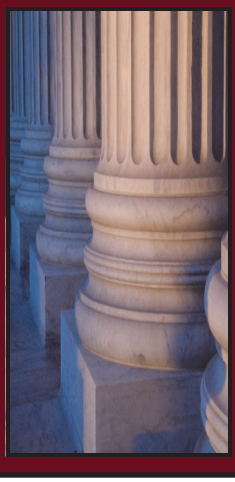

POSTCONVICTION REMEDIES NOTE

A Quarterly Review of Federal Postconviction Review Issues

Brian R. Means




Winter 2016

"People wait all week for Friday, all year for summer, all life for happiness."

Unknown

RECENT FEDERAL DECISIONS

JURISDICTION AND RELATED MATTERS

Chapter 10 of *Postconviction Remedies*
Chapter 2 of *Federal Habeas Manual*
Chapter 2 of *Introduction to Habeas Corpus*

***Synopsis*: Federal prisoner could not bring a challenge to his conviction under the savings clause: his claim was not based on a circuit-law busting, retroactively-applicable Supreme Court decision, and he failed to show that the 28 U.S.C. § 2255 motion remedy was inadequate or ineffective to test the legality of his detention.**

Petitioner, a Honduras citizen, was convicted of illegal reentry after deportation in violation of a federal statute. On appeal he unsuccessfully argued that he was deported pursuant to an order entered in violation of his due process rights. Later, he filed a habeas corpus petition pursuant to 28 U.S.C. § 2241, again challenging the lawfulness of the deportation order, but with additional evidence to support his claim. The district court dismissed the petition for lack of jurisdiction, and the Eleventh Circuit affirmed.

By statute, a federal prisoner may file a § 2241 habeas corpus petition only if a 28 U.S.C. § 2255 motion to vacate would be "inadequate or ineffective to test the legality of his detention," a provision commonly known as the savings clause. 28 U.S.C. § 2255(e). In *Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999), a case involving a sentencing challenge, the

SCALIA'S LAW

By Scott McLemee

Antonin Scalia's most-cited law review article provides a glimpse into at least part of that enigmatic entity known as "the mind of the Supreme Court," Scott McLemee writes.

In October 1985—not quite a year before Antonin Scalia took his seat on the U.S. Supreme Court—the *California Law Review* published a paper by Fred R. Shapiro called "*The Most-Cited Law Review Articles*." Nothing by Scalia was mentioned, and no surprise. He had published a bit of legal scholarship, of course (including a paper in *The Supreme Court Review* in 1978) but overall his paper trail was fairly thin and unexceptional, which proved a definite advantage in getting the nominee through the Senate hearings without drama.

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court set forth a three-factor test for determining when the savings clause applies:

> The savings clause of § 2255 applies to a claim when: 1) that claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and, 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255 motion.

Later, the Eleventh Circuit en banc suggested that the *Wofford* test may only apply to sentencing challenges. *See Gilbert v. U.S.*, 640 F.3d 1293, 1319 (11th Cir. 2011) (en banc). At the same time, the *Gilbert* court stated that, at the very least, the savings clause applies to actual-innocence claims due to a conviction for a non-existent offense. But the court admonished that it had not "said whether any other circumstances might permit a prisoner to challenge his conviction in a § 2241 petition, rather than a § 2255 motion, short of a change in the governing law as explicated by the Supreme Court."

The court concluded that it was not required to decide whether *Wofford*'s three-part test provided the governing standard or whether it was the exclusive test. That was because petitioner was not entitled to relief under the savings clause regardless of which test applied. Petitioner did not satisfy the *Wofford* test because his claim was not based on a circuit-law busting, retroactively-applicable Supreme Court decision. The legal basis for petitioner's claim was the law both when he was convicted in 2001 and when the circuit court affirmed his conviction on direct appeal in 2002. And even assuming that the *Wofford* test was not the only way to claim relief under the savings clause, the court added, petitioner failed to show that § 2255 was inadequate or ineffective to test the legality of his detention. Indeed, petitioner conceded that § 2255 was the superior vehicle for challenging his conviction. Although he would be required to contend with the one-year statute of limitations for filing § 2255 motions, this potential obstacle to obtaining relief did not render the § 2255 remedy inadequate or ineffective.

The court rejected petitioner's argument that a claim of actual innocence can, by itself, open the gateway to relief under the savings clause. The court stated that "the prisoner must show some sort of procedural defect in § 2255, and not merely assert that he has a particularly weighty substantive claim." Thus, the court held, "a claim of actual innocence, meritorious or not, cannot by itself open the gateway to § 2241 relief." *Zelaya v. Sec'y, Fla. Dep't of Corr.*, 798 F.3d 1360, 1370-72 (11th Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, § 5:7 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 1:29 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Four (2016 ed.).

***Synopsis*: Federal court lacked jurisdiction to consider petitioner's 28 U.S.C. § 2241 petition challenging his ACCA-enhanced sentence where, even after removing the challenged prior conviction from consideration as a violent felony, petitioner still had at least three prior violent felonies, thereby qualifying him for the enhanced sentence.**

In 2003, petitioner, a federal prisoner, pleaded guilty to being a felon-in-possession of a firearm. The maximum sentence for that offense was 10 years' imprisonment. But under the Armed Career Criminal Act (ACCA), sentencing courts are required to impose a term of imprisonment no lower than 15 years when a defendant has three prior convictions that qualify as serious drug offenses or violent felonies. At the time of sentencing, petitioner had five prior convictions that appeared to qualify him for an ACCA enhancement, including a Florida escape conviction. Applying ACCA, petitioner's sentence was enhanced to 211 months' imprisonment. The judgment was affirmed on appeal and § 2255 relief was denied.

In 2009, the Supreme Court in *Chambers v. U.S.*, 555 U.S. 122, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009), ruled that at least some escape convictions do not qualify as ACCA predicate convictions. Armed with the *Chambers* decision, petitioner filed a § 2241 habeas corpus petition arguing that he was wrongly sentenced under the ACCA because his 1992 escape conviction was no longer considered a violent felony.

In the Eleventh Circuit, a petitioner seeking to challenge a career sentencing enhancement in a

§ 2241 habeas proceeding must satisfy a five-part test:

> (1) throughout his sentencing, direct appeal, and first § 2255 proceeding, our Circuit's binding precedent had specifically addressed [his] distinct prior state conviction that triggered § 924(e) and had squarely foreclosed [his] § 924(e) claim that he was erroneously sentenced above the 10–year statutory maximum penalty in § 924(a);
>
> (2) subsequent to his first § 2255 proceeding, [a] Supreme Court [ ] decision . . . , as extended by this Court to [his] distinct prior conviction, overturned our Circuit precedent that had squarely foreclosed [his] § 924(e) claim;
>
> (3) the new rule announced in [the Supreme Court case] applies retroactively on collateral review;
>
> (4) as a result of [the Supreme Court case's] new rule being retroactive, [his] current sentence exceeds the 10-year statutory maximum authorized by Congress in § 924(a); and
>
> (5) the savings clause in § 2255(e) reaches his pure § 924(e)[ ] error claim of illegal detention above the statutory maximum penalty in § 924 (a).

Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253, 1278-79 (11th Cir. 2013) (brackets and ellipsis added). The purpose of the test is to prevent federal courts from "entertaining § 2241 petitions by federal prisoners who could have at least theoretically successfully challenged a career sentencing enhancement in an earlier proceeding."

In order to satisfy step four of the *Bryant* test, a habeas petitioner challenging an ACCA enhancement under § 2241 must demonstrate that his eligibility for relief from the enhancement only became available after a Supreme Court decision retroactively rendered one or more of his squarely foreclosed convictions invalid. "This means that, at *Bryant* step four, a petitioner must (1) look at his predicate convictions (including those the sentencing court counted in imposing an ACCA enhancement and those the sentencing court did not count but for which the government preserved an argument that the sentencing court should have counted in imposing the enhancement); (2) remove erroneously counted convictions and show that there were still at least three remaining convictions at the time of his initial § 2255 petition; and (3) show that fewer than three valid ACCA predicate convictions remain once all squarely foreclosed convictions are removed."

