Zant, 499 U.S. 467, 498 (1991), the term "diligent" appears mostly equivalent to exercising "reasonable diligence," "ordinary diligence," and "due diligence." *See Diligence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

108. *See generally* Amy Knight Burns, Note, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 STAN. L. REV. 727, 753–62 (2012) (criticizing equating *Strickland* prejudice with the "actual prejudice" in the "cause and prejudice" test, while acknowledging that the general practice of courts has been to do just that, at least implicitly.).

109. *See* Edwards v. Carpenter, 529 U.S. 446, 453 (2000).

able to use that ineffectiveness argument as "cause" in the federal court.

The Eleventh Circuit has dubiously extended this reasoning to apparently treat any claim of "cause" the same way as ineffective assistance of counsel, despite direct Supreme Court authority which appears to require the opposite.[110] Outside the Eleventh Circuit, other types of "cause" claims that do not constitute an independent constitutional claim in their own right are most likely exempt from presentation to the state courts.

Prisoners, of course, can make their "reasonable diligence" argument in the state court system on postconviction just as well as they can in federal court. But the opportunity to do so for the first time in federal court also has utility, since it enables a prisoner to switch or add theories that were not presented at a rather early stage in the postconviction process. As counsel in postconviction cases may think of new arguments long after the initial postconviction process has begun, the ability to add new arguments later is of substantial importance.

3. *The Difference Between "Adequacy" and "Cause and Prejudice" Arguments as Applied to the "Shoulda, Coulda" Rule*

Given the apparent overlap between the "cause and prejudice" test and the "adequacy" doctrine in this context, one may wonder if there is any utility for the petitioner and courts in choosing one over the other. This Note offers three reasons why adequacy arguments may be preferred for the prisoner. First, while it seems that the Court has held that "cause" arguments that are not in

110. *See* Fults v. GDCP Warden, 764 F.3d 1311, 1317 (11th Cir. 2014) (citing Henderson v. Campbell, 353 F.3d 880, 895–99 (11th Cir. 2003)), for the proposition that all cause and prejudice arguments must first be presented to the state judiciary, which appears substantially broader than the holding of *Henderson* itself.), *cert. denied* 136 S. Ct. 56 (2015). Although not in the scope the scope of this Note, the *Fults* holding seems dubious. The Supreme Court's holdings in *Edwards* and in *Murray v. Carrier*, 477 U.S. 478 (1986), rest on the proposition that ineffective assistance of counsel is an *independent constitutional claim* which must itself be exhausted. See *Carrier*, 477 U.S. at 488–89 ("[W]e think that the exhaustion doctrine . . . generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause — a question of federal law — without deciding an independent and unexhausted constitutional claim on the merits.") (internal quotations and citations omitted). *See also Edwards*, 529 U.S. at 451. A "cause" argument that a claim could not have been discovered earlier through the exercise of diligence is not an independent constitutional claim.

themselves an independent constitutional claim need not be presented to a state court, there is circuit court authority stating the opposite.[111] In contrast, it does seem clear that an adequacy argument need not be presented to the state courts. Therefore, in at least the Eleventh Circuit, an "adequacy" argument presented for the first time in federal court will likely be properly before the court, while a "cause" argument may be defaulted. Second, and more importantly, the state court precedent interpreting its "shoulda, coulda" rule may be more favorable than the overarching federal reasonable diligence principle, particularly if the final court to consider a claim, other than on application for discretionary review, is an intermediate or lower state court.[112] Accordingly, from the federal habeas court's perspective, it may be easier to hold that as a matter of "adequacy," that the state courts have inconsistently applied their law, rather than to make a "cause" ruling as a matter of federal law. Third, the burden of proving "adequacy" seems to be on the party asserting the procedural default — the State — while the burden in the "cause and prejudice" test is on the prisoner. It is at least a theoretical difference, although not necessarily one that makes a practical difference in the cases.

4. *The Uses of Ineffective Assistance of Counsel as "Cause"*

Ineffective assistance of counsel can serve as both an independent claim for relief, as well as "cause" to excuse the procedural default of another claim.[113] While generally it would seem redundant to use an ineffective assistance of counsel claim that by itself could provide habeas relief merely in the service of another claim, this may have substantial utility on federal habeas.

After the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[114] claims that have been decided on the merits in state court are subject to extremely deferential review on federal habeas corpus.[115] However, a claim that is not itself an inde-

111. *Fults*, 764 F.3d at 1317.

112. *See supra* notes 97–**Error! Bookmark not defined.** and accompanying text.

113. *See* Murray v. Carrier, 477 U.S. 478, 488–89 (1986).

114. Pub. L. No. 104-132, 110 Stat. 1214 (codified in relevant part at 28 U.S.C. § 2241 to § 2255).

115. 28 U.S.C. § 2254(d)(1) (2012), which is just one of the many barriers to relief on federal habeas corpus, requires a federal court granting habeas relief, where a state court decided a claim on the merits, to find that the proceedings in the state court "resulted in a

pendent claim for relief, but instead is serving as "cause" for the default of another, may not be subject to this deferential standard of review. Concretely put, an ineffective assistance of counsel claim serving as "cause" in some circuits will be considered far more favorably than the same ineffectiveness claim serving as an independent ground for relief.[116] Prisoners with a newly discovered meritorious claim may accordingly wish to present an ineffectiveness claim and the diligence argument as "cause" claims, in order to obtain the favorable standard of review on the question of whether the two are direct opposites. As AEDPA deference essentially ensures that all debatable questions of law will be decided in favor of the State,[117] presenting the ineffective assistance claim as a "cause" claim may result in a better outcome.

III. THE RELATIONSHIP BETWEEN DILIGENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL IN ACTUAL CASES

This Note previously examined the theoretical relationship between diligence and ineffective assistance of counsel based on *Strickland* and the usual definition of "due diligence." But there are cases that directly address the relationship between the two. While only a few are reasoned in detail, the cases take rather different approaches to deciding what the appropriate relationship

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decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Supreme Court has ensured that this bar has teeth. *See, e.g.*, Harrington v. Richter, 562 U.S. 102 (2011) ("If this standard is difficult to meet, that is because it was meant to be."); Cullen v. Pinholster, 131 S. Ct. 1386 (2011) (imposing serious hurdles on showing that a determination in state court was unreasonable by limiting review under § 2254(d)(1) to the record that was created in state court).

