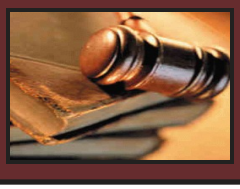
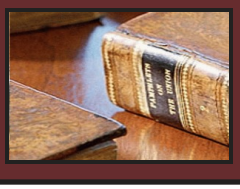
POSTCONVICTION REMEDIES NOTE

A Quarterly Review of Significant Postconviction Review Decisions

Brian R. Means





Summer 2017

"Eighty percent of success is showing up." – Woody Allen

RECENT FEDERAL DECISIONS

JURISDICTION

Chapter 8 of Postconviction Remedies
Chapter 1 of Federal Habeas Manual
Chapter Eight of Introduction to Habeas Corpus

***Synopsis*: State court order of protection prohibiting petitioner from contacting victim of harassment for two years did not place her "in custody" within meaning of habeas statute.**

Petitioner was convicted of misdemeanor attempted criminal contempt and harassment for violating an order of protection directing her to stay away from the victim. Petitioner was sentenced to a one-year conditional discharge, with the condition that she abide by a two-year order of protection. The order of protection required petitioner to stay away from the victim.

A Guide to Preparing Cert Petitions

Dan Schweitzer
Director and Chief Counsel, NAAG Center
for Supreme Court Advocacy

This is the second of a two-part discussion on preparing a certiorari petition. The first part appeared in the spring 2017 edition.

IV. SPECIFIC SECTIONS

A. Questions Presented

These are very important in cert petitions for two reasons: They are often the first thing a particular Justice or clerk reads; and if certiorari is granted they demarcate the issues you can raise in your merits brief. Practitioners have varying approaches to the questions. Some prefer non-argumentative questions that have no immediately obvious answer; others prefer

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After exhausting state court remedies, petitioner filed a federal habeas petition seeking relief on the ground that the trial court denied defense counsel with an opportunity to make a closing argument in violation of her Sixth Amendment right to assistance of counsel. Petitioner contended that although she was not incarcerated at the time she filed her federal petition, she was still "in custody" within the meaning of 28 U.S.C. § 2254(a) because she was subject to an order of protection that imposed a significant restraint on her liberty.

The Second Circuit held that the state court order of protection that prohibited petitioner from contacting the victim for two years did not place her "in custody." Petitioner's sentence never required her physical presence at a particular time or location. Nor was she affirmatively required to do anything such as perform community service. The only restraint on petitioner's freedom was that she stay away from the victim. The court stated that "[t]his narrow and pinpointed restriction is neither severe nor significant."

The court was unpersuaded by petitioner's argument that because the victim visited the apartment building where petitioner's mother-in-law lived every day to drop off and pick up her children, it was possible that petitioner would encounter the victim. The court reasoned that an inadvertent encounter with the victim would not violate the order of protection unless petitioner engaged with her or drew attention to petitioner's presence.

The court distinguished its decision in *Nowakowski v. New York*, 835 F.3d 210 (2d Cir. 2016). In that case, the court held that a petitioner who had been sentenced to a one-year conditional discharge, with the requirement to perform one day of community service, for second-degree harassment was "in custody" within the meaning of § 2254(a). The sentence in *Nowakowski* required the petitioner to be physically present at a particular time or place, and required her to perform community service. These circumstances did not exist in the present case. *Vega v. Schneiderman*, 861 F.3d 72, 75-76 (2d Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, § 7:12 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 1:22 (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eight (2018 ed.).

AEDPA REVIEW STANDARDS

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

Synopsis: **State court did not unreasonably apply *Graham v. Florida* in denying petitioner's motion to vacate his sentence of life imprisonment without parole for a nonhomicide offense committed at age of 16 where the state had a geriatric release program that considered parole factors in determining release.**

In 2003, petitioner was convicted of rape and sentenced by a Virginia state court to life in prison. Petitioner was 16 years old when he committed the crime. At the time petitioner was sentenced, Virginia had abolished parole that employed a traditional framework. In its place, Virginia enacted its so-called "geriatric release" program, which allows older inmates to receive conditional release in some circumstances.

Seven years after petitioner was sentenced, the Supreme Court in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), held that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." Petitioner moved a Virginia state court to vacate his sentence in light of *Graham*. The court declined, ruling that Virginia's geriatric program satisfied *Graham*'s requirement of a meaningful opportunity to obtain parole for juvenile offenders.

Petitioner then sought federal habeas relief. The district court granted the writ, stating that "there is no possibility that fairminded jurists could disagree

that the state court's decision conflicts wit[h] the dictates of *Graham*." The Fourth Circuit affirmed in a divided opinion.

The Supreme Court reversed in a unanimous per curiam opinion. *Virginia v. LeBlanc*, ___ U.S. ___, 137 S.Ct. 1726, 198 L.Ed.2d 186 (2017) (per curiam). The Court explained that the circuit court erred by failing to accord the state court's decision the deference owed under AEDPA:

> *Graham* did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented. And it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham*'s requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole.

Id. at ___, 137 S.Ct at 1729.

The Court stated that "'[p]erhaps'" the next logical step from *Graham* would be to hold that a geriatric release program does not satisfy the Eighth Amendment, but "'perhaps not.'" *Id.* at ___, 137 S.Ct at 1729 (quoting *White v. Woodall*, 572 U.S. ___, ___, 134 S.Ct. 1697, 1707, 188 L.Ed.2d 698 (2014)). The Court observed that there were reasonable arguments on both sides, but those arguments could not be resolved on federal habeas review. Because this case arose in that context, the Court expressed no view on the merits of the underlying Eighth Amendment claim. *LeBlanc*, ___ U.S. at ___, 137 S.Ct at 1729; *see* Brian R. Means, *Postconviction Remedies*, § 29:50 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 3:71 (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Fourteen(2018 ed.).

EXHAUSTION

Chapter 23 of Postconviction Remedies
Chapter 9C of the Federal Habeas Manual
Chapter Ten of Introduction to Habeas Corpus

***Synopsis*: Petitioner was not required to present his claim to the Colorado Supreme Court where a Colorado appellate rule stated that petitioning for certiorari was not required to exhaust a claim.**

Petitioner presented his claim of ineffective assistance of counsel to the Colorado trial court and court of appeals on collateral review, but did not petition the Colorado Supreme Court for certiorari review. A Colorado state rule provided:

> In all appeals from criminal convictions or post-conviction relief . . . , a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies. . . . Rather, when a claim has been presented to the Court of Appeals or Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.

The question on federal habeas review was whether the Colorado rule eliminated the need for petitioner to present his ineffectiveness claim to the Colorado Supreme Court to satisfy the exhaustion requirement imposed by AEDPA.

The Supreme Court in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999), held that AEDPA's exhaustion requirement means that "a state prisoner must present his claims to a state supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement." *Id.* at 839-40. "Critically, however, the Court stated that its holding does not require 'federal courts to ignore a state law or rule providing that a given [state appellate review] procedure is not available.'" *Ellis v. Raemisch*, 872 F.3d 1064, 1076 (10th Cir. 2017) (quoting *Boerckel,* 526 U.S. at 847-48). Four justices in *Boerckel*, three

dissenting and one concurring, indicated that if a state has identified discretionary supreme court review as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion, claims of state prisoners may be exhausted for purposes of federal habeas once the intermediate state appellate court has ruled upon them.