The Eleventh Circuit held that petitioner failed to satisfy this step of the *Bryant* test because, even after removing the challenged prior Florida escape conviction from consideration as a violent felony, petitioner still had at least three remaining prior violent felonies, thereby qualifying him for an ACCA -enhanced sentence. The federal court, therefore, lacked jurisdiction to consider the § 2241 petition. *McCarthan v. Warden, FCC Coleman-Medium*, 811 F.3d 1237, 1244-45 (11th Cir. 2016) (per curiam); *see* Brian R. Means, *Postconviction Remedies*, § 5:7 (West 2015 ed.); Brian R. Means, *Federal Habeas Manual*, § 1:29 (West 2015 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Four (2016 ed.).

***Synopsis*: Petitioner failed to satisfy the "custody" requirement of 28 U.S.C. § 2255 to challenge his conviction for possession of a machine gun where, although the sentence had not yet expired, it was running concurrently with several other unexpired sentences.**

Petitioner was convicted in federal court on 10 counts of an indictment, including one count of possessing a machine gun, count 8. On seven of the counts, including count 8, the district court sentenced petitioner to concurrent terms of 10 years' imprisonment, followed by a consecutive term of 30 years' imprisonment on a different count. The district court dismissed the two remaining counts. The court imposed a total term of eight years' supervised release, a fine of $3000, and a $100 special assessment on each count of conviction.

After the criminal judgment was affirmed on appeal, petitioner filed a § 2255 motion to vacate, arguing that his trial and appellate counsel rendered ineffective assistance. In particular, petitioner argued that counsel should have argued that the government introduced insufficient evidence to convict him of possessing a machinegun as charged in count 8, and that the jury instructions did not require the jury to find as an essential element of that crime that he knew of the characteristics of the firearm that brought it within the statutory definition of "machinegun." The district court agreed that

petitioner's conviction for possession of a machine gun was unlawful because the jury was not required to find that petitioner had specific knowledge of the gun's firing characteristics, but concluded that the error was not prejudicial.

The Third Circuit affirmed, holding that although it probably would have ruled in petitioner's favor had the claim been raised on direct appeal, the relief sought was not cognizable in a § 2255 proceeding. The court stated that the plain text of § 2255 provides relief only to those prisoners who claim the right to be released from "custody," and petitioner failed to satisfy this requirement.

The court rejected petitioner's argument that the collateral consequences associated with his conviction on count 8 constituted "custody" within the meaning of § 2255. In *Maleng v. Cook*, 490 U.S. 488, 492, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (per curiam), the Court held that, once a sentence for a conviction has completely expired, the collateral consequences of future sentencing enhancements potentially caused by that conviction are not themselves sufficient to render an individual "in custody" for the purpose of a habeas attack. Although petitioner's machine-gun-possession sentence had not yet expired, it was running concurrently with several other unexpired sentences.

The court found that petitioner's case was analogous to *Maleng* since the only additional harm stemming from the machine-gun-possession conviction was "whatever undefined collateral consequences may arise, not the term of imprisonment." Petitioner in the present case failed to identify a collateral consequence not already existing as a result of his other felony convictions. In the absence of any plausible evidence of collateral consequences stemming from petitioner's machine-gun-possession conviction, the court held, there was no basis to conclude that such consequences rendered him "in custody" and eligible for § 2255 relief.

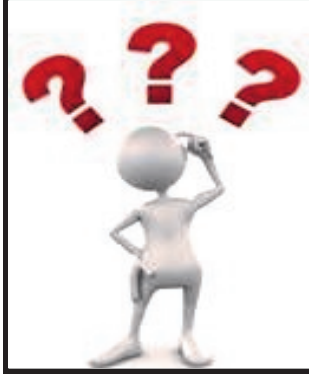
The court also rejected petitioner's argument that the $100 special assessment associated with his conviction on count 8 satisfied the "in custody" requirement. The court stated that its "own precedent holds that the monetary component of a sentence is not capable of satisfying the 'in custody' requirement of federal habeas statutes." *U.S. v. Ross*, 801 F.3d 374, 381-82 (3d Cir. 2015) (citing *Obado v. New Jersey*, 328 F.3d 716, 718 (3d Cir. 2003) (per curiam) ("The payment of restitution or a fine, absent more, is not the sort of 'significant restraint on liberty' contemplated in the 'custody' requirement of the federal habeas corpus statutes.")); *see* Brian R. Means, *Postconviction Remedies*, §§ 7:7, 7:9 nn.34-37 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, §§ 1:13, 1:20 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Four (2016 ed.).

AEDPA REVIEW STANDARDS

Chapter 29 of *Postconviction Remedies*
Chapter 3 of *Federal Habeas Manual*
Chapter 13 of *Introduction to Habeas Corpus*

***Synopsis*: Supreme Court's decision in *Hall v. Florida* did not constitute clearly established precedent with regard to intellectual disability claim rejected by the state court in 2010, was not merely an extension of *Atkins v. Virginia*, and did not fall within either of the two *Teague v. Lane* non-retroactivity exceptions.**

Petitioner was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed on direct appeal in 1996. Later, he



A PUZZLE . . .

WHICH WORD, IF PRONOUNCED RIGHT, IS WRONG, BUT IF PRONOUNCED WRONG IS RIGHT?

ANSWER ON BACK PAGE.

filed an application for state postconviction relief, pressing a claim based on intellectual disability. The state postconviction court denied relief and the state supreme court affirmed that decision in 2010. The state supreme court recognized that the execution of the intellectually disabled constitutes excessive punishment under the Eighth Amendment, citing *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and, relying on its own precedent, stated that requiring an IQ score of 70 or below to establish intellectual disability did not violate *Atkins*. Finding that petitioner did not meet the 70-IQ cutoff, the state supreme court held that petitioner failed to establish an intellectual disability.

Petitioner then sought federal habeas relief advancing three separate arguments. At the outset, he contended that the state supreme court unreasonably applied clearly established Supreme Court law embodied in *Hall v. Florida*, 572 U.S. ___, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), by upholding the imposition of the death penalty despite petitioner's claim of intellectual disability. According to petitioner, because the state supreme court imposed a bright-line IQ cutoff of 70, it violated *Hall*'s holding that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error [±5], the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."

The Eleventh Circuit disagreed. The state supreme court had affirmed petitioner's convictions and sentences in 1996, and denied petitioner's intellectual disability claim in 2010. As of 2010, the United States Supreme Court had not decided *Hall*. Because the state supreme court's decision predated *Hall*, the Eleventh Circuit held that "*Hall*'s holding was not 'clearly established' for purposes of § 2254(d)(1) of AEDPA."

Next, petitioner argued that even if *Hall* was not clearly established law in 2010, its holding merely "interpreted" or "refined" *Atkins*, the clearly established law extant at the time the state supreme court issued its decision. The Eleventh Circuit disagreed, stating that although *Atkins* held that the execution of intellectually disabled offenders is categorically prohibited by the Eighth Amendment, it did not define intellectual disability, direct states on how to define intellectual disability, nor provide the range of IQ scores that could be indicative of intellectual disability. Rather, *Atkins* expressly left it to the states to develop appropriate ways to enforce the constitutional restriction on executing the intellectually disabled. *Hall* changed course, the court explained, by requiring the states to recognize a margin of error of five points above or below an IQ score of 70 in assessing intellectual disability. Indeed, "*Hall* itself expressly acknowledged that its holding was taking the Supreme Court's prior precedents 'further' and that the Court was using its 'independent judgment' to declare the Florida statute unconstitutional." Moreover, the Eleventh Circuit added, the four dissenting judges in *Hall* "observed that the *Hall* majority 'sharply depart[ed] from the framework prescribed in prior Eighth Amendment cases'; that *Hall* 'mark[ed] a new and most unwise turn in our Eighth Amendment case law'; and that *Hall* relied on 'the standards of professional associations,' unlike 'our modern Eighth Amendment cases,' which relied on 'our society's standards.'" (Quoting *Hall*, 134 S.Ct. at 2002 (Alito, J., dissenting) (citations omitted).) That is all to say that

> [n]othing in *Atkins* suggested that a bright-line IQ cutoff of 70 ran afoul of the prohibition on executing the intellectually disabled. Thus, the [state supreme court] did not unreasonably apply *Atkins*'s ban on the execution of the intellectually disabled by setting a bright-line IQ cutoff at 70.