116. *See* Janosky v. St. Amand, 594 F.3d 39, 45 (1st Cir. 2010) (noting split in authority between Wrinkles v. Buss, 537 F.3d 804, 813 (7th Cir. 2008) (state court determination of "cause" claims subject to AEDPA deference) *and* Winston v. Kelly, 624 F. Supp. 2d 478, 497 (W.D. Va. 2008) (same), *with* Hall v. Vasbinder, 563 F.3d 222, 236–37 (6th Cir. 2009) ("cause" claims not subject to AEDPA deference) *and* Fischetti v. Johnson, 384 F.3d 140, 154–55 (3d Cir. 2004) (same)). Resolving this tension is beyond the scope of this Note, although the *Janosky* court did call this an "important issue." *Janosky*, 594 F.3d at 45. Given, however, that the text of AEDPA does not clearly require that a "cause" claim be subject to the deferential review required by that statute, pre-AEDPA case-law which did not require deferential review should probably still apply. *See Fischetti*, 384 F.3d 140, 155; *cf.* United States v. Texas, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." (internal quotation omitted)). This issue is well worth attention on certiorari review at the Supreme Court — the split appears to be fairly deep, and may make a difference for prisoners who have a valid but defaulted claim.

117. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 410–11 (2000).

between diligence and ineffective assistance is. This Part accordingly is broken into two subparts. Part III.A discusses the cases that treat ineffective assistance of counsel and due diligence as a dichotomy, with no room in between them. Part III.B then discusses the cases that take the opposite approach by attempting to find room between ineffectiveness and diligence, with particular emphasis on the *Seward III* case discussed in the Introduction to this Note.

A. THE CASES THAT FIND NO ROOM BETWEEN INEFFECTIVENESS AND DILIGENCE

The Alabama Supreme Court came across the relationship between ineffectiveness and diligence in the *Ex parte Pierce* cases — referred to here as *Pierce I*[118] and *Pierce II*.[119] *Pierce I* involved an Alabama death-sentenced inmate on petition for postconviction relief in state court.[120] Pierce's claim, as relevant here, was a claim of a *Turner v. Louisiana* violation.[121] *Turner* itself involved a trial where the key witnesses for the prosecution were two deputy sheriffs who were also in charge of arrangements for the sequestered jury throughout the three-day trial.[122] The United States Supreme Court held that the close and continual contact between the State's witnesses and the jury violated the defendant's right to due process.[123] Pierce's claim was similar; his claim was that a Sheriff was both a key witness for the prosecution as well as in close and continual contact with the sequestered jury.[124]

The Alabama Supreme Court in *Pierce I* found that Pierce's rights were violated by this arrangement.[125] However, that was not the end of the matter. The alternative holding of the courts below was that Pierce's claim was procedurally barred because it could have been raised at trial or on direct appeal.[126] The Alabama Supreme Court remanded the case for further fact-finding

118. *Ex parte* Pierce (*Pierce I*), 851 So. 2d 606 (Ala. 2000).
119. *Ex parte* Pierce (*Pierce II*), 851 So. 2d 618 (Ala. 2002).
120. *Pierce I*, 851 So. 2d at 608.
121. 379 U.S. 466 (1965).
122. *Id.* at 467–68.
123. *Id.* at 473–74.
124. *Pierce I*, 851 So. 2d at 608.
125. *Id.* at 612.
126. *Id.* at 614.

on the question of whether Pierce's counsel in fact knew or should have known about the *Turner* violation; if counsel knew or should have known about the violation, then the *Turner* claim would be procedurally barred.[127] However, the court also left open the possibility that Pierce's claim of ineffective assistance of counsel, for failure to discover and object to the *Turner* violation, would prove meritorious.[128]

On remand, the trial court found that the *Turner* claim was either known or should have been known by trial counsel.[129] The Alabama Supreme Court then held that while the direct *Turner* claim was accordingly barred from review, the same finding "breathe[d] life" into Pierce's ineffective assistance of counsel claim for failure to discover the *Turner* violation.[130] Accordingly, because the prejudice was essentially presumed in light of *Turner* and the likely reversal on appeal of the conviction, and the performance deficient by virtue of the trial court's finding that counsel should have known of the problem, Pierce was entitled to a new trial.[131] The implicit conclusion of the *Pierce II* court is that the standards for deficient performance of counsel and diligence are precisely opposite, or at least that on these facts there was occasion to consider an intermediate category.

Two cases that come to a similar conclusion are *Wilhoit v. State*, a newly discovered evidence case that equates lack of due diligence with ineffective performance,[132] and *Commonwealth v. Elangwe*, which in dicta reasons that failure to exercise due diligence is necessarily ineffective.[133]

B. CASES THAT ATTEMPT TO FIND ROOM BETWEEN DILIGENCE AND INEFFECTIVENESS

Directly contrary to the *Pierce II* reasoning is that of *Seward III*.[134] *Seward III* arose in an unusual procedural context. George Cameron Seward was convicted in 1985 on charges of

127. *Id.* at 616.
128. *Id.* at 617.
129. *Pierce II*, 851 So. 2d 618, 620 (Ala. 2002).
130. *Id.*
131. *Id.*
132. 816 P.2d 545, 546 (Okla. Crim. App. 1991).
133. 7 N.E.3d 1102, 1109 (Mass. App. Ct.), *further appellate review denied*, 10 N.E.3d 1134 (2014).
134. 102 A.3d 798 (Md. Ct. Spec. App. 2014), *cert. granted*, No. 12, Sept. Term 2015, 2015 WL 827687 (Md. Feb. 20, 2015).

"first-degree rape, first-degree sexual offense, assault with intent to murder, and related lesser offenses,"[135] for which he was sentenced to life in prison.[136] Seward had originally filed for postconviction relief in 1997, claiming that his lawyer was ineffective for failing to discover payroll records that established an alibi defense.