The Tenth Circuit concluded that the state rule rendered Colorado Supreme Court review "unavailable" for purposes of AEDPA exhaustion. Thus, petitioner had exhausted his ineffectiveness claim, even though the claim had not been presented to the Colorado Supreme Court. *Ellis*, 872 F.3d at 1071 n.2 (citing Brian R. Means, *Federal Habeas Manual* § 3:75 (2017)); *see* Brian R. Means, *Postconviction Remedies*, § 23:13 n.4 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 9C:17 (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Ten (2018 ed.) (upcoming release).

PROCEDURAL DEFAULT

Chapter 24 of Postconviction Remedies
Chapter 9B of the Federal Habeas Manual
Chapter Twelve of Introduction to Habeas Corpus

***Synopsis*: Sixth Circuit erred in reaching the merits of condemned inmate's habeas claim under the miscarriage of justice exception to procedural default.**

Petitioner sought federal habeas relief on the ground that the trial court violated his due process rights during the penalty phase of his trial by not instructing the jury that, when weighing aggravating and mitigating factors, they could consider only the two aggravating factors they had found during the guilt phase. But because petitioner failed to object to the trial court's instruction or to raise the claim on direct appeal, the claim was procedurally defaulted.

Nevertheless, the Sixth Circuit concluded that petitioner fell within the fundamental-miscarriage-of-justice exception to procedural default and, therefore, the court could reach the merits of the claim. The court provided two reasons: first, petitioner was ineligible to receive a death sentence, as the jury had not made the necessary finding of the existence of aggravating circumstances; and second, in light of the trial court's insufficient instruction on aggravating circumstances, the record failed to show that the jury's death recommendation was actually based on a review of any valid aggravating circumstances. Turning to the merits, the circuit court held that the trial court had violated petitioner's rights to a jury trial and due process by giving an erroneous jury instruction that did not define or list aggravating circumstances.

The Supreme Court reversed in a unanimous per curiam opinion. *Jenkins v. Hutton*, ___ U.S. ___, 137 S.Ct. 1769, 198 L.Ed.2d 415 (2017) (per curiam). The Court stated that the jury had, in fact, found the existence of aggravating circumstances at the guilt phase of trial when it concluded that petitioner had engaged in a course of conduct designed to kill multiple people and had committed kidnapping. Each of these aggravating circumstances, the Court explained, rendered petitioner eligible for the death penalty, and petitioner did not argue that the trial court improperly instructed the jury about aggravating circumstances at the guilt phase. *Id.* at ___, 137 S.Ct. at 1772.

The Court also concluded that the circuit court's second reason for reaching the merits rested on a legal error. Instead of asking whether, given proper instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances, the circuit court asked whether, given the alleged improper instructions, the jury might have been relying on invalid aggravating circumstances when it recommended a death sentence. This approach, the Court

admonished, "would justify excusing default whenever an instructional error could have been relevant to a jury's decision." *Id.* at ___, 137 S.Ct. at 1772. Petitioner had not shown by clear and convincing evidence that a properly instructed jury could not have recommended death. "In fact," the Court observed, "the trial court, Ohio Court of Appeals, and Ohio Supreme Court each independently weighed those factors and concluded that the death penalty was justified." *Id.* at ___, 137 S.Ct. at 1773; *see* Brian R. Means, *Postconviction Remedies*, § 24:19 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 9B:50 (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Twelve (2018 ed.).

STATUTE OF LIMITATIONS

Chapter 25 of *Postconviction Remedies*
Chapter 9A of the *Federal Habeas Manual*
Chapter Eleven of *Introduction to Habeas Corpus*

***Synopsis*: AEDPA limitations period for petitioner's claim that trial counsel failed to conduct blood type testing was not governed by § 2244(d)(1)(D), applicable to newly discovered factual predicates, where petitioner failed to exercise reasonable diligence.**

In 1991, petitioner was convicted of first degree murder. At trial, serology evidence was admitted implicating petitioner in the crime. A report prepared by H.B. Myers, a state police officer who testified at trial, indicated the blood tested was Type B. The Myers report was not introduced at trial, and petitioner was unaware of its contents.

On November 8, 1998, petitioner filed his first state habeas petition alleging that tainted serology evidence had been presented at his trial by Myers. Petitioner claimed that his blood type was not Type B, as reflected in Myers's serology report, but rather, Type A. Petitioner discovered that his blood type was Type A after undergoing medical testing in February 1998.

In 2006, petitioner filed a state habeas petition focusing on separate issues with the serological evidence used at trial. Petitioner learned of these issues from a report generated during a court-ordered investigation of the practices of the state crime laboratory (the "Zain III report"). In conducting this investigation, the investigators retested the blood evidence from petitioner's case. They determined that some of Myers's findings were "not supported by data" and that worksheets for certain items appeared to have been altered.

In September 2013, petitioner filed a § 2254 petition challenging his conviction. Although one year had passed since his criminal judgment became final, petitioner argued that his claim was timely under § 2244(d)(1)(D) because he could not have earlier discovered the factual predicates for his claims with due diligence. He argued that his two state habeas petitions were based on two separate factual predicates: (1) his incorrect blood type on Myers's report and (2) the factual findings in the Zain III report.

The Fourth Circuit disagreed. *Gray v. Ballard*, 848 F.3d 318 (4th Cir. 2017). According to petitioner, he could not have known that the blood type in Myers's report was incorrect until he

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Test your logic skills

Two fathers took their sons fishing.

Each man and son caught one fish, but when they returned to camp there were only 3 fish. How could this be?

(None of the fish were eaten, lost, or thrown back.)

Answer on back page.

(Continued from page 1)

questions that at least imply the answer you support. Either approach is fine.

Sometimes an issue is so complex that it is virtually impossible to craft concise and clear questions presented. In such cases, you should consider prefacing the questions with a brief description of the pertinent facts or statutory scheme. Such a preface should ordinarily be no longer than one or two paragraphs.

And try not to present more than two or three questions; presenting more than that detracts from the clarity and simplicity for which you are striving. Also, few cases have more than a couple of cert-worthy issues.

B. Introduction

Experienced Supreme Court practitioners are increasingly beginning their cert petitions with an Introduction section that, in one to three pages, describes the legal issue and why it warrants the Court's review. It is not as formal as a Summary of Argument and need not, like a Summary, outline (in order) each argument the petition will make. Rather, an effective Introduction provides a thematic overview of the case and highlights your most important points.

C. Boilerplate Sections

Cert petitions must include a list of all parties to the proceeding in the court below; citations to the opinions and orders entered in the case; a statement of the basis for jurisdiction; and the constitutional provisions and statutes involved in the case. To see what these sections should look like, look at cert petitions filed by the U.S. Solicitor General, available at https://www.justice.gov/osg/supreme-court-briefs; and by other experienced Supreme Court practitioners (some of which can be found by looking at the petitions filed in cases argued in the most recent Term, available at http://www.scotusblog.com/case-files/terms/ot2016/?sort=mname).