Finally, petitioner argued that *Hall* should be applied retroactively to his case. In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the Court held that a petitioner was not entitled to federal habeas relief when he was relying on a "new rule" of federal law, unless certain exceptions are met. Justice O'Connor noted in *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1)"—so long as the "old rule" under *Teague* is found in the Supreme Court's jurisprudence. *Williams*, 529 U.S. at 412, 120 S.Ct. 1495.

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As for Shapiro's article, it reflected the arrival of a new quantification mind-set about assessing legal scholarship. Culling data concerning some 180 journals, Shapiro (now an associate librarian and lecturer in legal research at the Yale Law School) tabulated and ranked the 50 most influential law review articles published between 1947 and 1985. Or, at least, the 50 most often cited in other law review articles, since he did not count citations in judicial opinions or interdisciplinary journals. At the time, Shapiro described the effort as "somewhere between historiography and parlor game," but it established him as, in the words of a later law review article, "the founding father of a new and peculiar discipline: 'legal citology.'"

Shapiro revisited the project in 1996 with a paper that was broader in scope (it included the interdisciplinary "law and ____" journals) and also more fine grained, listing the top 100 "Most-Cited Law Review Articles of All Time" but also identifying the most-cited articles published in each year between 1982 and 1991. The second time around, he stressed the historiographic significance of his findings over any parlor-game aspect. "The great legal iconoclast and footnote-hater, Fred Rodell, missed the point," wrote Shapiro. "Yes, footnotes are abominations destroying the readability of legal writing, but they proliferate and become discursive because they are where the action is."

In the meantime, Scalia gave a lecture at Harvard University in early 1989 that appeared in the fall in the *University of Chicago Law Review*. It had a definite impact. By 1996, Shapiro included Scalia's "The Rule of Law as a Law of Rules" in the list of the most-cited articles from 1989. It was in fourth place -- flanked, a bit incongruously, by Richard Delgado's "Storytelling for Oppositionists and Others: A Plea for Narrative" (third) and Joan C. Williams's "Deconstructing Gender" (fifth). Updating the study once more in 2012, Shapiro and his co-author Michelle Pearse placed Scalia's "The Rule of Law as a Law of Rules" on its list of the most-cited law-review articles of all time, at number 36. By then, Delgado's paper was in 68th place, while Williams was not on the list at all.

So much for the late justice's place in the annals of legal citology. (Wouldn't it make more sense to call this sort of thing "citistics"?) Turning to "The Rule of Law as a Law of Rules" itself, it soon becomes clear that its impact derives at least as much from the author's name as from the force of Scalia's argument. If written by someone not sitting in the highest court in the land, it would probably have joined countless other papers of its era in the usual uncited oblivion. That said, it is also easy to see why the paper has been of long-term interest, since it is a succinct, lucid and remarkably uncombative statement of basic principles by the figure responsible for some of the Supreme Court's most vigorous and pungent dissents.

Scalia takes his bearings from a dichotomy he finds expressed in Aristotle's Politics: "Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement."

Scalia assumes here that the reader or listener will know that Aristotle writes this in the context of a discussion of democracy, in which laws are created by those elected to "the court, and the senate, and the assembly" by the many, in keeping with a well-made constitution (rather than issued by monarchs, priests or tyrants). Official policy and decisions must, in turn, follow the body of established and "rightly constituted law." Anything else would amount to an usurpation of power.

Aristotle's point would apply to anyone in office, but Scalia is concerned with the authority of judges, in particular. For their part, upholding the law means restraint in determining how it is applied: judges should keep the exercise of their own discretion as minimal as possible. Aristotle

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allows, and Scalia concurs, that at times it is not clear just how a law ought to be applied. In that case a judge's decision must be made "on the basis of what we have come to call the 'totality of the circumstances' test," in Scalia's words.

Sometimes it can't be helped, but Scalia implies that curbs are necessary, lest judges feel an incentive to discover gray areas requiring them to exercise their discretion. "To reach such a stage," he writes, "is, in a way, a regrettable concession of defeat -- an acknowledgment that we have passed the point where 'law,' properly speaking, has any further application." It is "effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue." And when a higher court reviews a lower one's decision, Scalia treats appealing to the totality of circumstances as even less acceptable. An appellate decision should draw out and clarify the general principles embodied in the law that apply in the particular case.

"It is perhaps easier for me than it is for some judges to develop general rules," Scalia writes, "because I am more inclined to adhere closely to the plain meaning of a text."

What's striking about his formulation is not that Scalia takes a position in the debate between originalism and "living Constitution"-alism, but that he spells out an important assumption. Not only is the "plain meaning" of a law clearly decipherable from the words of its text (once we've looked up, if necessary, any unfamiliar expressions from the era when it was written) but so are the rules for determining its principles and for applying the law. The Constitution is like a cake mix with the instructions right there on the box. And if a given concept is not used or defined there—"privacy," for instance, to name one that Scalia regarded as unconstitutional, or at least nonconstitutional—then its use is ruled out.

"If a barn was not considered the curtilage of a house in 1791 or 1868," Scalia writes, "and the Fourth Amendment did not cover it then, unlawful entry into a barn today may be a trespass, but not an unconstitutional search and seizure. It is more difficult, it seems to me, to derive such a categorical general rule from evolving notions of personal privacy."

The distinction is clear and sharply drawn, however blunt the hermeneutic knife Scalia is wielding. But the example also displays one of the great weaknesses of this approach, spelled out by David A. Strauss in the University of Chicago Law Review some years later: "Even if one can determine what the original understanding was, there is the problem of applying it to radically new conditions: Is a barn in the rural nation of 1791 to be treated as equivalent to, say, a garden shed in 21st-century exurbia?"

Furthermore, the clearly formulated principle in a law can be rendered null and void by those who want only the narrowest construction of "original intent." In his magnum opus, *Reading Law: The Interpretation of Legal Texts* (2012), co-authored with Bryan A. Garner, Scalia quoted Joseph Story's *Commentaries on the Constitution of the United States* (1833) on the value of preambles in understanding the significance and intended effect of a law: "The preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, whichare to be accomplished by the provisions of the statute." As fellow Reagan judicial appointee Richard A. Posner pointed out when he reviewed *Reading Law*, an obvious instance would be the Second Amendment: "A well regulated Militia, being necessary to the security of a free State …" The preamble spells out that the amendment is, in Posner's words "not about personal self-defense, but about forbidding the federal

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Finding *Hall*'s ruling undeniably "new," the Eleventh Circuit turned to *Teague*'s first exception—whether the rule prohibits the imposition of a certain type of punishment for a class of defendants because of their status or offense. The court agreed that the new rule announced in *Atkins* fell within *Teague*'s first exception and, therefore, applied retroactively. But the court held that the same result did not hold true for *Hall* because that decision "merely provides new procedures for ensuring that states follow the rule enunciated in *Atkins*." The court also concluded that *Hall* did not announce a "watershed" rule under *Teague*'s second exception. "To fall within this exception, a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (internal quotation and emphasis omitted). The court stated that "[t]he presentation of evidence by a defendant seeking to establish intellectual disability does not meet this standard." Because neither *Teague* exception applied, the court held that *Hall* did not apply retroactively. (Because petitioner failed to show that *Hall* applied retroactively under *Teague* or its exceptions, the court assumed for purposes of argument that *Teague*'s exceptions survived § 2254(d)(1).) *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1310-16 (11th Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, §§ 29:23, 29:31, 26:19, 26:20 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, §§ 3:41, 7:36-7:37 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Twelve(2016 ed.).