These records, although not their content, were known to exist at the time of trial, and defense counsel, the State, and the Court all requested that the employer produce the records.[137] Despite the requests, however, the employer was unable or unwilling to produce them at the time.[138] An investigation by postconviction counsel turned up the records after the employer became more cooperative, and the records in fact showed that Seward had a strong alibi.[139] The postconviction court nonetheless denied the ineffectiveness of trial counsel claim, on the grounds that the lawyer had done everything reasonably possible to obtain the records, and that it would have practically required a search warrant to obtain them at the time of trial.[140] This was so even though the employer testified in postconviction proceedings that had she received a subpoena from the defense at the time of trial, she would have had to look harder and would have discovered the records in time for a motion for new trial to be granted.[141]

Ineffectiveness of counsel was Seward's only viable claim at the time because the statute of limitations for raising newly discovered evidence claims had by then long expired. Maryland law, however, was amended in 2009 to provide for the ability of pris-

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135. *Id.* at 800 & n.1.

136. For more details on the troublesome factual validity of this conviction, *see supra* notes 15–24 and accompanying text.

137. *Id.* at 812.

138. *Id.* at 803.

139. *See Seward II*, No. 84 CR 3827, slip op. at 4–7 (Md. Cir. Ct. Balt. Cty. July 30, 2012).

140. Seward v. State (*Seward I*), No. 84 CR 3827, 1999 WL 35241901, at *5 (Md. Cir. Ct. Balt. City Jan. 25, 1999) ("In the instant case, defense counsel did contact [the employer] as a potential alibi witness. Acting on his client's suggestion, he attempted to investigate and gather information from her that would be beneficial to his case. She could not remember whether the Petitioner had been working that day, and she could not produce payroll records. The State also requested that [the employer] produce the records. The Court instructed [the employer] to continue looking for the records. If requests by the Court and the State could not compel [the employer] to find these records, further attempts by defense counsel to request the records would in all likelihood also fail. Defense counsel investigated and issued a subpoena to the witness. Short of a search warrant, there was not much else to be done.").

141. *Seward III*, 102 A.3d at 803.

oners to make a freestanding claim of actual innocence based on newly discovered evidence, subject to a due diligence requirement in discovering the evidence.[142] Seward promptly filed such a claim.

The actual innocence court[143] decided that the finding that the lawyer had acted reasonably under the circumstances was the law of the case, and therefore was binding on the question of whether Seward had exercised "due diligence,"[144] although the court also independently made a due diligence finding. After concluding that the newly discovered evidence established Seward's probable innocence, the actual innocence court granted a new trial.[145]

The State appealed.[146] The Court of Special Appeals[147] reversed on the grounds that the standard for the performance prong of ineffective assistance of counsel and due diligence were "entirely different."[148] While the standard for due diligence in Maryland is that the prisoner act "'reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her,'"[149] and the *Strickland* standard is reasonableness under prevailing professional norms,[150] according to the Court of Special Appeals, the presumptions differ.[151] While *Strickland* contains the "strong presumption" that counsel acted reasonably, the standard for "due diligence" in Maryland contains no such presumption.[152] Therefore, according to the court, the same act that may not be proven to be unreason-

142. 2009 Md. Laws 4105-07 (codified as amended at MD. CODE ANN., CRIM. PROC. § 8-301 (West 2014)).

143. The actual innocence court (the *Seward II* court) is the trial court that heard the freestanding claim of actual innocence; the postconviction court is the court that heard the ineffective assistance of counsel claim.

144. *Seward III*, 102 A.3d at 811–12.

145. *Id.* at 803, 808.

146. *Id.* at 800.

147. The Court of Special Appeals is Maryland's intermediate appellate court. *See Court of Special Appeals*, MARYLAND JUDICIARY, http://www.courts.state.md.us/cosappeals [http://perma.cc/BGC5-MZLY] (last visited Nov. 17, 2015).

148. *Seward III*, 102 A.3d at 808.

149. *Id.* at 810 (quoting Argyou v. State, 709 A.2d 1194, 1204 (Md. 1998)). This is largely consistent with Black's Law Dictionary, which defines "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Due Diligence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

150. Strickland v. Washington, 466 U.S. 668, 688 (1984).

151. *Seward III*, 102 A.3d at 810–11.

152. *Id.* at 810. The presumption of reasonableness appears unique to the ineffective assistance of counsel context here.

able in the ineffectiveness context may be held unreasonable in the "due diligence" context.

This, to the court, was precisely Seward's case: while trial counsel acted "reasonably" even though he did not discover the critical payroll records for the purpose of the ineffective assistance of counsel inquiry,[153] he did not act "reasonably" for the purpose of establishing due diligence.[154] The Court of Special Appeals primarily relied on their finding that if trial counsel had been diligently trying to obtain the records, he would have had a subpoena duces tecum issued to the employer, and as a result, would have discovered the records earlier.[155] Therefore, Seward's actual innocence claim was denied.[156]

Seward III is therefore essentially the same situation as *Fults v. GDCP Warden*,[157] or *Pierce*, in that both the diligence standard and the ineffective assistance of counsel standard turn on the reasonableness of counsel's performance. Essentially, the Maryland Court of Special Appeals held that the burden of proof is on the prisoner to prove either "due diligence" or ineffective assistance of counsel; if the "strong presumption" of *Strickland* is not displaced, and the burden of showing "diligence" is also not met, then the prisoner loses. This is precisely the third category discussed in Part II.B.2 — the attorney's performance has been deemed unreasonable for diligence purposes, but reasonable for ineffectiveness purposes, because of the effect of the "strong presumption."