The jurisdictional statement should be short and to the point, listing the information required by Rule 14.1(e). If the case presents a genuine jurisdictional problem, that should be addressed in the Statement of the Case or Reasons for Granting the Petition.

D. Statement of the Case

This section serves several functions. Its primary goal is to show the Court that your case is a good vehicle through which to decide the questions presented. This means making the factual and procedural background appear as clear and simple as possible, and confirming that the questions presented were expressly decided. Do not distract the Court by describing more facts than necessary; but do not omit key facts so that the Court is left unsure of the true posture of the case.

The Statement can also be a tool to show why the case deserves the Court's attention. Without editorializing or argument, give a flavor of the issues involved and their implications. By the time the Justice or clerk has completed the Statement, he or she should be thinking: "a murderer is going free because of an expansive new application of *Miranda*"; "a federal court is micro-managing a state prison system"; "a large swath of territory, previously thought to be state land, has been found to be Indian country." You still need a persuasive Reasons for Granting the Petition section; but the Statement can be a very positive first step.

Always summarize the reasoning of the decision under review. You need not go on for pages; but summarize enough of the opinion so that the Court can understand its rationale without having to turn immediately to it. Subtly hint at flaws in the lower court's reasoning by quoting passages that underscore its weak points. And briefly summarize any dissenting opinions that bear on the questions presented (since they presumably support your position).

Other Points:

● Do not gloss over bad facts or misstate the record. And, at least with respect to critical or disputed factual assertions, provide citations wherever possible—preferably to the lower court opinions included in the Appendix; otherwise, to the record below. This enhances the Court's confidence in your assertions. (Note that the lower court

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discovered his true blood type in 1998. But, the circuit court observed, "a prisoner who attempts to use a DNA test as a factual predicate must act with reasonable promptness once the DNA sample and testing are available—he is not permitted to wait 'untold years' to have the testing done, and then claim that he has 'discovered' the result and "get the benefit of the rejuvenated 1-year period regardless of his lengthy delay.'" *Id.* at 323 (quoting *Johnson v. U.S.*, 544 U.S. 295, 310, 125 S.Ct. 1571, 161 L.Ed.2d 542 (2005)). Applying this standard, the court held that petitioner's claim clearly failed: "Blood typing technology existed for the entire length of his conviction, yet he claimed this new 'discovery' after seven years had passed." *Id.*

The court was likewise unpersuaded by petitioner's argument that the discovery of his blood type constituted a factual predicate for his claim that counsel was ineffective for failing to have the blood tested. According to petitioner, he could not have known that his counsel failed to test the blood until after he found out his blood type was wrong in Myers's report. But, the court stated, "[e]ven after a prisoner has requested that his attorney take a certain action, a prisoner still must exercise due diligence himself." *Gray,* 848 F.3d at 323. The court pointed out that counsel was supposed to have the testing conducted in 1991, before trial, and had petitioner been exercising due diligence, he "would have discovered his attorney's failure to do so long before 1998." *Id.*

The court also rejected petitioner's argument that the factual findings in the Zain III report constituted a second factual predicate. Petitioner had argued that, after the release of the Zain III report in 2006, he discovered that other parts of Myers's serology report were false. But, the court stated, petitioner received the Myers's serology report prior to trial and had the opportunity to conduct his own serology testing if he believed that anything in the report was inaccurate or incomplete. Indeed, his attorney initially made such a request, which was granted, but the attorney never had the testing completed. Because petitioner's attorney could have independently tested the serology evidence and discovered that parts of Myers's report were false prior to his trial, the Zain III report's publication in 2006 could not be used as the start date for the limitation period. In sum, because petitioner failed to exercise due diligence in discovering his blood type and the facts contained in the Zain III report, his petition was untimely. *Gray*, 848 F.3d at 324 (4th Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, § 25:18 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 9A:33 (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eleven (2018 ed.).

***Synopsis*: Delay by prison officials in providing petitioner with requested certificate for *in forma pauperis* filing was an extraordinary circumstance justifying equitable tolling, and petitioner was not required to show he acted diligently for portion of the limitations period preceding the extraordinary circumstance.**

Petitioner's conviction became final on direct appeal on October 5, 2009, thereby commencing AEDPA's one-year statute of limitations. On September 25, 2010, 354 days later, petitioner filed a petition for state postconviction relief, tolling the limitations period until November 16, 2011, when the petition was denied. Petitioner received notice that his petition had been denied five days later, on November 21, 2011, with seven days remaining on the limitations period. On the same day, petitioner requested a prison account certificate from the prison trust office, something that was required in order for petitioner to file a federal habeas petition *in forma pauperis*. The certificate was issued December 2, 2011, and petitioner filed his federal petition that same day.

The question for the Ninth Circuit to decide

was whether the period of time between November 21, when petitioner requested the prison account certificate, and December 19, the date on which he received it, was equitably tolled. The answer depended on "whether equitable tolling may be denied because a court decides that the prisoner acted unreasonably by failing to work diligently on his case throughout *the entire portion* of the one-year statute-of-limitations period that preceded the occurrence of the 'extraordinary circumstance'?" (Emphasis added.)

The court concluded that it may not be denied, observing that "[n]o opinion of this court or of the Supreme Court has ever upheld the denial of equitable tolling to a prisoner on the ground that he had not used the portion of the one-year statute-of-limitations period that *preceded* the event justifying tolling in a reasonable manner." *Grant v. Swarthout*, 862 F.3d 914, 921 (9th Cir. 2017) (emphasis added). The court disavowed language in two prior cases, *Gibbs v. Legrand*, 767 F.3d 879, 892 (9th Cir. 2014), and *Roy v. Lampert*, 465 F.3d 964, 972 (9th Cir. 2006), suggesting that diligence *prior to* an extraordinary circumstance may be a relevant factor. The court made clear, however, that a petitioner seeking equitable tolling must act diligently *during* the existence of the extraordinary circumstance. (Citing *Valverde v. Stinson*, 224 F.3d 129, 136 (2d Cir. 2000) (petitioner "not ineligible for equitable tolling simply because he waited until late in the limitations period to file his habeas petition").)

The Ninth Circuit concluded both that petitioner experienced an extraordinary circumstance and that he acted with reasonable diligence. With regard to the former, the court noted that petitioner was entirely dependent on prison officials to provide him with the requested document and could not file his petition for habeas corpus without it. "Where a prisoner is dependent on prison officials to complete a task necessary to file a federal habeas petition and the staff fails to do so promptly, this constitutes an extraordinary circumstance." *Grant*, 862 F.3d at 926 (citing *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) ("Here, as an incarcerated pro se litigant, Miles depended on prison authorities to draw on his trust account and to prepare a check for the filing fee. He further relied on these same authorities to mail his check and petition to the district court. Once Miles made his request, any delay on the part of prison officials in complying with Miles' instructions was not within Miles' control.")). The court also found petitioner acted diligently by twice checking on the status of his prison account certificate between November 21 and December 19. Finally, the court had no trouble finding that the prison officials' delay was the "cause" of the federal habeas petition being denied as untimely. *Grant*, 862 F.3d at 924 (9th Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, § 25:36 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, §§ 9A:86, 9A:87, 9A:108 (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eleven (2018 ed.).