***Synopsis*: The record demonstrated that the state court did not ignore petitioner's proffered evidence, but instead found it not credible.**

Petitioner was convicted and sentenced to death for the murder of a husband and wife and their two young daughters "by tying them up in the basement and then cutting their throats, stabbing them, striking them with a claw hammer, and setting fire to their home." In a habeas petition filed in the state supreme court, petitioner alleged that his trial attorney failed to make a reasonable investigation of a confession he gave police following his arrest. In dismissing the claim, the state supreme court held that petitioner had not shown either that counsel performed unreasonably or that petitioner was prejudiced. The court made various findings of fact in support of its ruling, relying heavily on an affidavit by petitioner's trial attorney.

On federal habeas review, petitioner argued that the state supreme court's decision to deny the ineffective-assistance-of-trial-counsel claim warranted no deference because the state court made an "unreasonable determination of the facts" by ignoring evidence and by resolving factual disputes without an evidentiary hearing.

The Fourth Circuit disagreed, finding "neither contention persuasive." The court agreed that "[w]hen a state court apparently ignores a petitioner's properly presented evidence, its fact-finding process may lead to unreasonable determinations of fact under § 2254(d)(2)." (Citing *Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir. 2013); *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004); *Miller–El v. Cockrell*, 537 U.S. 322, 346, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (expressing concern that a state court "had before it, and apparently ignored" petitioner's probative evidence of a constitutional violation).) But "a state court need not refer specifically to each piece of a petitioner's evidence to avoid the accusation that it unreasonably ignored the evidence." Instead, "to determine whether the state court considered or ignored particular evidence, the federal court must review the entirety of the state court's order." (Internal quotation marks and brackets omitted.)

The Fourth Circuit found that the record demonstrated that the state supreme court did not ignore petitioner's evidence, but rather determined that the evidence was not credible. The circuit court reached this conclusion based on the fact that (1) the state supreme court denied the warden's motion to strike counsel's affidavit as inadmissible hearsay after substantial briefing on the issue, indicating that the state court had considered the affidavit, and (2) counsel's affidavit had little probative value.

The court also rejected petitioner's argument that the state supreme court's determinations of fact were necessarily unreasonable because it had failed to hold an evidentiary hearing. The court explained that because petitioner's allegations were conclusory and the record presented a "detailed account of events" contradicting the allegations, the state supreme court permissibly resolved the disputed facts without holding an evidentiary hearing. *Grat v. Zook*, 806 F.3d 783, 790-92 (4th Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, §§ 21:8, 22:12, 22:12, 28:5 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 5:8, (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Thirteen (2016 ed.).

TEAGUE NEW RULES

Chapter 10 of *Postconviction Remedies*
Chapter 2 of *Federal Habeas Manual*
Chapter 2 of *Introduction to Habeas Corpus*

***Synopsis*: Claim faulting counsel for failing to research and consider potential immigration consequences when negotiating a plea deal barred by *Teague*.**

Petitioner sought a writ of *coram nobis* challenging the validity of his wire fraud conviction on the ground that his attorney failed to properly advise him of the immigration consequences of pleading guilty. Specifically, he argued that his lawyer's performance was deficient for failing to "negotiate an effective plea bargain" and "mitigate harm under the plea agreement." By this, he faulted counsel for failing to research and consider potential immigration consequences when negotiating the plea deal.

The District of Columbia Circuit held that this argument was foreclosed by *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (holding that defense attorneys provide inadequate representation when they fail to advise their clients about the likely deportation consequences of pleading guilty), and *Chaidez v. U.S.*, ___ U.S. ___, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013) (holding that *Padilla* announced a new rule of criminal procedure under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), at least insofar as the decision required attorneys to advise their clients about the risks of deportation). Petitioner's case became final before *Padilla* was decided and it made "no sense" to the court "that although defense attorneys had no duty to advise their clients about the immigration consequences of pleading guilty prior to *Padilla*, they nonetheless had a duty to research those consequences and take them into account when negotiating a plea deal."

Alternatively, petitioner argued that his attorney provided ineffective assistance by affirmatively misrepresenting the potential immigration consequences of his conviction. The government did not dispute that, at the time petitioner was convicted, a lawyer's erroneous immigration advice could form the basis of an ineffective assistance claim. But it argued that petitioner was unable to establish prejudice because counsel provided inaccurate advice only after he pleaded guilty. The circuit court concluded that nothing about the temporal relationship between petitioner's plea and his attorney's inaccurate advice categorically barred petitioner from establishing prejudice. After all, the court noted, petitioner could have withdrawn his plea prior to sentencing under Fed. R. Crim. P. 11(d)(2)(B) for any "fair and just reason." The court declined to express an opinion on whether petitioner could demonstrate prejudice, but instead remanded that issue to the district court for further consideration. *U.S. v. Newman*, 805 F.3d 1143, 1147-48 (D.C. Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, § 26:18 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 7:38 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Twelve (2016 ed.).

SECOND/SUCCESSIVE PETITIONS

Chapter 27 of *Postconviction Remedies*
Chapter 11 of *Federal Habeas Manual*
Chapter 8 of *Introduction to Habeas Corpus*

***Synopsis*: Challenges to interpreter's performance at trial, based on factual predicates that existed and were discoverable at the time the first federal petition was filed, were successive, but claim challenging the fairness of state postconviction proceedings, which was unripe when the first federal petition was filed, was not successive.**

Petitioner unsuccessfully challenged his state-court murder conviction in federal district court.

True Urban Legends

Chirping Crickets Can Be Used to Tell Temperature

There is a mathematical formula to determine in Fº the temperature using the chirps of crickets. Count the number of chirps in 14 seconds. Then add 30 to that number. The result is the current temperature.

Hidden Basketball Court in Disney

Deep within the recesses of the Disneyland mountain ride, the Matterhorn, is a hidden basketball court where Disney employees can go to sink a few buckets between shifts.

The Unsolvable Theorem

A young college student was working hard in an upper-level math course, for fear that he would be unable to pass. On the night before the final, he studied so long that he overslept the morning of the test.

Later, he filed a second federal habeas petition challenging the same criminal judgment, but included three claims not presented in his first petition: (1) the interpreter at trial was incompetent; (2) trial and appellate counsel were constitutionally ineffective because they failed to object to the interpreter; and (3) petitioner did not receive a fair hearing on his state postconviction petition. The district court denied relief.

The Seventh Circuit affirmed. At the outset, the circuit court found that the first two claims were "successive" within the meaning of 28 U.S.C. § 2244(b)(2). The court stated that in determining whether a second-in-time petition is successive, it must be

> "careful to distinguish genuinely unripe claims (where the factual predicate that gives rise to the claim has not yet occurred) from those in which the petitioner merely has some excuse for failing to raise the claim in his initial petition (such as when newly discovered evidence supports a claim that the petitioner received ineffective assistance of counsel); only the former class of petitions escapes classification as 'second or successive.'"

(Quoting *U.S. v. Obeid*, 707 F.3d 898, 901 (7th Cir. 2013).)

The factual predicates for the first two claims—those centering on the interpreter—existed and were discoverable at the time the first petition was filed; therefore, these claims were successive. And because petitioner did not argue, nor could he establish, that he met the stringent requirements for entertaining successive petitions, the circuit court held that the district court properly dismissed these claims.

But the third claim—challenging the fairness of the state postconviction hearing—was not successive because it was not ripe. At the time the first federal petition was filed, the state postconviction proceedings had not yet occurred. Nevertheless, the circuit court held that the claim failed to state a basis for relief. Although a majority of federal circuit courts had concluded "that errors in state post-conviction proceedings do not provide a basis for redress under § 2254," *Word v. Lord*, 648 F.3d 129, 131 (2d Cir. 2011) (collecting cases), the Seventh Circuit had not adopted this *per se* rule. Instead, the Seventh Circuit had decided that "[u]nless state collateral review violates some independent constitutional right, such as the Equal Protection Clause, errors in state collateral review cannot form the basis for federal habeas corpus relief." *Montgomery v. Meloy*, 90 F.3d 1200, 1206 (7th Cir. 1996) (citations omitted) (citing as an example *Lane v. Brown*, 372 U.S. 477, 484-85, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963), in which the Court held that, when a state prisoner is denied access to a state postconviction proceeding on the basis of indigency alone, the Equal Protection Clause is violated). But petitioner had not alleged that he was denied access to postconviction proceedings on the basis of his indigency, nor had he alleged the violation of some other, independent constitutional right in the way the state administered its postconviction proceedings. Accordingly, the claim was not cognizable

under § 2254. *Flores-Ramirez v. Foster*, 811 F.3d 861, 866 (7th Cir. 2016) (per curiam); *see* Brian R. Means, *Postconviction Remedies*, §§ 6:4 nn. 14-21, 27:8, 27:11 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, §§ 1:43, 11:39 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eight (2016 ed.).