However, *Seward III* itself does not seem to be a defensible third category case. The postconviction court does mention the

153. *Id.* at 803.
154. *Id.* at 810–11.
155. *Id.* at 813.
156. *Id.* at 814.
157. 764 F.3d 1311 (11th Cir. 2014), *cert. denied* 136 S. Ct. 56 (2015). *Fults* (the racist juror case discussed in the Introduction, *see* discussion *supra* Part I), is procedurally more complicated. The Eleventh Circuit found that Mr. Fults had switched back and forth between arguing that his attorney failed to exercise diligence and arguing that he was ineffective, and that his argument for reasonable diligence was waived and untimely made in the district court. *Fults*, 764 F.3d at 1317–19. In addition, the court also found that Mr. Fults failed to develop his arguments in the state court system showing that his lawyer was ineffective or in fact used diligence. *Id.* These holdings could be independent bases for precluding Mr. Fults's claim, although particularly the timeliness point seems somewhat procedurally stingy for a capital case. However, assuming those points could be avoided, *Fults* would otherwise be identical to *Seward III*, in that an ineffective assistance of counsel claim and a due diligence claim were both denied on precisely the same undisputed facts.

presumption that counsel acted reasonably under all the circumstances,[158] but then seems to hold that even without the presumption, that trial counsel acted reasonably, and more importantly, that there was no other reasonable way to get the evidence at the time of trial or in time for a motion for new trial.[159] It is hard to see how trial counsel could nonetheless be deemed negligent, which would be required to show a failure to exercise due diligence. While the Court of Special Appeals held in *Seward III* that the postconviction court's factual findings were made under a different legal standard, and therefore needed not be credited in the actual innocence proceeding, it is unclear exactly what facts the Court of Special Appeals found,[160] and how those facts differed from the postconviction court's findings.[161] The court appears to believe that a subpoena duces tecum could have made a difference,[162] but since that finding has to be viewed from counsel's perspective at the time,[163] it seems to be inconsistent with the postconviction court's finding that another subpoena would have made no difference.[164] Moreover, even on the Court of Special Appeals' finding that a subpoena would have made a difference, it seems that finding would necessarily imply that trial counsel should have been aware of that possibility and exercised it, and that failure to do so was ineffective in light of the critical importance of that evidence.[165] This evidence, after all, was really the only thing standing between Seward and a life sentence.

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158. *Seward I*, No. 84 CR 3827, 1999 WL 35241901, at *5 (Md. Cir. Ct. Balt. City Jan. 25, 1999).

159. *Id.*

160. The Court of Special Appeals apparently found that the actual innocence court's independent finding that a subpoena would have made no difference was clearly erroneous, despite previously being unwilling to make the same finding in the context of ineffective assistance of counsel.

161. Even the *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005) (en banc), court, *see supra* note 75, while generally agreeing with the *Seward III* court that the presumptions differ on the ultimate conclusion of deficient performance or malpractice (and thus on whether diligence was exercised), was willing to find that the factual inquiries were identical in each context, and that factual findings might be subject to issue preclusion in an appropriate case.

162. *Seward III*, 102 A.3d at 813.

163. *See supra* note 149.

164. *See supra* note 140.

165. To be fair to the Court of Special Appeals, they may not have agreed with the postconviction court's resolution of the ineffective assistance of counsel claim, as it was not reopened in their *Seward III* decision. *Seward III*, 102 A.3d at 813. Under Maryland law, it appears that a discretionary denial of leave to appeal creates no *res judicata* type effects. *See generally* Rypma v. Stehr, 511 A.2d 527, 529 & n.1 (Md. Ct. Spec. App. 1986), *cert. granted* at 517 A.2d 1120 (table). However, it was the same Court of Special Appeals

George Cameron Seward, despite the fact that the only court that has ever considered his post-trial evidence found him likely innocent, remains in prison[166] on a life sentence.[167]

Other decisions that have made a similar ruling, or at least imply that the third category exists, include *Williams v. Commissioner of Corrections*, which holds that a finding of lack of due diligence is different from a finding of deficient performance, because deficient performance carries a higher burden of proof,[168] and *Love v. State*, which holds that lack of due diligence does not by itself establish deficient performance if an attorney made a reasonable strategic choice to focus all available resources in a particular area.[169] Another such case, *Bharadia v. State*, is particularly worrisome because DNA evidence almost certainly proves the prisoner's innocence,[170] but he was found to not have been diligent in discovering that fact.[171] The lower court in *Bharadia* relied on the fact that the presumption in ineffectiveness cases differs from that on due diligence, without explaining how the presumption made a concrete difference in the result.[172] *Bha-*

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that denied leave to appeal the postconviction court's decision in the first place. *Seward III*, 102 A.3d at 803. Moreover, in Maryland, in the interests of justice, the trial court can reopen a previously decided postconviction proceeding in the interest of justice. *See* MD. CODE ANN., CRIM. PROC. § 7-104 (West 2014). Seward's case would seem to qualify, considering the key factual finding underlying the previous decision has apparently been ruled clearly erroneous. We may therefore find out exactly what the Court of Special Appeals thinks about the ineffectiveness claim, if the Maryland Court of Appeals decides against Seward on his current appeal.

166. *See supra* note 27.

167. *Seward III*, 102 A.3d at 802–03.

168. 917 A.2d 555, 561–62 (Conn. App. Ct. 2005).

169. 621 A.2d 910, 918–19 (Md. Ct. Spec. App. 1993). This portion of the decision is probably pure dicta — an ineffectiveness claim was not made in the appeal at issue, and therefore the court's comments regarding the standard for an ineffectiveness claim being different than for a due diligence claim do not seem necessary to decide the case. Moreover, to the extent the comments are not dicta, it probably is not a third category case either; the claimed failure of counsel was failure to interview the key witness, whose name had been disclosed by the prosecution, prior to the trial. The justification that seems to be floated is that the attorney made a strategic decision to admit the underlying facts and focus on procedural arguments. While the court seems to allude to the fact that this was probably a reasonable strategic decision, it seems hard to formulate such a strategy without actually talking to the key witnesses — *Wiggins v. Smith* establishes that the decision to terminate an investigation has to itself be reasonable. 539 U.S. 510, 523 (2003). But if the facts truly looked bleak enough that a reasonable attorney would nonetheless simply not contact a witness because of resource constraints, it seems hard to nonetheless hold that the defense should have discovered the witness's story through due diligence.

