STATE POST CONVICTION HANDBOOK

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I. MESSAGE FROM THE AUTHOR

This handbook is intended for the benefit of clients who are facing prosecution or who have been prosecuted in a Pennsylvania State Court ["PSC"]. It is not offered as legal advice and is not a substitute for the advice of counsel in an individual case.

II. THE CHARGING INSTRUMENT

The Fourteenth Amendment to the Constitution of the United States applies to the States and guarantees a minimum level of procedural and substantive due process, which includes notice and opportunity to be heard. Unfortunately, the Fourteenth Amendment does not guarantee prosecution by indictment, and neither does the Pennsylvania Constitution. In Pennsylvania, a prosecution usually begins with a complaint followed by an information. Rule 560, PA Rules of Criminal Procedure. Regardless of the label attached to the charging instrument, there must be a properly executed charging instrument or the conviction is not valid. The charging instrument is subject to amendment to correct a defect in form. However, the amendment may not charge a new or different offense because the accused has the right to be informed of the nature of the charge. Rule 564, PA Rules of Criminal Procedure.

III. PRETRIAL MOTIONS

A. DISCOVERY

Before commencement of trial or before the entry of a guilty plea, there is a limited right to pretrial discovery and inspection pursuant to Rule 573, PA Rules of Criminal Procedure and pursuant to ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)["Brady"][Prosecution must produce evidence favorable to the defense] and ***Giglio v. United States***, 405 U.S. 150, 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972)[State must disclose promises or understandings made to its witnesses].The State has a continuing obligation to disclose ***Brady/Giglio*** material, which includes information of any kind or description that could be used by a skilled defense attorney to put the case in a different light. This obligation includes production of any promise, understanding, or possible understanding made to any prosecution witness. This obligation cannot be forfeited or waived.

B. SPEEDY TRIAL RIGHTS

Pennsylvania guarantees the right to a speedy and public trial held within 180 days of the date the complaint is filed if the accused is incarcerated. If the accused is on bail, trial must begin no later than 365 days from the date the complaint is filed. Rule 600, PA Rules of Criminal Procedure. There are numerous exceptions and exclusions which are beyond the scope of this booklet.

C. SUPPRESSION

Occasionally, law enforcement officers obtain information in violation of the constitutional rights of the accused. Article I, Section 8 of the Pennsylvania Constitution protects privacy and it provides more protection than federal law, which provides the floor for constitutional rights. Even so, you must have an interest in the property searched or the property seized, and the interest must be one the society is willing to recognize. For example, a person has the right to suppression of contraband found in his car, but not contraband found in a stolen car. It is important to remember that unlike federal law Pennsylvania does not recognize a good faith exception to an illegal search and/or seizure.

(1) THE FOURTEENTH AMENDMENT AND MIRANDA PROTECT THE FIFTH AMENDMENT RIGHT NOT TO MAKE INCRIMINATING STATEMENTS THAT CAN BE USED IN COURT AS A BASIS FOR CONVICTION

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) requires that, before custodial questioning, the suspect must be informed that he has the right to remain silent, that any statement he makes can be used against him, that he has the right to the presence of an attorney, either retained or appointed. ***Id.*** at 455. ***Miranda*** warnings are constitutionally required to counterbalance the compelling pressures inherent in a custodial police interrogation and to permit full opportunity to exercise the privilege against self-incrimination guaranteed by the Fifth Amendment. ***Miranda*** warnings are rights of constitutional magnitude. ***Dickerson v. United States***, 530 U.S. 428, 440, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). Statements obtained in violation of ***Miranda*** are inadmissible at trial even if they are voluntary. ***Michigan v. Mosley***, 423 U.S. 96, 100, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). If the accused files a motion to suppress alleging the statements were involuntary, the State has the burden of proving, by a preponderance of the evidence, that the accused was properly advised of his ***Miranda*** rights, and that the accused knowingly, intelligently and voluntarily waived the ***Miranda*** rights. ***Colorado v. Connelly***, 479 U.S. 157, 169, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). "A defendant may waive his ***Miranda*** rights if the waiver is made knowingly, intelligently and voluntarily." ***United States v. Pruden***, 398 F3d 241, 246 (3d Cir. 2005). To determine whether the waiver was knowing, intelligent and voluntary, the State must prove two factors:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. ***Moran v. Burbine***, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

A defendant who seeks to suppress evidence has the initial burden of proof. ***United States v. Johnson***, 63 F3d 242, 245 (3d Cir. 1995). An assertion of coercion is insufficient to justify suppression. Rather, the reviewing court will examine the totality of the circumstances. ***United States v. Jacobs***, 431 F3d 99, 112 (3d Cir. 2004).