***Synopsis*: Petitioner was not entitled to file a successive federal habeas petition based on a purported *Brady* violation occurring years after his conviction—*Brady* is not a cognizable constitutional right in postconviction proceedings, and petitioner failed to establish another constitutional violation as required by statute.**

In 2000, petitioner was convicted of capital murder and sentenced to death. Following unsuccessful attempts to obtain state postconviction relief, he filed a federal petition for a writ of habeas corpus, which was ultimately denied as untimely. Later, he sought leave to file a second federal habeas corpus petition alleging that in 2014, he learned that someone else had confessed to the murder and that the state had received information about this confession in 2013 but had failed to timely disclose this evidence. Petitioner argued that the state's failure to alert him to this evidence constituted a *Brady* violation and that he was prejudiced because by the time he learned about the confession, the individual that confessed had committed suicide. Alternatively, petitioner argued that his second federal habeas petition was not second or successive because, pursuant to *McQuiggin v. Perkins*, 569 U.S. ___, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013) (establishing actual innocence exception to limitations bar), his first time-barred federal petition did not count for purposes of the second or successive petition rule, 28 U.S.C. § 2244(d).

The Eleventh Circuit was unpersuaded. The purported *Brady* violation occurred in 2013, many years after petitioner's 2001 conviction. The court explained that because *Brady* is not a cognizable constitutional right in postconviction proceedings, petitioner failed to establish "another constitutional violation" as required by § 2244(b)(2)(B)(ii). (Citing *In re Davis*, 565 F.3d 810, 824 (11th Cir. 2009).) The court also found that because there was overwhelming evidence of petitioner's guilt and the confession evidence lacked reliability, a reasonable factfinder could conclude, notwithstanding the purported confession, that petitioner was guilty of murder.

The court was equally unpersuaded by petitioner's argument that *McQuiggin* provided him with a basis for relief. The Supreme Court in *McQuiggin* indicated that its holding was limited to initial, not second or successive, habeas petitions. The circuit court noted that petitioner did "not point to, and research does not reveal, any case law supporting [petitioner's] argument that *McQuiggin* allows us to discard his first

True Urban Legends

When he ran into the classroom several minutes late, he found three equations written on the blackboard. The first two went rather easily, but the third one seemed impossible. He finished the problems just as time was called.

His professor called him later that day and informed him that the last problem was an example of an equation that mathematicians since Einstein had been trying to solve without success. This story was used as the setup of the plot in the 1997 movie *Good Will Hunting*.

Sometimes It Feels As If I Live Here

A man lived in a French airport from 1988 to 2006 because he lacked a passport. French authorities did not know where to deport him. An Iranian refugee, his refugee status papers were stolen so no one could verify his status. The 2004 Tom Hanks film *The Terminal* is loosely based upon the experiences of this individual.

untimely § 2254 petition and consider his constitutional claims afresh." The court added that, even if, as petitioner argued, "*McQuiggin*'s 'essential principle' should be extended to create an exception to the bar against successive petitions where the initial petition was dismissed as time-barred, the exception would not apply because [petitioner's] initial § 2254 petition was alternatively denied on the merits." *In re Bolin*, 811 F.3d 403, 409-11 (11th Cir. 2016); *see* Brian R. Means, *Postconviction Remedies*, § 27:7 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 11:29 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eight (2016 ed.).

***Synopsis*: District court erred in not finding counsel ineffective for failing to advise petitioner that plea agreement rendered petitioner's removal a virtual certainty.**

Petitioner was charged with felony attempted transportation of illegal aliens and aiding and abetting. Later, defense counsel presented petitioner with a misdemeanor plea agreement requiring her to stipulate to removal following her criminal sentence. When petitioner rejected the agreement, her attorney obtained a revised misdemeanor plea agreement that, among other things, did not include the stipulation for removal upon completion of the sentence. The revised plea replaced the stipulated removal provision with a provision entitled "Immigration Consequences" that stated petitioner recognized that pleading guilty "may have consequences with respect to her immigration status if she is not a citizen of the United States," and that she "nevertheless affirms that she wants to plead guilty regardless of any immigration consequences that his [sic] plea may entail, even if the consequence is his [sic] automatic removal from the United States." (Brackets in original.) The final section of the plea stated that petitioner "has discussed the terms of this agreement with defense counsel and fully understands its meaning and effect."

Petitioner accepted the plea. At her plea colloquy, the magistrate judge informed petitioner that "potentially you could be deported or removed, perhaps." Later, at her sentencing hearing, petitioner's counsel stated to the court that "even though this is a misdemeanor, there is a high likelihood that she'll still be deported. It's still probably considered an aggravated felony for purposes of immigration law." Shortly after petitioner was sentenced, she was issued a Notice to Appear stating that she was removable because her conviction qualified as an aggravated felony.

Petitioner moved to vacate her conviction pursuant to 28 U.S.C. § 2255 on the ground that her attorney failed to advise her that the plea agreement rendered removal a virtual certainty, and that the district court erred in dismissing her petition without holding an evidentiary hearing. Petitioner included her own declaration stating that counsel never told her that the plea would result in her removal. The district court ordered an expansion of the record and supplemental briefing. To that end, petitioner's counsel filed a declaration stating that he had several conversations with petitioner "regarding potential immigration consequences," that he explained "there was a potential [she would] be deported based on her immigration status," and that he "believed she had a better chance with Immigration with a misdemeanor than a felony."

The district court denied the petition without holding any further hearings. The court ruled that counsel was required to advise petitioner only that her plea created a general risk of removal, and that this duty was satisfied by counsel's statement prior to the plea that petitioner faced a "potential" of removal and by counsel's statement at the sentencing hearing that petitioner faced a "high likelihood" of removal. It also found that petitioner was not prejudiced.

The Ninth Circuit reversed. The court stated that where the law is "'succinct, clear, and explicit'" that a conviction renders removal virtually certain, counsel must advise his client that removal is a virtual certainty. (Quoting *Padilla v. Kentucky*, 559 U.S. 356, 36-68, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).) And, the court added, where the immigration statute or controlling case law expressly identifies the crime of conviction as a ground for removal, "'the deportation consequence is truly clear.'" (Quoting *Padilla*, 559 U.S. at 369, 130 S.Ct. 1473.) The immigration statute expressly identified petitioner's conviction as a ground for removal and her conviction of a removable offense rendered her removal "'practically inevitable.'" (Quoting

Padilla, 559 U.S. at 363-64, 130 S.Ct. 1473.) Thus, the Ninth Circuit held, counsel was required to advise petitioner "that her conviction rendered her removal virtually certain, or words to that effect." The fact that petitioner "might theoretically avoid removal" under various exceptions did not alter the fact that removal was virtually certain.

The court rejected the government's argument that counsel did not perform ineffectively because petitioner received notice that she might be removed from a provision in the plea agreement and the court's plea colloquy. These matters, the court stated, were "simply irrelevant to the question whether *counsel's* performance fell below an objective standard of reasonableness." The court also held that counsel's statements made after petitioner had already pleaded guilty—that she faced a "high likelihood" of removal—did not satisfy counsel's "duty to accurately advise his client of the removal consequences of a plea before she enters into it."