170. *See* Julia Seaman, Opinion, *When Innocence is No Defense*, N.Y. TIMES (Aug. 12, 2015), http://www.nytimes.com/2015/08/12/opinion/when-innocence-is-no-defense.html.

171. 755 S.E.2d 273 (Ga. Ct. App. 2014), *aff'd*, 774 S.E.2d 90 (Ga. 2015).

172. *Id.* at 277–78.

radia was subsequently affirmed on appeal by the Georgia Supreme Court, although solely on due diligence grounds.[173]

IV. IS THERE ROOM BETWEEN INEFFECTIVE ASSISTANCE OF COUNSEL AND DUE DILIGENCE?

The cases that discuss the relationship between ineffectiveness and diligence are quite split. This Part tries to establish the parameters of the third category, which admittedly is a difficult exercise without many reasoned cases on point. Part IV.A examines the potential interpretations of the "strong presumption" of *Strickland*. While the cases have yet to examine its effect in great detail, this Part discusses how it should be interpreted once the question is cleanly presented in an actual case. This Note concludes that the presumption has its greatest effect in cases where the facts are relatively uncertain. However, the difficult question is its potential impact on the ultimate legal determination of reasonable attorney performance, even when the facts are not in doubt. Because the third category is precisely as wide as the effect of the "strong presumption," this becomes the hard question that will confront courts in the future.

Part IV.B provides an analysis of the litigation issues presented by the third category, and how to resolve cases that present the relationship between ineffectiveness and diligence. Considerations for litigating these cases from the perspective of the State and prisoner are both discussed.

A. THE THEORETICAL EFFECT OF THE "STRONG PRESUMPTION"

This Note argues that the easiest way for a case to end up in the third category is for there to be uncertainty about the facts, as burdens and presumptions matter much more in cases with uncertainty.

The *Strickland* "strong presumption"[174] can operate in multiple ways, but one effect it undoubtedly has is that it allocates the burden of proof and persuasion as a factual matter.[175] The pris-

173. Bharadia v. State, 774 S.E.2d 90 (Ga. 2015).

174. Strickland v. Washington, 466 U.S. 668 (1984).

175. Chandler v. United States, 218 F.3d 1305, 1314 & n.15 (11th Cir. 2000) (en banc) (describing strong presumption of competence as similar to presumption of innocence, which would be a burden of proof and persuasion); Cirilo-Munoz v. United States, 404 F.3d 527, 530 (1st Cir. 2005) (citing Scarpa v. DuBois, 38 F.3d 1, 8–9 (1st Cir. 1994)).

oner must produce the evidence, to the extent evidence is required, that shows that his lawyer was ineffective; failing to do so is grounds for denial of the claim.[176] Burdens of proof and persuasion are irrelevant once all the facts are known[177] — they exist precisely because there is generally residual uncertainty about what the facts really are after each side has presented their evidence.[178] In light of that residual uncertainty, the law has deemed it best to allocate that residual uncertainty to one side or the other depending on the type of case.[179] Since that residual uncertainty will be allocated against the prisoner, the easiest third category cases seem to be those where uncertainty reigns. A "strong presumption" that an attorney acted reasonably has an impact, and is even likely to carry the day, in a case where the facts are uncertain, even if the same evidence is insufficient to meet the prisoner's burden of proof on diligence. Essentially, the presumption of reasonableness modifies the factual findings in a case of uncertainty. Where the facts are unknown, the presumption requires a court to substitute an implied factual finding favorable to the attorney's performance for an actual factual finding. However, that same implied factual finding may not be made the same way for the purpose of diligence. As a result, the underlying facts in which the two claims are considered as a legal matter become different, thus creating a wide third category.

This Note argues that, in fact, cases where ineffective assistance of counsel and diligence are both at issue are similar to criminal trials in that it is in the defense's — here, the State's — interest to create uncertainty. After all, the third category is the only category in which the defense wins, and this category gets wider the more uncertainty there is. Evidentiary hearings and trials are generally designed to reduce or eliminate uncertainty, not to create it. Yet here the State is more likely to win when it is unclear what the actual facts are, such that the prisoner may lose by failing to overcome his burden of proof.

However, in ineffective assistance of counsel cases, there are times where essentially all of the evidence is available to make

176. However, some claims of ineffectiveness of counsel can be determined based solely on the record created in the trial court, such that no additional evidence is necessary.

177. *See* Comment, *Procedure and Substance in State Courts Enforcing Federal Statutory Rights*, 33 YALE L.J. 308, 312 (1924).

178. *See generally* Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627 (1994).

179. *Id.*

legal judgments, as the key facts are undisputed. For instance, in *Seward III*,[180] there was no real dispute about what counsel knew or did.[181] Furthermore, the subjective beliefs of trial counsel are frequently irrelevant to the *Strickland* standard.[182] Since the *Strickland* inquiry is an objective one,[183] it is hard to imagine what more facts would be needed to make a determination about whether counsel's performance was reasonable or not.[184] *Strickland*'s strong presumption as a burden of proof carries substantial bite in at least some cases, although less so when the record is essentially complete.

A mere factual burden of proof or persuasion may not be what the Court intended when it stated that courts must apply a strong presumption in favor of reasonable attorney performance. Otherwise, merely obtaining or stipulating to all the relevant facts would displace the strong presumption and enable a court to decide the question of reasonableness under all the circumstances without reference to the presumption.[185] Instead, the *Strickland* presumption may operate as a mixed-question-of-law-and-fact type burden of proof — where it has an impact on the factual determinations as well as on the legal ones.

One thought experiment that can help determine the effect of the strong presumption is sometimes called "perfect procedure."[186] In the world of perfect procedure, fact-gathering and application of legal rules is cost-free and error-free.[187] The "perfect procedure" model allows one to separate out the substantive rights to relief from the procedural complications in obtaining it.[188] If the strong presumption of reasonableness is just a high

180. *See* discussion *supra* Part III.B.

181. *Id.*

182. Harrington v. Richter, 562 U.S. 86, 110 (2011) ("*Strickland,* however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.").