(2) THE FOURTH AMENDMENT PROTECTS THE RIGHT NOT TO HAVE HOME OR CAR SEARCHED WITHOUT A WARRANT

If the State obtains evidence as a result of the search of a home, motor vehicle or person without a warrant, the accused can file a motion to suppress physical evidence obtained in violation of the Fourth Amendment right not to be subjected to unreasonable searches and seizures, and Article I, Section 8 of the Pennsylvania Constitution. Searches and seizures conducted without a search warrant are presumptively unreasonable. There are, however, specific exceptions to the warrant requirement including "consent." The exceptions are evaluated for "reasonableness" on a case by case basis and are beyond the scope of this booklet.

In addition to suppression of the evidence obtained as a result of an unreasonable search, the defense can move for the suppression of the fruit of the poisonous tree. ***Wong Sun v. United States***, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963). Fruit of the poisonous tree includes physical evidence, a confession, or the testimony of a witness discovered as a result of an illegal search. See id. ***Oregon v. Elstad***, 470 U.S. 298, 305-06, 84 L.Ed.2d 222, 105 S.Ct. 1285 (1985)[noting the "fruit of the poisonous tree" doctrine is derived from ***Wong Sun***, where "the Court held that evidence and witnesses discovered as a result of a search in violation of the Fourth Amendment must be excluded from evidence."].

IV. THE TRIAL PROCESS

The Sixth Amendment guarantees the following rights: (1) the right to confront prosecution witnesses, (2) the right to call witnesses for the defense, (3) the right to reasonably effective assistance of counsel, and (4) the right to effective assistance of counsel free from interference by the prosecution. The right to reasonably effective assistance of counsel does not attach until the State has filed a charging instrument.

At trial, the Sixth Amendment guarantees the right to a fair and impartial jury consisting of twelve members of the community chosen at random. Conviction or acquittal requires a unanimous verdict of guilty or not guilty.

The State is required to prove each element of the offense beyond a reasonable doubt. ***In Re Winship***, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This standard requires the jury to be convinced of each element of the offense to a subjective state of "near certainty."

If the affirmative defense of entrapment is asserted, the defense must produce some proof of two elements: (1) inducement by the government; and (2) lack of predisposition. If the defense produces some evidence of both elements, the government then must prove a lack of inducement or predisposition beyond a reasonable doubt. ***United States v. Wright***, 921 F2d 42, 44 (3d Cir. 1990).

V. THE GUILTY PLEA

Many State cases are resolved by a plea agreement. Pursuant to the plea agreement, the accused agrees to settle the case with a guilty plea and the State offers something of value in return ("consideration"). A plea agreement is a special form of contract which must be supported by consideration. Sometimes, as consideration, the State agrees to drop counts or reduce the charges. Sometimes, the State agrees that a sentence will run concurrent with a federal sentence. The plea agreement is a special form of contract because it involves a waiver of valuable constitutional rights. When the accused enters a guilty plea, it constitutes a knowing, intentional and voluntary admission of facts sufficient to establish the elements of the criminal offense(s) charged in the charging instrument, and it waives (gives up) all non-jurisdictional defenses including, but not limited to, claims that the evidence was obtained in violation of the Fourth Amendment right against unreasonable searches or seizures, the Fifth Amendment right against compulsory self-incrimination, and the Sixth Amendment right to a speedy trial, and the right to call defense witnesses. The entry of a guilty plea waives (gives up) all pretrial defenses unless specifically preserved in a written plea agreement. The entry of a guilty plea does not waive the right to appeal or file a state post conviction motion or petition unless the accused specifically waives those rights in a written plea agreement. The entry of a guilty plea does not waive the Sixth Amendment right to effective assistance of counsel in connection with the negotiation of the plea agreement. The entry of a guilty plea does not waive the claim that the plea was not knowing, intelligent, and voluntary. For example, an accused under the influence of drugs at the time of the plea cannot enter a knowing, intelligent and voluntary plea. An incompetent person cannot plead guilty knowingly, intelligently and voluntarily.

VI. SENTENCING PROCEDURES

Post-conviction begins with the imposition of sentence. A criminal defendant should be represented by an attorney familiar with post-conviction practice.

Apprendi vs. New Jersey, 530 U.S. 466, 490,120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) held:

> other than the fact of a prior conviction, any fact that increases
> the penalty for a crime beyond the prescribed statutory maximum
> must be submitted to a jury and proved beyond a reasonable doubt.