Next, the court ruled that petitioner satisfied the *Strickland* prejudice prong. Petitioner alleged that she would not have accepted the plea had she known she would be removed, but instead "would have insisted on A) proceeding to trial; or B) an offer that would not have caused my deportation." The court stated that "[a] petitioner may demonstrate that there existed a reasonable probability of negotiating a better plea by identifying cases indicating a willingness by the government to permit defendants charged with the same or a substantially similar crime to plead guilty to a non-removable offense." Petitioner cited four recent cases from the Southern District of California in which defendants originally charged with transportation of illegal aliens pleaded guilty to being an accessory after the fact. These cases demonstrated, the court held, "a reasonable probability that, but for counsel's deficient performance, [petitioner] could similarly have negotiated a different plea agreement not requiring her removal."

The court added that a petitioner may also demonstrate a reasonable probability "by showing that she settled on a charge in a purposeful attempt to avoid an adverse effect on her immigration status." (Citing *Kovacs v. U.S.*, 744 F.3d 44, 53 (2d Cir. 2014).) Petitioner rejected an initial plea bargain containing a stipulated removal provision and accepted the revised plea bargain only after this provision had been removed. Moreover, counsel's declaration stated that petitioner accepted the revised plea after he advised her that "she had a better chance with Immigration with the misdemeanor conviction" than with the charged felony. The court held that these facts indicated that petitioner "settled on the misdemeanor charge with the stipulated removal provision deleted specifically in order to limit her chances of removal and, consequently, showed a reasonable probability that, but for counsel's failure to provide adequate advice, she would have negotiated a plea bargain not requiring her removal."

The court also found that petitioner demonstrated prejudice "by showing a reasonable probability that, even in the absence of a more favorable plea agreement, she would have gone to trial." Petitioner had made a concerted effort to avoid separation from her family, all of whom resided in the United States, by rejecting an initial plea agreement containing a stipulated removal provision. And she demonstrated that she placed great emphasis on remaining in the United States by having numerous conversations with her counsel regarding the immigration consequences of her plea. Finally, petitioner was just 22 years old at the time she entered into the plea agreement, and had she gone to trial on the initial felony charge, she faced a prison term likely spanning just 10–16 months. "A young lawful permanent resident may rationally risk a far greater sentence for an opportunity to avoid lifetime separation from her family and the country in which they reside." The court held that these circumstances, taken together, demonstrated that petitioner "placed a particular emphasis on preserving her ability to remain in the United States, and that had she known that her removal was virtually certain she would have acted rationally in rejecting the second plea agreement and going to trial."

The court rejected as inapposite cases cited by the government, outside the immigration context, in which defendants were not prejudiced because they were advised, either by the plea agreement or the court, that there existed a possibility of a harsher sentence than they anticipated receiving. "Unlike in criminal cases, in which it is the courts that retain

discretion over criminal sentencing, courts have no discretion over the immigration consequences of a conviction for a removable crime." The Ninth Circuit stated that the district court's advisement, like the statements in the plea agreement, that petitioner faced the possibility of removal "did not purge prejudice, if for no other reason than that they did not give her adequate notice regarding the actual consequences of her plea." The plea agreement and plea colloquy, like the advice of her lawyer, each notified petitioner "only that there existed a possibility of removal, when in fact her removal was virtually certain."

The Ninth Circuit also concluded that counsel's statement at the sentencing hearing that there was a high likelihood that petitioner would still be deported was "similarly deficient because it likewise fail[ed] to state accurately the plain and clear status of the law, . . . and thus understate[d] the likelihood that his client would be removed." Moreover, the court added, even had counsel accurately stated that petitioner's removal was virtually certain, it "would still find his statement inadequate to purge prejudice because it came too late." By the time counsel made his statement at the sentencing hearing, petitioner needed the district court's permission to withdraw her plea. And by the time of her sentencing hearing, plea bargaining had ended. Having found petitioner received ineffective assistance of counsel, the Ninth Circuit vacated the conviction and remanded the case to the district court. *U.S. v. Rodriquez*, 797 F.3d 781, 786-92 (9th Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, § 35:12 nn.34-40 (West 2015 ed.).

***Synopsis*: Where petitioner was convicted of two offenses and sentenced to concurrent prison terms, the state court did not unreasonably apply clearly established Supreme Court precedent in ruling that petitioner was not prejudiced by trial counsel's failure to object to the jury's verdict on one of the counts since only one of the two identical concurrent sentences was the subject of the ineffective-assistance claim.**

Petitioner was charged with murder in the second degree and criminal possession of a weapon in the second degree. At the prosecutor's request, the trial court charged the jury on first-degree manslaughter as a lesser-included offense of murder in the second degree. At the conclusion of the trial, the jury announced a verdict of "not guilty" of second-degree murder, but "guilty" of first-degree manslaughter. These verdicts were not challenged. The clerk then asked the jury foreperson about the weapons charge. Twice the jury foreperson answered, "Not guilty." The trial judge then asked the jurors whether they wished "to go back and fill the rest of the box in? Go back and fill it out." The jurors answered "yes" and then left the courtroom. Upon their return, the jury foreperson represented that the jury had found petitioner guilty on the weapons charge. Petitioner was sentenced to concurrent prison terms of 15 years on the manslaughter and weapons convictions.

Petitioner argued on direct appeal that he had been denied his Fourteenth Amendment right to a fair trial, and that his trial attorney was ineffective for failing to object when the trial court sent the jury back into the jury room. The state appellate court rejected the fair-trial claim on procedural grounds and on the merits, but did not address the ineffective -assistance claim. Petitioner's attempt to obtain federal habeas relief was unsuccessful.

The Second Circuit agreed with the district court that even assuming that trial counsel acted unreasonably in failing to object, the state court's decision that petitioner was not prejudiced was not objectively unreasonable under § 2254(d)(1). The court rejected petitioner's argument that his case was governed by a prior circuit decision, *Jackson v. Leonardo*, 162 F.3d 81, 86-87 (2d Cir. 1998), in which the court had held that the potential collateral consequences of a conviction were sufficient to establish *Strickland* prejudice, even where the petitioner received identical concurrent sentences on two convictions, only one of which was being challenged. The court stated that if it was considering petitioner's claim *de novo* on direct appeal, it would agree that *Jackson* controlled. But, the court explained:

> Reviewing the state court's decision under AEDPA, however, we cannot say that that court's contrary conclusion was "an objectively unreasonable application of

> clearly established federal law," as determined by the Supreme Court. . . . [Petitioner] cannot point us to a Supreme Court case that holds that collateral consequences of conviction are sufficient to establish *Strickland* prejudice where a defendant, serving identical sentences that run concurrently, challenges only one of two convictions and sentences.

The court found petitioner's reliance on *Ball v. U.S.*, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), misplaced. In *Ball*, the Court held that the defendant, a convicted felon, could not be convicted both of possessing and of receiving a weapon. The Court also concluded that the remedy was not to make the sentences on the separate counts run concurrently rather than consecutively, but instead to vacate one of the convictions. The Court stated that this was because the collateral consequences of the convictions "may not be ignored":

> [T]he presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

Although the Second Circuit agreed that *Ball* was suggestive of how the Supreme Court would rule ifv confronted with the issue, the decision in *Ball* did not clearly establish that proposition for purposes of AEDPA review. The circuit court then added:

> This conclusion is further supported by the Supreme Court's continued acceptance, in however limited a form, of the concurrent sentence doctrine, which allows courts, in their discretion, to avoid reaching the merits of a claim altogether in the presence of identical concurrent sentences. While the Supreme Court accepts this doctrine, it can hardly be a clearly established principle of Supreme Court jurisprudence that the collateral consequences of a conviction alone suffice to establish *Strickland* prejudice.

Tavarez v. Larkin, 814 F.3d 644, 649 (2d Cir. 2016); *see* Brian R. Means, *Postconviction Remedies*, § 7:9 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 1:13 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Thirteen (2016 ed.).

***Synopsis*: Certificate of appealability was improvidently granted with respect to claim that petitioner's appellate attorney was ineffective for not arguing petitioner had a right to counsel at a pre-appeal evidentiary hearing on a motion for new trial.**

Petitioner filed a *pro se* motion for new trial shortly after being convicted and sentenced for armed robbery and related offenses. The motion was denied and the judgment affirmed on appeal. Petitioner then filed a state postconviction motion for relief, alleging that his appellate attorney was ineffective for not arguing that petitioner had a right to counsel at his pre-appeal evidentiary hearing on his motion for a new trial. The state judge denied the motion, noting that he had warned petitioner himself against proceeding without counsel. Subsequent state appellate review was fruitless.