Ed. Note: Ninth Circuit case law is unclear regarding whether a petitioner may need to prove that he was diligent after the extraordinary circumstance ended. In *Gibbs*, 767 F.3d at 879, the court adopted a "stop clock" approach for equitable tolling of claims. Under a pure stop-clock approach, "[t]here is no need to show diligence after the extraordinary circumstances have ended." *Luna v. Kernan*, 784 F.3d 640, 651 (9th Cir. 2015). But in *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003), the court stated that a petitioner is required to show diligence through the time of filing, even after the extraordinary circumstance dissolved. And more recently, the Ninth Circuit stated that "[o]rdinarily, a petitioner must act with reasonable diligence both before and after receiving delayed notice that the state denied his habeas petition." *Fue v. Biter*, 842 F.3d 650, 656 (9th Cir. 2016) (en banc) (citation omitted). Thus, under current Ninth Circuit law, a federal court must "apply both the diligence-through-filing requirement imposed by

Spitsyn and the stop-clock approach adopted in *Gibbs*." *Luna*, 784 F.3d at 651-52. The court in *Grant* did not need to resolve the question because the petitioner was diligent after the extraordinary circumstance had ended. *Grant*, 862 F.3d at 924-25 ("Although there is considerable confusion in our case law regarding whether a petitioner may need to prove that he was diligent after an extraordinary circumstance has ended, we need not resolve that question in this case because it is obvious that Grant was diligent after the extraordinary circumstance had ended").

SECOND AND SUCCESSIVE PETITIONS

Chapter 27 of Postconviction Remedies
Chapter 11 of the Federal Habeas Manual
Chapter Nine of Introduction to Habeas Corpus

***Synopsis*: Petitioner made a prima facie showing that his intellectual deficiency claim was "previously unavailable" to him, even though *Atkins v. Virginia* was decided nearly two years before petitioner filed his first petition; at that time, petitioner believed his IQ score was above the benchmark for the subaverage intellectual functioning prong of *Atkins* claim, and it was not until years later that evidence came to light indicating his IQ was below benchmark.**

Petitioner sought permission to file a second or successive petition to allege a claim under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), on the ground that the decision fell within the "new rule" provision of 28 U.S.C. § 2244(b)(2)(A). (The Court in *Atkins* ruled that the execution of a mentally retarded criminal constitutes cruel and unusual punishment prohibited by the Eighth Amendment.)

To satisfy § 2244(b)(2)(A), petitioner was required to make a prima facie showing that: (1) his *Atkins* claim was not "presented in a prior application"; (2) his *Atkins* claim relied "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; and (3) his *Atkins* claim had merit. 28 U.S.C. § 2244(b)(2)(A).

It was undisputed that the *Atkins* claim was not presented in petitioner's prior federal habeas petition; thus, the first requirement was satisfied. And with regard to the second requirement, it was undisputed that *Atkins* created a new rule of constitutional law made retroactive by the Supreme Court; what was disputed was whether the *Atkins* claim was "previously unavailable." *Atkins* was decided on June 20, 2002, and petitioner filed his federal petition on April 2, 2004, nearly two years later.

Petitioner argued that two circumstances rendered *Atkins* practically unavailable. The first was that the Flynn Effect was not considered by courts until at least 2005. (The Flynn Effect "is a phenomenon positing that, over time, standardized IQ test scores tend to increase with the age of the test without a corresponding increase in actual intelligence in the general population." *Wiley v. Epps*, 625 F.3d 199, 203 n.1 (5th Cir. 2010).) Second, petitioner argued that it was not until after he filed his second state habeas petition in 2008 that the State disclosed other evidence in its possession suggesting that petitioner's true IQ was at most 73, well within the *Atkins* range. *See Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, 1995, 88 L.Ed.2d 1007 (2014) (instructing that where an IQ score is close to, but above, 70, courts must account for the test's "standard error of measurement").

The court concluded that, "[a]t this preliminary stage," petitioner made a sufficient showing that *Atkins* was previously unavailable at the time of his first petition and its disposition. *In re Cathey*, 857 F.3d 221, 230 (5th Cir. 2017) (per curiam). At that time, petitioner believed his IQ score to be above the benchmark for the subaverage intellectual functioning prong of an *Atkins* claim—even accounting for a five-point margin of error—and it was not until years later that evidence came

to light indicating petitioner's IQ was below the benchmark. *Id.*

The court also found that petitioner satisfied the third and final requirement—that the *Atkins* claim had merit. Petitioner made a prima facie showing of intellectual-functioning deficits. Although petitioner's IQ was higher than the *Atkins* benchmark, the court observed that IQ scores are susceptible to inflation, and other documents indicated that petitioner's IQ was lower than his score indicated. Petitioner also made a prima facie showing of adaptive deficits, presenting evidence suggesting difficulties with language, relationships, and keeping steady work. Lastly, petitioner showed that the onset of deficits occurred prior to age 18. *In re Cathey*, 857 F.3d at 234-40.

The court cautioned that, although petitioner made a prima facie showing that his successive petition satisfied § 2244(b)(2)(A), the authorization to file a successive petition was "tentative" and was to be followed by the district court's "thorough review." In addition, the court pointed out that the district court would also have to determine the timeliness of the *Atkins* claim. *In re Cathey*, 857 F.3d at 240-41; *see* Brian R. Means, *Postconviction Remedies*, § 27:6 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 11:38 (West 2017 ed.); Brian R. Means, Introduction to Habeas Corpus, Chapter Nine (2018 ed.).

Laws too gentle, are seldom obeyed; too severe, seldom executed.

— Benjamin Franklin (1706-1790)

INEFFECTIVE ASSISTANCE OF COUNSEL

Chapter 35 of Postconviction Remedies

***Synopsis*: A defendant is not required to show good cause for the dismissal of retained counsel, even if he intends to request appointed counsel, and the erroneous denial of a motion to substitute retained counsel with appointed counsel constitutes structural error.**

While represented by competent retained counsel in a federal criminal prosecution, petitioner sent a pro se letter to the district court requesting the appointment of a "panel" attorney. The court received the letter on April 11, 2006. Petitioner did not express concerns about counsel's competence or performance, but instead complained about the "financial cost" of having retained counsel. The court clerk "rejected' the pro se letter for filing and returned it to counsel for failure to comply with the district court's local rules, evidently without the district court's knowledge.

The local rules prohibited a party from writing or communicating with a judge "unless opposing counsel is present," and required all matters to be called to a judge's attention "by appropriate application or motion." The rules also prohibited a represented party from acting pro se. The court clerk sent a notice of discrepancy to counsel informing him that the filing had been rejected, along with a copy of the letter.