Alleyne v. United States, 570 U.S.___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) held that the facts necessary to impose a mandatory minimum sentence must be alleged in the indictment, charged to the jury, and found by the jury beyond a reasonable doubt. For example, if the Government wants the judge to impose a mandatory minimum sentence of ten years for distribution of cocaine under 21 USC 841(a)(1)(A), the indictment must charge more than 5 kilograms of cocaine, the judge must charge the jury that it must find five kilograms, and the jury must return a verdict finding the offense involves 5 kilograms or more of cocaine.

A sentence above the statutory maximum is an illegal sentence.

Except for juveniles, in Pennsylvania, convictions for first and second degree murder carry an automatic life sentence without parole. All other offenses are subject to sentencing guidelines.

Commonwealth v. Yuhasz, 592 PA 120, 923 A2d 1111 (2007) states that Pennsylvania has a "guided sentencing system" requiring the judge to consider the guidelines promulgated by the Pennsylvania Commission on Sentencing in choosing a minimum sentence. The Legislature has provided that:

> The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission of (sic) Sentencing and take effect pursuant to section 2155 (relating to publication of guidelines for sentencing). In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing pursuant to Section 2154 (relating to adoption of guidelines for sentencing) and made effective pursuant to section 2155 the court shall provide a contemporaneous written statement of the reasons for the deviation from the guidelines. Failure to comply shall be grounds for vacating the sentence and resentencing the defendant. 42 PACSA 9721(b).
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> The Sentencing Guidelines, located at 204 PA Code 303 et seq., recommend ranges of minimum sentences based on the type of offense, the defendant's prior criminal history, and a variety of aggravating and mitigating factors. The standard recommended minimum sentence is determined by the intersection of the defendant's prior record score and the offense gravity score on the Basic Sentencing Matrix. 204 PA Code 303.16. The Guidelines further recommend that if the court determines that aggravating or mitigating circumstances are present, it may impose a sentence that is a specified amount of time greater than the upper limit of the standard range or less than the lower limit of the standard range. 204 PA Code 303.13.
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> It is well established that the Sentencing Guidelines are purely advisory in nature.

Commonwealth v. Mouzon, 571 PA 419, 812 A2d 617 (PA 2002) states that "Under the Pennsylvania Sentencing Code, 42 PACSA 9701 et seq., the sentencing court must "follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court must also consider the statutory Sentencing Guidelines, which were promulgated in order to address the problems associated with disparity in sentencing. See Id. 42 PACSA 2151-2155 (governing

creation and adoption of the Sentencing Guidelines)." The Legislative history indicates the Sentencing Guidelines were promulgated "in order to structure the trial court's exercise of its sentencing power and to address disparate sentencing." Id at 571 PA 425.

Commonwealth v. Kozarian, 566 A2d 304 (PA Super. 1989) states that a sentence based on a miscalculation of the sentencing guidelines is reversible error.

Pennsylvania courts impose a minimum sentence and a maximum. Pennsylvania has a parole system for those that are eligible at the minimum date.

VII. APPEAL: DIRECT REVIEW OF JUDGMENT OF CONVICTION AND SENTENCE

A. THE APPELLATE PROCESS

Following imposition of sentence, the accused has the right to file post verdict motion within ten days of imposition of sentence, and a right to file a direct appeal within thirty (30) days of imposition of sentence or denial of post trial motions, whichever is later. The direct appeal is restricted to errors of law that appear in the trial record and have been preserved by appropriate and timely objection. The appellate court will not consider an error of law not supported by the trial record. The appellate court will not consider an issue not adequately supported by facts, argument, and case law. The deadline for filing the notice of appeal is thirty (30) days from the date of imposition of sentence or date of denial of post trial motions, whichever is later. The deadline is jurisdictional, which means that if the deadline is missed, the right to appeal is lost unless the right is restored via PCRA petition. If the notice of appeal is filed on time, the trial judge will order counsel to file a statement of matters complained of on appeal ("SOMCA"). The accused, now called the "Appellant," files the statement which must present all of the claims and issues that will be raised in Appellant's Initial Brief. The Initial Brief identifies the issues supported by facts, argument and case law. Any misstep in the procedures results in a procedural default. Thirty days later, the State files a reply brief. Fourteen days later, the Appellant files a brief responding to the State's reply brief. After briefing, a panel consisting of three judges is assigned to the case.

A criminal defendant is entitled to a fair trial but is not entitled to a perfect trial. As such, few trials (if any) are free of error. The PA Superior Court applies a harmless error standard of review to an error of law presented on appeal. A legal error noticed and preserved by appropriate and timely objection is subject to de novo or plenary review, which means the appellate court will reverse the conviction and/or the sentence if it if finds that the trial judge made an error of law, and also finds a reasonable probability the error had an effect on the verdict or the sentence. A legal error not preserved by appropriate and timely objection is considered waived or defaulted.