Petitioner then filed a federal petition for writ of habeas corpus, again alleging that his appellate attorney was ineffective for not arguing that petitioner had a right to counsel at the pre-appeal evidentiary hearing on his motion for a new trial, and that petitioner had not waived that right. The district court denied relief.

The Sixth Circuit affirmed. The circuit court stated that the dispositive issue was whether the Supreme Court had held that a hearing on a motion for new trial is a "critical stage" of a criminal prosecution. It had not. To the contrary, in *Marshall v. Rodgers*, ___ U.S. ___, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013), the Court specifically declined to resolve the issue. As a result, the Sixth Circuit concluded, there was no clearly established Supreme Court precedent

> creating a right to counsel at a hearing on a motion for a new trial and, thus, no basis on which [petitioner's] appellate attorney could have argued before the [state court of appeals] that a violation of the Sixth Amendment had occurred when

> [petitioner] was allowed to appear without counsel in the absence of a valid waiver. It follows that there could be no finding of ineffective assistance of counsel in this regard and, therefore, no arguable basis for the issuance of a certificate of appealability, which we now vacate as improvidently granted.

Coleman v. Bergh, 804 F.3d 816, 818-19 (6th Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, § 35:2 (West 2016 ed.).

"Sometimes people come up to me and inquire, 'Justice Scalia, when did you first become an originalist?' As though it's some weird affliction, you know, 'When did you start eating human flesh.'"

– Associate Justice Antonin Scalia

(Continued from page 7)

government to disarm state militias." If it matters that the Constitution never explicitly identifies a right to privacy, then the complete lack of any reference to a right to individual gun ownership seems at least as conspicuous a silence.

Posner notes that when Scalia did mention the preamble in one decision, it was dismissive. Sometimes you "adhere closely to the plain meaning of a text," it seems, and sometimes you just wish it would go away.

The skyrocket ascent of Scalia's paper is easy to understand: whatever you think of the ideas, they are clearly and at times forcefully expressed, and "The Rule of Law as a Law of Rules" provided a glimpse into at least part of that enigmatic entity known as "the mind of the Supreme Court." Absent that, its interest is likely to be chiefly historical or biographical. Other cards will take its place in the parlor game of citation and influence.

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* The views expressed here are solely those of the author in his private capacity and do not in any way represent the views of the California Department of Justice or any other government entity. Scott McLemee is the Intellectual Affairs columnist for Inside *Higher Ed.* His reviews, essays, and interviews have appeared in *The New York Times*, *The Washington Post*, *The Boston Globe*, *The Nation*, *Newsday*, *Bookforum*, *The Common Review*, and numerous other publications.

Briefly stated . . .

Recharacterization. The Eleventh Circuit held that the district court did not err in declining to *sua sponte* recharacterize a *pro se* petitioner's 28 U.S.C. § 2241 habeas petition as a 28 U.S.C. § 2255 motion to vacate. The circuit court noted that recharacterization would have subjected any subsequent motion under § 2255 to the second-or-successive-motion restrictions. Moreover, petitioner evinced an unambiguous desire to proceed under § 2241, and expressly rejected any perceived attempt by the district court to recharacterize his petition as a § 2255 motion. *Zelaya v. Sec'y, Fla. Dep't of Corr.*, 798 F.3d 1360, 1367-68 (11th Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, § 27:14 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 11:75 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eight (2016 ed.).

Equal Protection. The Ninth Circuit held that sex offenders committed under California's Sexually Violent Predator Act (SVPA) for indefinite time periods were not similarly situated to mentally disordered detainees committed under a different state law who were deemed a danger to themselves or others and were subject to less onerous commitment terms. The circuit court pointed out that sexually violent predators posed a greater risk of danger than mentally disordered detainees, did not demonstrate the capacity to avoid future felonious conduct, and had the opportunity for release if they proved they were no longer likely to reoffend. *Taylor v. San Diego County*, 800 F.3d 1164, 1170-71 (9th Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, § 42:2 (West 2016 ed.).

Liberty Interest Challenge. The Ninth Circuit rejected plaintiff's civil rights action challenging the constitutionality of California Penal Code § 1405 (providing a mechanism for obtaining DNA testing of evidence where testing is potentially relevant to proving innocence). Plaintiff's challenge was directed to the statute's requirements that an applicant show that the DNA testing would raise a "reasonable probability" that the verdict or sentence would have been more favorable if the DNA testing had been available at the time of trial, and that the applicant establish a chain of custody with respect to the evidence. *Morrison v. Peterson*, 809 F.3d 1059, 1068-69 (9th Cir. 2015) (applying *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S.Ct. 2308, 2320, 174 L.Ed.2d 38 (2009)); *see* Brian R. Means, *Postconviction Remedies*, § 1:45 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 11:75 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eight (2016 ed.).

Favorable Termination under *Heck*. Plaintiff, a former inmate, satisfied *Heck*'s favorable termination rule where his prior criminal sentence had been vacated by a state court, even though the plaintiff's specific legal challenges to his sentence were not addressed in the state court's decision. The order vacating the sentence was entered in light of the government's concession that an error was committed during sentencing, plaintiff was released from custody after the order vacating sentence was entered, and the order did not impose any unfavorable conditions or burdens on plaintiff that would be inconsistent with his claim that the sentence was illegal. The court distinguished *Kossler v. Crisanti*, 564 F.3d 181, 187-91 (3d Cir. 2009) (en banc), and *Gilles v. Davis*, 427 F.3d 197, 209 (3d Cir. 2005), on the ground that the state court order in the present case did not imply that the sentence imposed was valid as had occurred in *Kossler* and *Gilles*. *Bronowicz v. Allegheny County*, 804 F.3d 338, 347-48 (3d Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, § 11:2 n.19, 11:5 n.7 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 2:1 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Two (2016 ed.).

Statute of Limitations: Final Judgments. The Ninth Circuit held that a sentence of incarceration, coupled with an unspecified amount of restitution, is a sufficiently final judgment to support a direct appeal. Therefore, "once the time for filing a direct appeal of this type

of judgment expires, the one-year limitation period under § 2255(f) is triggered." The limitations period does not restart when the specified amount of restitution is later entered. The court distinguished *Gonzalez v. U.S.*, 792 F.3d 232, 233 (2d Cir. 2015) (per curiam), where the Second Circuit held that the limitations period began to run when the time to file a direct appeal of the revised restitution order expired. The Ninth Circuit explained that the initial judgment in *Gonzalez* was vacated on direct appeal, unlike the present case in which the judgment was merely amended to include the specific restitution amount. *U.S. v. Gilbert*, 807 F.3d 1197, 1199-1200 (9th Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, § 25:13 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 9A:12 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Ten (2016 ed.).

Second or Successive: "Made" Retroactive. The Sixth Circuit held that the Supreme Court in *Johnson v. U.S.*, ___ U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (holding that the imposition of an increased sentence under the Armed Career Criminal Act's residual clause violates due process because it is so vague that it "denies fair notice to defendants and invites arbitrary enforcement by judges"), made its decision categorically retroactive to cases on collateral review, thereby allowing the filing of a second or successive 28 U.S.C. § 2255 motion. *In re Watkins*, 810 F.3d 375, 377 (6th Cir. 2015); *see also Woods v. U.S.*, 805 F.3d 1152, 1153-54 (8th Cir. 2015) (per curiam); *Pakala v. U.S.*, 804 F.3d 139, 139-40 (1st Cir. 2015) (per curiam); *Price v. U.S.*, 795 F.3d 731, 734 (7th Cir. 2015). *But see In re Williams*, 806 F.3d 322 (5th Cir. 2015); *In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015); *In re Gieswein*, 802 F.3d 1143 (10th Cir. 2015); *see also In re Franks*, 815 F.3d 1281, 1284-86 (11th Cir. 2016) (holding that its earlier decision in *In re Rivero*, involving a challenge to a sentence that was calculated based on the residual clause in the federal Sentencing Guidelines, applied to challenges to the residual clause found in the Armed Career Criminal Act); *see* Brian R. Means, *Postconviction Remedies*, § 27:6 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 11:35 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eight (2016 ed.).