183. *Id.*

184. To the extent a factual finding, as opposed to a legal conclusion, was necessary on the likelihood of a subpoena succeeding was necessary, that finding was made in the post-conviction court. *See supra* note 140.

185. To the extent *Strickland* and other cases speak about eliminating the distorting the bias of hindsight, a similar elimination of the distortion would be necessary in the diligence inquiry. Many things look much easier in hindsight; the due diligence inquiry does not require x-ray vision.

186. *See* Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 229 (1987) (describing model of perfect procedure).

187. *Id.*

188. *Id.*

burden of proof and persuasion as to facts only, it does progressively less work as one approaches a perfect procedure world. Burdens of proof or persuasion are procedural, not substantive.

Instead, the strong presumption of reasonableness may be a legal presumption, or even a legal fiction; certain complete sets of facts,[189] although not enough to constitute reasonable attorney performance by themselves, when combined with the presumption, may be deemed reasonable. In other words, the presumption operates to shift the substantive rights of the parties, rather than impacting solely the procedure to obtain those rights.

So how wide is the third category? Exactly what sets of complete facts would fit in that category? Certainly the state and lower federal courts have sometimes, and perhaps inadvertently, held that there are essentially no third category cases on complete facts. This Note argues that in fact, even if those decisions are ignored or simply wrong, a true third category case would be very difficult for the State to argue for in good faith. Essentially, the State would be in the odd position of arguing that counsel's performance was just unreasonable enough to be reasonable for effectiveness purposes in light of *Strickland*'s strong presumption. The State's position would resemble attempting to balance a seesaw; argue too persuasively that the attorney was unreasonable and it loses; argue too persuasively that the attorney was reasonable and it also loses. Even more important is that a court would be hard-pressed to make the third category ruling — once the linkage between the standards of due diligence and ineffective assistance of counsel is made, the third category is hard to justify on the facts of any individual case, as seen in the last Part. While in the abstract there might be cases where the presumptions do some work, in a concrete case an action looks either reasonable or unreasonable in light of the evidence and information available to counsel at the time. It seems difficult to justify ruling that an attorney acted unreasonably in not pursuing an important claim, but because of a legal presumption, the prisoner still loses. In a completely fact-determined world, the third category seems to be the most difficult to enter.

Advocates of a wider third category may argue that perhaps the presumption of reasonableness does something akin to lowering the standard for attorney performance to gross negligence, or

189. A "complete set of facts" is a set of facts where there is no residual uncertainty.

a comparable standard. Certainly, if the Court had simply said that the standard for attorney performance is a gross negligence standard, while the standard for "due diligence" remained unchanged, there would be a third category of cases in the area between negligence and gross negligence. However, the Supreme Court has not said that the standard is gross negligence, but has instead explicitly endorsed the standard as being reasonableness, just with a strong presumption. Even if the standard was gross negligence, the difference between gross negligence and negligence is frequently difficult to grasp, if it is intelligible at all.[190] If the difference the presumption of reasonableness makes is less than the difference between gross negligence and negligence, the gradations become quite fine indeed. The third category would be extremely narrow, but extant.

There is undeniably tension between saying there is no room between diligence and ineffectiveness, and the repeated statements of the Supreme Court that review of counsel's decisions on ineffectiveness claims must be "most deferential."[191] And deferential review has substantial bite in other contexts.[192] It seems that the way to distinguish this situation from the deferential review that undoubtedly matters in other contexts is that ineffectiveness is already based on a reasonableness standard, rather than a right/wrong standard. The fact that reasonableness is already baked into the standard for attorney performance makes the deferential review a form of "double reasonableness," which seems hard to distinguish from just reasonableness.

Certainly an example of deferential review with bite is in the related context of AEDPA deference to a state court's decision on the merits of a federal claim. Under AEDPA, the standard of review of a state court's decision on habeas review is that the decision must not be just wrong, but actually an unreasonable application of the Supreme Court's rulings.[193] There are certainly cas-

190. Milwaukee & St. Paul Ry. Co. v. Arms, 91 U.S. 489, 494 (1875) (noting that many English courts concluded there was no understandable line at all between gross negligence and negligence, and specifically citing Wilson v. Brett, (1843) 152 Eng. Rep. 737, 739, 11 M. & W. 113 (Rolfe J.) (Exch. Div.) for the proposition that "gross negligence is ordinary negligence with a vituperative epithet.") However, modern courts have tried to create an intelligible line, although they vary on the formulation. *See generally* John C. Roberson, Comment, *Exemplary Damages for Gross Negligence: A Definitional Analysis*, 33 BAYLOR L. REV. 619, 621–22 (1981).

191. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

192. *See infra* note 194.

193. 28 U.S.C. § 2254(d)(1) (2012).

es holding or at least suggesting that a state court's decision was wrong, but not unreasonable,[194] showing that the deference actually is making a difference in concrete cases. But in cases of ineffectiveness, the standard at issue in judging an attorney's performance is not just a bright-line right/wrong standard; instead, it already encompasses a reasonableness element. In the context of AEDPA, the deferential review requires courts to uphold a state court decision that is within the zone of reasonableness; deferential review is harder to apply with ineffectiveness precisely because a lack of diligence on an important matter is also a finding that an attorney has been unreasonable. An attorney who is unreasonable is thus outside the zone of debate about what a reasonable attorney would have done — unless there was a conscious, strategic decision not to seek out that information for fear that it could lead to negative consequences.[195] The strong presumption of reasonableness, if it is more than a factual burden of proof, seems extremely difficult to operate in practice, and the Supreme Court has not clearly stated it does anything more than require an objective look at counsel's performance.[196] In at least some circuits, many states, and occasional Supreme Court cases, it apparently does not operate at all.[197]

Admittedly, it is a counterintuitive argument to say that the entirety of the Supreme Court's repeated statements in the ineffective assistance of counsel context about deferential review and strong presumptions amount to very little, if anything at all, once the facts are not in doubt. But at the same time, it is also hard to say that an attorney's performance was unreasonable under prevailing professional norms, but not so unreasonable as to amount to deficient performance, in light of the standard for attorney performance being precisely reasonableness under prevailing professional norms.