The record indicated that counsel discussed the matter with petitioner. In the three months that followed, neither petitioner nor counsel raised the issue. On July 25 and 31, 2006, petitioner wrote two additional letters to the district judge asking for an in camera hearing to seek the appointment of new counsel. The court promptly scheduled a hearing. After addressing petitioner's concerns, the district judge denied the motion on the ground that it was filed on the eve of trial and, therefore, was untimely. Following his conviction, petitioner

argued on appeal that the district court abused its discretion when it failed to inquire into his April letter to replace his retained attorney with court-appointed counsel.

The Ninth Circuit agreed, holding that the trial judge had a duty to inquire into the problems between petitioner and counsel when they were first raised. The petitioner's "failure to submit his letter through the very counsel he was hoping to discharge, [did] not negate the court's duty." The court rejected the government's argument that the district judge was not required to address petitioner's request because it was not filed in compliance with local rules that prohibited litigants who are represented by counsel from acting pro se and from communicating with the judge via letters or phone calls. The court explained that when the clerk's office rejected petitioner's letter, it made no mention of these local rules or the reason for the rejection. Had such an explanation been given to petitioner, the court stated, petitioner would have been in a position to properly comply with the local rules: he could have requested that his counsel file a motion asking to withdraw, a motion which counsel would have been ethically obligated to file or, alternatively, he could have filed another letter explaining why he was unable to comply with the rules. "Because no explanation was provided, [petitioner] was not given notice as to how he could properly present his request for new counsel, and as such, the local rules served to arbitrarily deny [petitioner's] constitutional rights."

Moreover, the record demonstrated that the substitution of counsel would not have "caused significant delay" or impeded the "fair, efficient and orderly administration of justice." The district court received petitioner's April 2006 letter four months prior to the start of trial, and petitioner specifically stated that he did not want to delay the trial. In light of the "defects in the district court's handling of [petitioner's] requests," the court vacated petitioner's conviction and remanded for a new trial. *U.S. v. Yepiz,* 844 F.3d 1070, 1080 (9th Cir. 2016).

Judge Nguyen dissented. She rejected the majority's conclusion that petitioner had not been adequately advised of why his April letter had been rejected, pointing to a docket entry that stated that the letter was rejected on the ground that a local rule stated that parties were not to write letters to any judge. Petitioner's counsel, she added, was expected to know of this rule, and he certainly would have known that he was required to serve motions on the government. The court should presume, in Judge Nguyen's view, that counsel would have received notice of the letter's rejection and filed a withdrawal motion if petitioner had remained intent on firing him.

Judge Nguyen also disagreed with the majority's conclusion that when a district court erroneously denies a motion to substitute retained counsel with appointed counsel, it commits structural error. She explained that the Sixth Amendment's right to counsel encompasses two distinct rights: a right to adequate representation and a right to choose one's own counsel. A violation of the right to effective representation requires a showing of prejudice. On the other hand, the improper denial of the right to select one's own counsel constitutes structural error. Petitioner did not seek to retain a particular lawyer. Rather, he asked the district court to appoint counsel. Because his request was not grounded in the right to counsel of choice, but rather in the right to the effective assistance of counsel, a showing of prejudice was required.

Judge Nguyen recognized that the circuit court in *U.S. v. Brown*, 785 F.3d 1337 (9th Cir. 2015), had ruled that the erroneous denial of a motion to substitute retained counsel with appointed counsel was structural error, requiring reversal even absent a showing of prejudice. (The court in *Brown* concluded that there were really two issues. The first was whether a defendant may discharge the attorney whom he had retained, which implicated the Sixth Amendment right to counsel of choice.

The second involved the defendant's request for appointment of counsel. *Brown* concluded that because the first issue involved a right that if violated requires automatic reversal, the ultimate decision was also subject to automatic reversal if erroneous. *See also U.S. v. Rivera-Corona*, 618 F.3d 976 (9th Cir. 2010).) But Judge Nguyen opined that the court in *Brown* had conflated two distinct rights—the right to counsel of choice and the right to effective counsel—thereby forging structural error from harmless mistake. Instead, she stated, a court should treat motions to substitute retained counsel with appointed counsel under the standard for appointing new counsel. In any event, she added, regardless of the logic of *Brown*, it made no sense to apply it when the substitution request was, as here, for purely financial reasons. *Yepiz*, 844 F.3d at 1084 (Nguyen, J., dissenting); *compare U.S. v. Jimenez-Antunez*, 820 F.3d 1267, 1271 (11th Cir. 2016) ("We agree with those courts that have held that a defendant may discharge his retained counsel without regard to whether he will later request appointed counsel," and an error in this regard is structural) (citing cases), *with U.S. v. Mota-Santana*, 391 F.3d 42, 47 (1st Cir. 2004) (good cause standard applies to motion to replace retained counsel with substitute counsel); *see* Brian R. Means, *Postconviction Remedies*, §§ 45:3, 45:4 (West 2017 ed.).

***Synopsis*: Claim that counsel was ineffective for failing to file a motion to suppress was not barred by *Tollett v. Henderson* where evidence found during the search was critical to the prosecution's case, preventing petitioner from making an informed choice on whether to plead guilty.**

Sheriff deputies were dispatched to a residence after receiving a report of a man and woman arguing over a gun. The residence was owned by the mother of petitioner's girlfriend, Tracy. Petitioner was living in a garage on the property. As deputies approached the property, petitioner walked out and met them at the front gate. He told them that Tracy had left before the deputies arrived. Tracy's mother told deputies the same thing. Deputies then conducted what they called a "protective sweep" of petitioner's room in the garage. The deputies believed it was justified due to the report of possible domestic violence and the concern that petitioner might be hiding a victim. Although deputies did not find anyone inside, they did observe firearm ammunition. After deputies learned that petitioner had a prior felony conviction, they arrested him for being a felon in possession of ammunition. Petitioner pleaded guilty and received a six-year sentence.

Later, petitioner filed two state habeas petitions alleging that the warrantless search of his room violated the Fourth Amendment and that defense counsel provided ineffective assistance by failing to move to suppress the evidence discovered during the search. The petitions were summarily denied on the merits. Petitioner then filed a federal habeas petition, again arguing that he received ineffective assistance of counsel. The district court granted the petition and the Ninth Circuit reversed.

The state argued on appeal that petitioner's ineffective-assistance-of-counsel claim was not cognizable on federal habeas review because it rested upon an alleged constitutional violation that preceded his guilty plea. The Court in *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973), held that "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." But the Court also stated that the rule is not without exception. In that regard, a petitioner may attack the voluntary and intelligent character of a guilty plea based on pre-plea ineffective assistance of counsel "by showing that the advice he received from counsel was not within the . . . range of competence demanded of attorneys in criminal

cases." *Id.* at 267-68, 93 S.Ct. 1602 (internal quotation marks omitted).