***Martinez* and Rule 60(b)(6).** The Sixth Circuit held that the Supreme Court's decision in *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) (holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial"), did not provide grounds for the petitioner to reopen his federal habeas action under Fed. R. Civ. P. 60(b)(6). The court had previously held that neither *Martinez*, nor its follow-on decision in *Trevino v. Thaler*, ___U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), were "extraordinary" within the meaning of Rule 60(b)(6). Moreover, petitioner was not diligent. The Supreme Court issued its decision in *Martinez* one month before petitioner filed his petition for certiorari from the circuit court's decision affirming the denial of habeas relief by the district court. Had petitioner included his *Martinez* claim, the Supreme Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524, 529, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005), makes it clear that the Supreme Court would have granted petitioner the reconsideration he later sought in his Rule 60(b) motion. *Sheppard v. Robinson*, 807 F.3d 815, 820-21 6th Cir. 2015); *see* Brian R. Means, *Federal Habeas Manual*, § 12:14 (West 2016 ed.).

Speedy Trial Rights. The Seventh Circuit held that a state-court determination that a 42-month delay before trial did not violate petitioner's right to a speedy trial was not an unreasonable application of clearly established federal law where nearly 90% of the pretrial delay was due to continuances requested by petitioner's lawyer. Although petitioner asserted his right to a speedy trial and objected to the continuances requested by his attorney, "the actions and decisions of defense counsel are attributable to the [petitioner]." And although the state court mistakenly attributed the entire delay to the defense, this mistake of fact could not form the basis for habeas relief unless petitioner

was able to show that the state court's decision was based on it. (Citing *Byrd v. Workman*, 645 F.3d 1159, 1172 (10th Cir. 2011); *Juan H. v. Allen*, 408 F.3d 1262, 1270 n.8 (9th Cir. 2005).) The circuit court ruled that "[b]ecause the continuances requested by [petitioner's] lawyer accounted for almost all of the pretrial delay, . . . it cannot reasonably be argued that this modest factual mistake had any meaningful effect on the state court's decision. The factual error had no constitutional significance." *O'Quinn v. Spiller*, 806 F.3d 974, 977-78 (7th Cir. 2015); *see* Brian R. Means, *Postconviction Remedies*, § 38:6 (West 2016 ed.).

Statute of Limitations. The Court in *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed. 2d 130 (2010), held that a petitioner is entitled to equitable tolling of the statute of limitations if he demonstrates (1) that he pursued his rights diligently, and (2) that some extraordinary circumstance stood in his way that prevented timely filing.

In *Menominee Indian Tribe of Wisconsin v. U.S.*, 136 S.Ct. 750, 755-56, 193 L.Ed.2d 652 (2016), the Court rejected the litigant's argument that "diligence" and "extraordinary circumstances" should be considered together as two factors in a unitary test and the circuit court should have considered the litigant's diligence in connection with its finding that no extraordinary circumstances existed. The Court stated that these two components are treated as "elements," not "merely factors of indeterminate or commensurable weight." Therefore, equitable tolling is available only if the prisoner satisfies both elements of this two-part test. The diligence prong, the Court explained, "covers those affairs within the litigant's control; the extraordinary-circumstances prong, by contrast, is meant to cover matters outside its control." The "extraordinary circumstances" prong requires the prisoner seeking tolling to show an "external obstacle" to timely filing, i.e., that the circumstances that caused a litigant's delay must have been beyond its control. The phrase "external obstacle" reflects the Supreme Court's "requirement that a litigant seeking tolling show 'that some extraordinary circumstance stood in his way.'" Therefore, the second prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary and beyond its control. *See* Brian R. Means, *Postconviction Remedies*, § 25:35 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 9A:80 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Ten (2016 ed.).

Actual Innocence and Successive Petitions. The Eleventh Circuit held that a petitioner asserting a claim of actual innocence in a successive petition must nevertheless satisfy the statutory restrictions imposed by AEDPA, 28 U.S.C. § 2244(b)(2)(B). Under that statute, a petitioner seeking leave to file a second or successive petition must establish actual innocence by clear and convincing evidence *and* another constitutional violation. The court referred to this as the "actual innocence plus" standard. Because petitioner had not shown a separate constitutional violation, his actual innocence claim was not cognizable under 28 U.S.C. § 2244(b)(2)(B). *Johnson v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1317, 1324 (11th Cir. 2015) (per curiam); *see* Brian R. Means, *Postconviction Remedies*, § 27:6 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, §§ 11:27-11:29 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eight (2016 ed.).

Actual Innocence and the Statute of Limitations. The Eleventh Circuit held that the actual innocence exception recognized in *McQuiggin v. Perkins*, ___ U.S. ___, 133 S.Ct. 1924, 1928, 185 L.Ed.2d 1019 (2013), "does not extend to cases in which a movant asserts actual innocence of his sentence, rather than of his crime of conviction." *U.S. v. Jones*, 758 F.3d 579, 586 (11th Cir. 2014) (2-1 decision), *cert. denied*, 135 S.Ct. 1467, 191 L.Ed.2d 413 (2015); *see* Brian R. Means, *Postconviction Remedies*, § 25:9 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 9A:143 (West 2016 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Nine (2016 ed.).

UNITED STATES SUPREME COURT GRANTS OF CERTIORARI

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Betterman v. Montana, 14-1457. Certiorari was granted to address whether the Sixth Amendment guarantee of a speedy trial applies to the sentencing phase of a criminal proceeding. Petitioner Brandon Betterman was sentenced to five years' imprisonment in 2011 based on a domestic assault charge. In addition, he pleaded guilty to bail jumping in April 2012, based on his failure to appear at a 2011 court appearance on the domestic assault charge. After waiting nine months for the court to sentence him on that latter conviction, Betterman filed a motion to dismiss for failure to grant a speedy trial. The trial court denied the motion and, five months later (14 months after Betterman pleaded guilty), the court sentenced him to seven years in state prison, partly suspended. The Montana Supreme Court affirmed, rejecting Betterman's speedy trial claim. 342 P.3d 971. The court, reversing its prior precedent, held that the Sixth Amendment's speedy trial right "cease[s] to apply when conviction becomes definitive." The court reasoned that as a historical matter, the criminal "trial" did not include sentencing; that the interests served by the Speedy Trial Clause do not apply at sentencing; and that the only remedy for a speedy trial violation—dismissal of the indictment—would violate the principle that a convicted defendant should not "escape punishment altogether" merely because a "court committed error in passing sentence." The court then rejected Betterman's claim that the sentencing delay violated the Due Process Clause, finding that "any prejudice to [him] from a delayed sentencing was not substantial and demonstrable."

Betterman claims in his petition that the lower courts are deeply divided over whether the Speedy Trial Clause applies at sentencing, with five federal courts of appeal and eight state high courts holding that it does; six federal courts of appeal and six state high courts assuming that it does; and one federal court of appeals (the Second Circuit) and five state high courts (plus the Montana Supreme Court) holding that it does not. On the merits, Betterman argues that sentencing delays inflict the same kinds of harm to defendants—oppressive incarceration, anxiety and concern due to uncertainty in the proceedings, and possible impairment of a defense due to sentencing delay if the defendant is retried—as delays at the start of trial. He further maintains that the Montana Supreme Court was wrong as a matter of history (because the Founders treated trial and punishment as a unit) and wrong in believing that the only remedy is dismissal of the indictment. Betterman also asserts that the Due Process Clause is an inadequate substitute because it requires defendants to show actual prejudice from the delay, whereas the four-part test for speedy trial claims set out in *Barker v. Wingo*, 407 U.S. 514 (1972), takes other considerations into account and does not require the defendant to show actual prejudice. In his view, the difference between the two standards is outcome-determinative here.

Answer to "Puzzle" from page 4.

The answer is the word "wrong."