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194. *See, e.g.*, Sessoms v. Grounds, 776 F.3d 615, 631–32 (9th Cir. 2015) (en banc) (Kozinski, J., reluctantly dissenting) (noting that while he has no doubt that the state court's result was wrong, he could not grant habeas relief due to AEDPA (quoting Cavazos v. Smith, 132 S. Ct. 2, 4 (2011) (per curiam) ("[T]he inevitable consequence of [AEDPA] is that [federal] judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold.") (alterations in original))).

195. *Harrington v. Richter* is such an example, where counsel may have reasonably chose not to investigate blood evidence for fear that it would further implicate his client. 562 U.S. at 108.

196. *See supra* Part II.B.1.

197. *See supra* notes 73–75.

Strickland may really be just a factual burden of proof requirement, and burdens of proof can be defeated with appropriate factual development, or stipulation between the parties. If the presumption of reasonableness does no work, the surprising conclusion is that so long as there is a complete record, the prisoner can stipulate to any set of facts, and still obtain merits review of a sufficiently prejudicial newly discovered claim,[198] so long as those facts do not reveal a strategic decision to intentionally not discover something along the lines of the potential decision in *Harrington v. Richter*.[199] Regardless of what the facts are, if there is no third category, the attorney performance has to fit in one of the other two categories, and merits review is always possible in those. Perhaps this is a strong argument for the existence of at least some third category, but many courts apparently have held that there is no such category. Unless courts begin reversing those decisions, it seems that prisoners can take advantage.

Therefore, in state postconviction, it seems that prisoners should attempt to develop a complete factual record.[200] Likewise, from the State's perspective, they should essentially stipulate to nothing and require the state court to specify the degree to which it is certain in the factual findings it makes. This Note addresses the legal arguments that courts will confront in the next Part.

B. LEGAL ARGUMENTS PRESENTED BY THE PROBLEM OF THE THIRD CATEGORY

The third category poses a problem for courts in that the State and prisoners frequently litigate without recognizing that the relationship between due diligence and ineffectiveness even exists. For the prisoner, a narrow third category is a blessing, while

198. *See supra* Part II.B.2.

199. *See supra* note 195.

200. Of course, this is probably good advice even for prisoners that do not have a newly discovered type claim; after *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), evidentiary development of claims on federal habeas review is very limited. The broadening of habeas with *Martinez* and *Trevino* may provide some new avenues for obtaining evidentiary hearings in federal court on the ineffectiveness of postconviction counsel, but those decisions do not seem to provide an opportunity to take evidence with respect to the adequacy of a state court's imposition of a procedural default of a claim. While it an open question whether an evidentiary hearing is available to establish "cause" or "adequacy" for a procedural default, after *Pinholster*, when that default turns on trial or appellate attorney performance, it seems unlikely that evidentiary development would be possible.

even with a somewhat wider third category, the State is limited in its ability to plead alternative theories that are mutually inconsistent.

This Note argues that if the state court denies the underlying claim based solely on procedural grounds, and not on the merits, the prisoner should get de novo review on federal habeas of all the key issues,[201] at least in some circuits, that were submitted on state postconviction, as a matter of current doctrine.

There are two options that make sense for litigating a newly discovered claim from the perspective of the prisoner, after the State has raised the procedural bar and denied the ineffectiveness of counsel. The first is to present both an argument that the procedural bar does not apply because reasonable diligence was exercised, and that counsel was ineffective for failing to exercise reasonable diligence. This is essentially to argue that the State is making inconsistent arguments by making an inconsistent argument. The State is then forced into the third category to avoid the inconsistency. If the state court rules in the State's favor, and invokes a procedural bar to avoid ruling on the merits, then a prisoner should make arguments against the procedural bar on federal habeas. These should probably include "cause" in the form of both that the claim was not reasonably apparent, and an ineffectiveness claim.[202] A similar result could be achieved by arguing that the state procedural bar is inadequate, particularly in circuits that subject at least some "cause" arguments to AEDPA review. In some circuits, the entire set of rulings, presented this way, would be subject to de novo review, as both the ineffectiveness and diligence arguments are being presented as "cause" or "adequacy" arguments. Even in circuits that subject most "cause" arguments to AEDPA review, casting the diligence argument as an "adequacy" argument will almost certainly entitle the argument to de novo review, although "adequacy" arguments can be harder to make. As far as the ineffectiveness claim

201. "Cause and prejudice," and the "adequacy" of a procedural default, are frequently federal issues reviewed without deference to the state court. *See* discussion *supra* Part II.C. The direct claim will be reviewed without the deference generally required by 28 U.S.C.§ 2254(d) (2012) (requiring as a prerequisite to deference that the state court decision be "on the merits," which would not be the case if the state court denies a claim based on procedure.) *See also* Johnson v. Williams, 133 S. Ct. 1088, 1097 (2013).

202. Alternatively, if the state standard is more favorable than the federal "reasonably apparent" standard, a prisoner may also want to argue that the state court erroneously applied their own procedural bar, or that the bar is inadequate as inconsistently applied. *See* discussion *supra* Part II.C.

is concerned, while there may be AEDPA deference to overcome as to that argument, a state court's rejection of the ineffectiveness claim on the grounds that the evidence was reasonably discoverable under state law may still provide valuable ammunition in the form of factual findings, findings that may be "presumed to be correct."[203]

This brings up the possibility that it may be better for a prisoner to develop in state court all the facts, but only argue the legal position that counsel was ineffective.[204] The prisoner's goal would be to draw the state into arguing that counsel's performance was reasonable even without resort to presumptions. Assuming the state courts rule in the State's favor, at that point the prisoner can make the argument that counsel exercised reasonable diligence as a cause or perhaps adequacy argument on federal habeas. Since adequacy arguments are federal questions peculiar to federal habeas, and cause arguments that are not independent constitutional claims do not need to be exhausted,[205] it is generally unlikely[206] that they can be waived by failure to present them to state courts.[207] The training of rhetorical firepower on the ineffectiveness argument while ignoring the State's invocation of a procedural bar may convince the state courts to hold that counsel's performance was entirely reasonable even without presump-

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203. 28 U.S.C. § 2254(e)(1) (2012). *But see infra* note 209.