If the Superior Court affirms the conviction and sentence (denies the appeal), the Appellant may file a petition for allowance of appeal with the PA Supreme Court within thirty (30) days of the date the Superior Court affirms. The issues raised on appeal to Superior Court are deemed exhausted even if the petitioner elects not to file a petition for allowance of appeal.

VIII. THE PETITION FOR CERTIORARI

If the PA Supreme Court affirms the judgment of conviction and sentence (denies the appeal), the Appellant has the right to file a petition for certiorari with the United States Supreme Court. The deadline for filing the petition for certiorari is ninety (90) days from the date the PA Supreme Court denied the petition for allowance of appeal. If not petition for allowance of appeal was filed, the deadline for filing the petition for certiorari is 90 days from the date the Superior Court affirmed the conviction and sentence.

When the United State Supreme Court denies the petition for certiorari, or the time for filing the petition has expired, direct review comes to an end. ***Clay vs. United States,*** 537 U.S. 522, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003).

IX. THE PENNSYLVANIA POST CONVICTION RELIEF ACT: COLLATERAL REVIEW OF A CONVICTION IN STATE COURT

A. THE PCRA PETITION

With limited exceptions, Pennsylvania regards applications for post conviction relief as petitions under the Pennsylvania Post Conviction Relief Act regardless of how they are labeled. 42 PACSA 9541 et seq. ["PCRA"]. The PCRA petition must be filed within one year of the date the conviction becomes final with the conclusion of the direct review process described above. The deadline for filing the PCRA petition is subject to statutory exceptions, including government interference, and newly discovered evidence. The most often cited exceptions include the suppression of information material to the defense, failure to disclose benefits offered to induce testimony, newly discovered evidence, and recantation testimony. New evidence must be presented within sixty (60) days after discovery. All exceptions are construed narrowly.

The PCRA petition is the statutory replacement for habeas corpus and other common law writs. This means that it is the procedure to raise claims of ineffective assistance of counsel, prosecutorial misconduct, interference with the right to counsel, new evidence of actual, factual innocence. To justify a hearing, the allegations in a PCRA petition must be sufficiently definite, specific, detailed, and non-conjectural. The allegations must be so substantial that if true they would justify the relief requested.

Brady/Giglio violations cannot be waived or defaulted. If the errors are presented to the State court system but left uncorrected, it is likely they will be corrected at the federal level.

B. THE APPEAL OF THE DENIAL OF A PCRA PETITION

If the PCRA petition is denied, the petitioner must appeal the denial to the PA Superior Court within thirty (30) days of the date of the order denying the petition. An appeal must be filed to exhaust state court remedies. The claims must be "fairly presented" which means the claims must be presented in a way that alerts the State court to the federal nature of the claims and issues presented.

C. COLLATERAL REVIEW IN THE STATE SUPREME COURT

Collateral review in the PA Supreme Court may be requested but is not necessary to exhaust state remedies.

X. POST CONVICTION: COLLATERAL REVIEW OF A STATE CONVICTION IN THE UNITED STATES DISTRICT COURT

A. THE 2254 PETITION FOR HABEAS CORPUS

A State prisoner must fairly present federal issues to the State Court in a federal format, and demand a hearing where the facts alleged, if true, would justify the relief sought. The federal courts will not consider issues that have not been fairly presented to the State Court in a federal format. ***Daye v. Attorney General***, 696 F2d 186, 190-192 (2d Cir. 1982)(en banc). The federal court will not consider a mixed petition consisting of exhausted and unexhausted claims. ***Rose v. Lundy***, 459 U.S. 509, 519-520, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The federal courts will not grant an evidentiary hearing unless the federal issues were presented to the State Court and not addressed, or not adequately addressed.

1. DEADLINE FOR FILING FEDERAL HABEAS CORPUS PETITION

The federal system has relegated itself to the limited role of correcting extreme malfunctions of the State judicial process. Even so, the federal system continues to play an important role because there are so many extreme malfunctions of the State judicial process that the State chooses not to correct.

28 U.S.C. 2241(d)(1) reads, in pertinent part, as follows:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment of conviction became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing the application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

> (2) The time during which a properly filed application for State post conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

CAUTION: The AEDPA time clock operates like the game clock in a football or basketball game. The clock for calculating the one year time limit starts the day the conviction becomes final with the conclusion of direct review. The clock stops when a timely PCRA post conviction petition is filed. The clock restarts but does not reset when the PCRA post conviction petition is no longer pending and all State appeals have been exhausted. The petition for certiorari is not considered part of the State appeals process and will not stop the clock. It is essential to correctly calculate the deadline for filing the habeas corpus petition.