The state maintained that *Tollett*'s "voluntary and intelligent plea" exception applies only to ineffective assistance rendered when providing incompetent advice concerning the guilty plea itself, and not to ineffective assistance rendered in other pre-plea contexts. Under this interpretation of *Tollett*, a claim that counsel provided incorrect advice about minimum and maximum sentences or parole eligibility would not be barred, but a claim, like the one brought by petitioner, that a defendant received deficient representation in connection with a pre-plea suppression motion would be barred.

The Ninth Circuit disagreed, stating that "[t]he *Tollett* exception is not as narrow as the State contends." The court explained that "*Tollett*, properly understood, provides that although freestanding constitutional claims are unavailable to habeas petitioners who plead guilty, claims of pre-plea ineffective assistance of counsel are *cognizable on federal habeas review when the action, or inaction, of counsel prevents petitioner from making an informed choice whether to plead.*" (Emphasis added.) Petitioner's ineffective assistance of counsel claim, premised upon a failure to file a motion to suppress, fell squarely within the *Tollett* exception:

> The entire case against petitioner depended on its ability to introduce into evidence the firearms and ammunition found in his room. If the deputies unconstitutionally searched [petitioner's] home, counsel's failure to move to suppress the fruits of that search prevented [petitioner] from making the informed choice to which he was entitled. Thus, petitioner's ineffective assistance of counsel claim was not barred by *Tollett*.

Turning to the merits of petitioner's claim, the Ninth Circuit concluded that trial counsel should have moved to suppress the firearms and ammunition. The court explained that "[t]here was at least a chance such a motion would have succeeded." But that was not the end of the matter. Because the state courts had adjudicated the claim on the merits, § 2254(d)(1)'s deference standard applied, and because the state courts had not explained their reasoning, the federal habeas court was "obliged to supply the reasons those courts could have had for their denials." The Ninth Circuit stated that it would have been reasonable for the state courts to have concluded that a motion to suppress, if brought, would likely have been denied. The state courts could have reasonably believed that the search was justified under the "emergency aid" exception to the warrant requirement. "It thus would not have been unreasonable for the state courts to regard the possibility of a victim inside [petitioner's] room as an exigent circumstance justifying the warrantless search of the room." *Mahrt v. Beard*, 849 F.3d 1164, 1170-72 (9th Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, §§ 6:20, 35:12 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 1:64 (West 2017 ed.).

***Synopsis*: *Martinez-Trevino* doctrine applies to Indiana defendants who seek federal habeas relief, even though Indiana did not have either a procedural system that made it impossible to effectively litigate a *Strickland* claim on direct review or an affirmative judicial directive not to do so.**

Petitioner and his co-defendant were convicted of murder in a joint trial in Indiana. Petitioner claimed that his attorney was ineffective for not insisting that the judge give a

On the Lighter Side

Send in the Clowns (or not)

Evidently, defendant Orlando Melendez had the idea that he could entertain his way out of a conviction. Orlando was charged with using a toy gun to rob a convenience store. In a pretrial motion, Melendez, who was representing himself, sought permission to juggle three paper wads at trial. Melendez said the demonstration was part of his defense to show jurors that he was just "clowning around" when he allegedly tried to rob the convenience store. Melendez wrote in his motion that the "keystone to his defense is: He's literally a clown." The motion was denied.

Poor Planning

Authorities say an Indiana man who robbed a gas station made off with food, drinks, and cigarettes. One thing he didn't steal from the gas station: gas. A state trooper arrested 33-year-old Sean Harris after finding him stranded by the side of a two-lane highway with his vehicle out of fuel. He was charged with robbery.

limiting instruction generally required when a co-defendant's out-of-court confession is introduced as evidence. The district court denied the habeas petition, finding that petitioner had procedurally defaulted this claim in failing to bring it in state-court proceedings.

In *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), as later expanded in *Trevino v. Thaler*, 569 U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), the Supreme Court addressed what constitutes "cause" to excuse a default resulting from the failure of state postconviction counsel to raise a trial-counsel-ineffectiveness claim. The Court held that "cause" to overcome a default exists if (1) the state collateral review proceeding was the "initial" review proceeding with respect to the ineffective-assistance-of-trial-counsel claim; (2) it is highly unlikely in the typical case that a defendant will have a meaningful opportunity to raise an ineffective-assistance-of-trial-counsel claim on direct appeal; (3) collateral review counsel was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), or the defendant was not represented by counsel, and (4) the claim of ineffective assistance of trial counsel was "substantial."

The Seventh Circuit held that the form of "cause" found in *Martinez*, as expanded in *Trevino,* was "available to federal habeas corpus petitioners in Indiana who have substantial claims for ineffective assistance of trial counsel that have been procedurally defaulted in state postconviction proceedings by lack of any counsel or lack of effective counsel." (The dissent maintained that, unlike *Martinez* and *Trevino*, Indiana did not have a procedural system that made it impossible to effectively litigate a *Strickland* claim on direct review or an affirmative judicial directive not to do so.)

With regard to the requirement of demonstrating that petitioner's collateral review counsel was deficient, the court stated:

> For purposes of applying *Martinez* and *Trevino*, the approach we take to claims of ineffective assistance of counsel on direct appeal provides the best available guide. Pursuit of unsuccessful arguments and claims does not show ineffective assistance of counsel. But we may compare the claims actually presented to those that might have been presented. Where counsel chose to pursue just one issue that was a virtually certain loser, . . . a petitioner may show deficient performance by showing that a much stronger claim or argument was available.

Petitioner argued that a viable claim of ineffective assistance of trial

counsel could have been premised on counsel's failure to seek a limiting instruction as to the hearsay a witness offered when testifying to his conversation with petitioner's co-defendant. In contrast, the court observed, "the one claim counsel pursued in the post-conviction petition was doomed from the beginning." Although the court offered no opinion on the ultimate question of postconviction counsel's performance, it held that "[b]y showing that another, much stronger claim was available, . . . petitioner has shown he is entitled to an evidentiary hearing on that issue."

The court then turned to the question of whether petitioner had made a substantial underlying claim for ineffective assistance of trial counsel. The court noted that the Supreme Court had not explained the substantiality standard, and that lower courts had offered "limited further guidance." The court rejected the notion that by granting a certificate of appealability it had already determined that petitioner's defaulted claim of ineffective assistance of trial counsel was substantial under *Martinez*. But guided by *Strickland*'s two-prong approach, the court concluded that petitioner had made a substantial showing of ineffectiveness by trial counsel.

The court reversed the dismissal of the petition and remanded to the district court for an evidentiary hearing on the issue of effective assistance of postconviction counsel. The court stated that if the district court found deficient performance by postconviction counsel, petitioner's default would be excused and he would be entitled to an evidentiary hearing on the merits in the district court for the underlying claim of ineffective assistance of trial counsel. *Brown v. Brown*, 847 F.3d 502, 511-16 (7th Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, § 7:12 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 1:22 (West 2017 ed).

***Synopsis*: The rule that a court has a duty to inquire into a potential conflict of interest by counsel, and that the failure to do so results in a presumption of prejudice and automatic reversal, applies only to cases involving multiple representation.**

Petitioner was convicted of various child pornography offenses. Prior to trial, petitioner became aware that defense counsel and the

My thanks to Julie Hokans for her contribution.