204. This approach has some serious dangers: in some states the burden is on the petitioner to disprove a procedural bar once pleaded. *See, e.g.*, ALA R. CRIM. P. 32.3. Therefore, a procedural bar may be applied on an actually independent and adequate state ground: that it was uncontested in the state courts. While there may be "cause" or an adequacy argument to excuse the default on the rule requiring claims to be raised at the earliest possible time, there may be an independent default on the rule requiring a prisoner to disprove the application of a procedural bar. The state court, however, must explicitly invoke this separate bar in order for it to be effective in federal court. *See supra* note 89.

205. This is probably true at least outside the Eleventh Circuit. *See supra* note 110 and accompanying text.

206. *See supra* note 204.

207. Ineffective assistance of counsel serving as "cause," however, can itself be waived. It is therefore extremely important for the prisoner to at least present the ineffective assistance of counsel claim to the state courts. *See* Edwards v. Carpenter, 529 U.S. 446 (2000). The Court has recently added a narrow exception to this waiver issue in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), under which it may be possible to salvage an ineffective assistance of counsel argument even if that argument was not made in postconviction. But *Martinez* does not alter the fact that the direct merits claim must nearly always be presented to the state court system. *See generally* O'Sullivan v. Boerckel, 526 U.S. 838, 850–62 (Stevens, J., dissenting) (describing interplay between procedural default and exhaustion, with views largely endorsed by the majority opinion, see *id.* at 848 (majority opinion)).

tions, making factual findings to that effect and then procedurally barring the claim. The court may then not consider the problem that the same factual findings also imply diligence. If the state court rests entirely on procedural grounds, and does not resolve the underlying claim on the merits, then the whole claim would be resolved de novo in federal court.[208] To the extent a prisoner believes that the federal court is a more hospitable forum, the factual findings from the state court, which may be presumed to be correct,[209] or subject to judicial estoppel if the State changes their position on them,[210] might be very helpful in making a reasonable diligence argument on federal habeas.

Regardless of which choice is made, it seems that eventually forcing the State into the narrow box of the third category is the most likely path to relief for the prisoner. If both arguments (ineffectiveness and diligence) are not made, then the State can win in two of the three categories.

From the State's perspective, their goal seems to be to make the factual record as incomplete and difficult as possible, so that they obtain the benefit of the strong presumption. With a wider third category, there are more opportunities for the state to win. It is perhaps an unusual litigation strategy, but the only one reasonably able to lead to victory.

From the perspective of a state court, the issues raised by this Note show that newly discovered claims are probably best decided on the merits, instead of or in the alternative to procedure. The third category is narrow and does not exist in many states. Even in states where the situation is less clear, reliance on the strong presumption for its deferential review in order to deny claims is rarely decisive. The easiest way to avoid reversal is to decide a claim on its merits, instead of creating a potentially inconsistent procedural hurdle. But if a court is insistent on deciding a case on procedural grounds adversely to a prisoner, there are a few approaches a state court can take to avoid being re-

208. *See supra* note 201.

209. 28 U.S.C. § 2254(e)(1) has an interesting anomaly in that it puts the burden of rebutting a state court factual finding on the petitioner. However, nowhere does § 2254(e) address what should happen if the State later contests factual findings made in the state court.

210. Given that the state presumably asked for the factual findings at issue, and won in the state court on them, there would be strong arguments for judicial estoppel if they later contest them. *See* 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE (2d. ed. 2002) § 4477.

versed on federal habeas. First, the key is to specify the exact degree of certainty with which factual findings are made. As the third category gets wider on uncertain facts, finding facts by preponderance of the evidence, or explicitly making different findings based on the different standards, may create a wider third category. Second, the state court should clearly rely on the presumption of reasonableness in deciding a case. To the extent a case is explicitly decided as being in the third category, that decision may be entitled to at least some deference in federal court, depending on the circuit. Finally, a state court should always decide a case, in the alternative, on the merits, if those are capable of being decided adversely to the prisoner, to obtain the AEDPA deferential standard of review on those merits.[211]

On federal habeas, the federal courts should keep in mind that the standard of review is frequently de novo as to all the key procedural issues, and therefore the federal court's inquiry largely mirrors that of the state court. The most difficult issue is what to do with state court factual findings that are unclear as to what standard they were found under. There becomes a conflict between the goal of AEDPA to increase respect for state court decisions, including specifically their factual findings, since crediting those factual findings as correct will increase the rate of reversal of the underlying decisions. Nonetheless, this difficulty should create a strong preference for direct merits review of the underlying claim, without resort to procedure, in light of the complications.

V. CONCLUSION

This Note is partially a call for clarity from the Supreme Court as to what effect it intends its "strong presumption" and "deferential review" to have. Clearly it is loath to reverse convictions on ineffective assistance of counsel grounds, but the terminology being used leaves it deeply unclear just how much room there is between diligence and ineffectiveness. Obviously, drawing a line for attorney performance is a difficult enterprise, and there are undoubtedly valid concerns with intrusive judicial review of counsel's performance — but a negligence standard with incom-

211. *See* MEANS, *supra* note 92 at § 3:19.

prehensible presumptions is a recipe for inconsistent and confused jurisprudence.

That inconsistent and confused jurisprudence has a high human cost. George Cameron Seward and Kenneth Fults have fallen into the judicially created vacuum that seems predictable only in its result: that the prisoner loses. Courts have read out the "strong presumption" of reasonableness in *Strickland* when it serves to deny a prisoner turned plaintiff's malpractice claim, but bring it back to prevent new trials for those who deserve them. Courts can only justify decisions that deny a newly discovered meritorious constitutional claim by applying the "strong presumption" in a particularly muscular manner, one that is hard to reconcile with the actual applications of that presumption in the Supreme Court's caselaw. Fortunately for Seward, at least, his case is not yet final; the higher court may see the evident problem. Besides being the fair thing to do, it happily would be legally justifiable as well.