On the Lighter Side

Even Criminals Can Be Victims

Self-described Florida drug dealer David Blackmon called 911 to report a robbery in Fort Walton Beach. Blackmon told the responding deputy that someone entered his car and took $50 and about a quarter ounce of cocaine from the center console. The deputy spotted some cocaine and a crack rock on the console and a crack pipe on the floorboard by the driver's side door. Blackmon was arrested and charged with possession of cocaine.

"How Did You Find Me So Fast?"

Authorities had little trouble tracking down a thief who had stolen 100 GPS trackers from a Santa Clara tech firm. "The moment we realized they had a box of trackers, we went into recovery mode," said a company representative. "We notified the police and equipped them to track the devices, and in about five or six hours, it was done." The thief thought the devices were cell phone chargers that could be resold.

prosecutor were divorced and shared custody of their child. For that and numerous other reasons, petitioner asked the court to provide him with a new attorney. The district court denied the request, and petitioner ultimately decided to represent himself at trial. On appeal, petitioner argued that the district court should have inquired into his attorney's potential personal conflict of interest to determine if the relationship might have affected his right to a fair trial. The district court's failure to do so, petitioner maintained, required automatic reversal based on *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (holding that whenever a trial court improperly requires counsel to represent multiple codefendants over counsel's timely objection, reviewing courts will apply an "automatic reversal" rule).

The Tenth Circuit disagreed. The court ruled that the automatic reversal rule of *Holloway* applies only to multiple representation conflicts of interest. And because the alleged conflict did not involve multiple representation, the district court's failure to inquire into the potential conflict did not trigger the automatic reversal rule. The court explained that "a potential conflict of interest that is *not* a multiple representation conflict—regardless of whether it is raised prior to trial—does not fall under *Holloway*'s 'duty to inquire' into potential conflicts of interest." The court also ruled that there was no evidence that counsel's representation was compromised due to defense counsel's relationship with the prosecutor. In fact, the court noted, before petitioner brought his conflict of interest concern to the attention of the court, defense counsel made the court aware of his relationship with the prosecutor, and he specifically stated that it was not a conflict. *U.S. v. Williamson*, 859 F.3d 843 (10th Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, § 35:21, 35:32 n.39 (West 2017 ed.).

The law isn't justice. It's a very imperfect mechanism. If you press exactly the right buttons and are also lucky, justice may show up in the answer. A mechanism is all the law was ever intended to be.

Raymond Chandler (1888-1959) U.S. writer of detective fiction

(Continued from page 6)

record is not sent to the Justices except at their request. *See* Rule 12.7. Counsel should therefore assume that the Justices do not have the full record before them. If you believe that portions of the record are critical to disposition of the petition, you should incorporate them in the petition or include them in the Appendix.)

- Some Supreme Court practitioners believe in beginning the petition with an Introduction—at the outset of the Statement or in a stand-alone section just before it—that quickly summarizes what the case is about and why it merits the Court's review.

E. Reasons for Granting the Petition

The Reasons section will be where you make the specific arguments, discussed above, that are effective in cert petitions. Deciding the order in which to make those arguments is not always easy. When there is a direct conflict among the appropriate lower courts, that should generally go first. Likewise, a clear conflict with a Supreme Court decision should be asserted up front. Supreme

(Continued on page 17)

Court Practice states (at 485) that a trickier issue is whether "a discussion of importance or conflict in principle should precede a treatment of the merits (if they cannot be integrated)." The authors suggest that the answer "may depend upon whether the question will appear important apart from the correctness of the decision below. If not, the merits should be argued ahead of the showing of importance." There is obviously no universally right answer; each case needs to be judged independently.

The Court rules do not require the petition to include a summary of argument. It is often effective, nevertheless, to open the Reasons for Granting the Petition section with a one or two paragraph overview of the issues and the importance of the case. (This is especially true if you do not begin the petition with an Introduction.)

F. Conclusion

This section should be one line: "The petition for a writ of certiorari should be granted." This is not the place for another summary of the argument.

V. REPLY AND SUPPLEMENTAL BRIEFS

Reply Briefs

Rule 15.6 permits a petitioner to "file a reply brief addressed to new points raised in the brief in opposition." These are short documents, quickly prepared. The Rules limit them to 3,000 words; and the Court gives petitioners only 14 days to file them. Yet they often play a critical role in the certiorari process.

Except where the respondent filed an utterly ineffectual brief in opposition (which can happen if it was filed by a pro se habeas petitioner), you will want to file a reply brief. A good brief in opposition will try to explain why the conflict you alleged is not genuine; why your claims of importance are overstated; and why the lower court reached the correct conclusion. And it will often assert that the case has "vehicle" problems that would prevent the Court from reaching the questions you present. The reply brief is your chance to reframe the case. It is your chance to show that the conflict is indeed genuine; that the case is indeed important; that the lower court really did err; and that there are no genuine vehicle problems with the case.

The reply is not a place to quibble over small matters. Focus on the essentials. Where the respondent has attempted to muddy the water by raising factual and procedural problems with the case, your reply should be simple, direct, and with supporting citations. "The Court has no time to check the record and decide who is right about a factual dispute; it may deny cert simply because of the dispute unless your reply contains conclusive proof that you are right. So if the respondent says that you did not properly raise an issue below and you did, attach the relevant pleadings in the appendix." Stewart A. Baker, *A Practical Guide to Certiorari*, 33 Cath. U.L. Rev. 611, 632 (1984).

If you do not wish to file a reply brief and wish to expedite the Justices' consideration of the case, you should notify the Clerk's office as soon as possible that you are waiving the reply.

Supplemental Briefs

Rule 15.8 provides that "[a]ny party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing." Such a supplemental brief should deal exclusively with the new matter, and should follow the form for a brief in opposition.

VI. CONCLUSION

Preparing an effective petition for a writ of certiorari is a great challenge, particularly for lawyers who do not regularly practice before the U.S. Supreme Court. That said, you do not need to be a former or current member of the U.S. Solicitor General's office to write a successful cert petition. With the advice in this article, the advice in the books and articles I've cited, and a study of cert petitions filed by first-rate Supreme Court practitioners (easily found on-line), you should be on your way.

Briefly stated . . .

The Seventh Circuit held that "[a]s a general matter, a defense attorney's failure to present a material exculpatory witness of which he was aware qualifies as deficient performance." *Jones v. Calloway*, 842 F.3d 454, 464 (7th Cir. 2016); *see* Brian R. Means, *Postconviction Remedies*, § 35:4 (West 2017 ed.).

♦♦♦

The Fourth Circuit held that the state courts were objectively unreasonable in ruling that a prosecutor's references to petitioner during closing arguments were not appeals to racial prejudice that violated petitioner's due process rights. The prosecutor referred to petitioner, an African-American male, as an "old caveman," a "mountain man," a "monster," a "big old tiger," and "King Kong." The court noted that the prosecutor could have used other means to called attention to petitioner's size and strength in a race-neutral manner. *Bennett v. Stirling*, 842 F.3d 319 (4th Cir. 2016); *see* Brian R. Means, *Postconviction Remedies*, § 46:16 (West 2017 ed.).

♦♦♦

The Sixth Circuit held that petitioner satisfied the "inordinate delay" exception to the exhaustion rule where he presented his Sixth Amendment claim to the state trial court in 2002, received only a request for additional evidence from the court in June 2008, and had not heard anything further in September 2009, when a magistrate judge waived the exhaustion requirement. *Phillips v. White*, 851 F.3d 567, 576 (6th Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, § 23:21 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 9C:51. (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Nine (2018 ed.).

♦♦♦

The Fourth Circuit held that a petitioner, after being resentenced following a successful habeas petition, could challenge his underlying, undisturbed conviction in a second-in-time habeas petition. *In re Gray*, 842 F.3d 319, 143 (4th Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, § 27:10 (West 2016 ed.); Brian R. Means, *Federal Habeas Manual*, § 9A:18 (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Nine (2018 ed.).

♦♦♦

The Fifth Circuit held that the retroactivity element of the circuit's savings-clause analysis did not require the Supreme Court to have held that the new rule applies retroactively; it is sufficient, according to the court, that the § 2241 habeas petition be based on a retroactively-applicable Supreme Court decision. *Santillana v. Upton*, 846 F.3d 779, 782-83 (5th Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, § 5:7 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 1:29 (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Six (2018 ed.).

♦♦♦

The Third Circuit ruled that counsel provided ineffective assistance for failing to seek the trial judge's recuse for bias, holding that "the right to an impartial trial

extends to a bench trial, and that such right cannot be waived by a defendant." *McKernan v. Superintendent Smithfield SCI*, 849 F.3d 557, 565 (3d Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, § 1:68 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, § 8:7 (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eight (2018 ed.).

♦♦♦

The Sixth Circuit rejected petitioner's speedy trial claim on the ground that petitioner was not prejudiced by a 25-month delay between the date of his arrest and the date of trial, even though allegedly exculpatory audio recordings were lost during the delay and two of four of the state's witnesses suffered partial memory lapses. The court stated that overwhelming evidence, including petitioner's confession, supported his conviction, lost tapes gave petitioner the ability to attack the state's otherwise air-tight case, and the inability of the state's witnesses to remember particular facts did not undermine the defense, but rather weakened the government's case. *Brown v. Romanowski*, 845 F.3d 703, 718-19 (6th Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, § 38:12 (West 2017 ed.).

♦♦♦

The Sixth Circuit held that the state was not required under *Brady v. Maryland* to disclose to the defendant evidence that it intended to pay a testifying witness for her federal testimony, absent a showing that the witness actually knew before she testified that she would receive the money. *Thomas v. U.S.*, 849 F.3d 669, 680 (6th Cir. 2017); *but see Thomas v. Westbrook,* 849 F.3d 659, 663-65 (6th Cir. 2017) (prosecutor violated *Brady* in failing to disclose witness's receipt of $750 from the FBI for assistance where the witness provided the only credible evidence linking petitioner to the crime); *see* Brian R. Means, *Postconviction Remedies*, § 36:9 (West 2017 ed.).

♦♦♦

The Fifth Circuit held that petitioner was not entitled to a delayed trigger date for commencement of the one-year AEDPA limitations period based on the discovery of new facts under 28 U.S.C. § 2255(f)(4), namely, his attorney's failure to timely appeal. The court ruled that, even assuming abandonment by counsel, petitioner failed to act with reasonable diligence to determine whether counsel had filed a notice of appeal. The court pointed out that petitioner only alleged to the district court that he had told counsel of his desire to prosecute an appeal and that counsel had replied that he would talk about it with him (but never did), and petitioner waited until almost one year and three months after the period for filing a notice of appeal had expired before sending a letter to the district court requesting documents. *U.S. v. Rodriguez*, 858 F.3d 960, 962-64 (5th Cir. 2017); *see* Brian R. Means, *Postconviction Remedies*, §§ 25:18, 25:36, 25:39 (West 2017 ed.); Brian R. Means, *Federal Habeas Manual*, §§ 9A:33, 9A:86, 9A:105 (West 2017 ed.); Brian R. Means, *Introduction to Habeas Corpus*, Chapter Eleven (2018 ed.).

UNITED STATES SUPREME COURT GRANTS OF CERTIORARI

Dan Schweitzer, Supreme Court Counsel, NAAG
Washington, D.C.

McCoy v. Louisiana, 16-8255. The Court will decide whether it is constitutional for defense counsel, in a capital case, to concede a defendant's guilt over the defendant's express objection. Petitioner Robert McCoy was tried for murdering his estranged wife's son, mother, and stepfather. In light of the overwhelming evidence against McCoy, his retained defense counsel conceded during his opening and closing statements that McCoy killed the victims and was guilty of second-degree murder. Counsel hoped to maintain his credibility with the jury in the penalty phase and thereby spare McCoy the death penalty. McCoy, however, disagreed with that strategy and declared his innocence. Rejecting his counsel's advice, McCoy testified at trial that he was innocent (all the evidence against him was the product of a conspiracy among law enforcement and others) and had an alibi for the murders. Counsel explained his ethical dilemma to the judge, who refused to let him withdraw and allowed McCoy to testify even though counsel believed McCoy was committing perjury. The jury convicted McCoy of first-degree murder and sentenced him to death. The Louisiana Supreme Court upheld his convictions and sentence after ruling against McCoy's claims regarding his counsel's concession of guilt. 218 So. 3d 535.

The Louisiana Supreme Court held that trial counsel does not have to "adopt a capital client's unsupportable trial strategy at the guilt phase, particularly when the assertion of such a defense would involve perjured testimony." The court concluded that McCoy's ineffective-assistance-of-counsel claim should be assessed under *Strickland v. Washington*, 466 U.S. 668 (1984), and that it failed that test because counsel did not perform deficiently. In the court's view, conceding guilt in the hope of saving a defendant's life was a reasonable trial strategy and did not create a conflict of interest between counsel and McCoy. The Louisiana Supreme Court also relied on *Florida v. Nixon*, 543 U.S. 175 (2004), which held that counsel may concede guilt for that reason where the defendant "never verbally approved or protested [counsel's] proposed strategy." McCoy argues that *United States v. Cronic*, 466 U.S. 648 (1984)—which holds that prejudice is presumed when counsel "completely abdicate[s] the defendant's defense"—applies here. In his view, "[t]he choice to use the tool of counsel to assist one's defense does not and was never intended to extinguish the more fundamental personal right to make a defense, even if counsel advises that making a defense is a bad idea." And although counsel does not need "the defendant's consent prior to each tactical decision," that does not mean that counsel may override a defendant's instructions on a matter of such importance. McCoy also distinguishes *Florida v. Nixon* as not involving a client who expressly objected to the concession.

Answer to **Test Your Logic Skills** from page 5.

There were only three people: the son, his father, and his grandfather.

Kuddos to Venice F. Cadwallader, a senior staff attorney for the U.S. District Court, for discovering that the answer to last edition's puzzle was wrong. My apologies.