The AEDPA deadline is subject to "equitable tolling." ***Holland v. Florida***, 130 S.Ct. 2549, 177 L.Ed.2d 130 (6/14/2010) held that there is a rebuttable presumption in favor of equitable tolling. ***Id.*** at 2560. The strength of the presumption is reinforced by the fact that traditional equitable principles have always governed habeas corpus law. ***Id.*** at 2560. "AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home." ***Id.*** at 2560. The Court stated that the courts should take a flexible approach to equitable tolling to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute rules, which, if strictly applied, threaten "the evils of archaic rigidity." ***Id.*** at 2560. The diligence required for equitable tolling is "reasonable diligence" for a prisoner not "maximum possible diligence."

The AEDPA deadline is subject to an "equitable exception" for actual innocence. The doctrine of procedural default does not bar a claim of actual innocence.

First, the AEDPA time bar does not apply to a gateway claim of actual innocence nor does it apply to a free standing claim of actual innocence. ***McQuiggin v. Perkins***, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013).

Second, all procedural defaults are excused for gateway claims of actual innocence. See, for example, ***Wright v. Superintendent, SCI Somerset***, 601 Fed. Appx. 115, note 15 (3d Cir. 2015) which states:

> The appellees argue that, if Wright's actual innocence claim is not entitled to AEDPA deference, then Wright has not properly exhausted his actual innocence claim. This argument is unavailing. Even if Wright "did not fairly present his actual innocence claim to the state courts in a manner that put them on notice that a federal claim was being asserted, ***Rainey v. Varner***, 603 F3d 189, 198 (3d Cir. 2010), ***Bronstein v. Horn***, 404 F3d 700, 725 (3d Cir. 2005), that procedural default would be excused if Wright had a meritorious actual innocence claim. See ***Mize v. Hall***, 532 F3d 1184, 1195 n. 9 (11th Cir. 2009)["If a petitioner in fact has a freestanding claim of actual innocence, he would be entitled to have all of his procedural defaults excused as a matter of course under the fundamental miscarriage of justice exception."]

Third, the presumption of correctness normally attached to the State court's conclusions does not apply where, as here, the State courts have not ruled on the federal claims. See, for example, ***Lee v. Glunt***, 667 F3d 397 (3d Cir. 2012)[remanded for discovery and evidentiary hearing on claim that newly discovered expert testimony about arson science rendered testimony of State's arson experts unreliable and denied due process].

So you might ask what is required to state a viable claim of actual innocence.

Schlup v. Delo, 513 U.S. 298, 331, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) states that analysis of a gateway claim of actual innocence requires the reviewing court to consider all of the new evidence, and make credibility determinations regarding the old evidence. **A showing of actual innocence is not insufficient merely because the trial record contains sufficient evidence to support the jury's verdict**. An evidentiary hearing is generally required when the new evidence requires the habeas court to make credibility determinations. In stark contrast, the test for sufficiency of the evidence requires the reviewing court to accept the facts in the light most favorable to the State and assume that all State witnesses were truthful.

House v. Bell, 547 U.S. 518, 538, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) reiterates that a gateway claim of actual innocence requires the habeas court to consider all of the evidence--the new and the old, the incriminating and the exculpatory without regard to its admissibility. The habeas court then based on the total enhanced record makes a "probablistic determination about what reasonable, properly instructed jurors would do." ***Id.*** (quoting ***Schlup***, 513 U.S. at 329). This standard does not require absolute certainty about the petitioner's guilt or innocence.

> A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt--or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt. ***House***, 547 U.S. at 538

House, supra reiterates that analysis of a gateway claim of actual innocence is completely different from analysis for sufficiency of the evidence. Sufficiency of the evidence claims require the reviewing court to take the facts in the light most favorable to the government as the verdict winner and assume the government's witnesses testified truthfully. In stark contrast, gateway claims of actual innocence require the habeas court to reweigh the evidence, and consider how the new evidence affects the credibility of the witnesses who provided the old evidence.

2. STANDARDS FOR OBTAINING FEDERAL HABEAS CORPUS

28 U.S.C. 2254(d) set the following standards for granting federal habeas corpus.

An application for a writ of habeas corpus on behalf of a prisoner in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A State court's decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in Supreme Court cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from this precedent." ***Mitchell v. Esparza***, 540 U.S. 12, 15-16, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003)(per curiam)(quoting ***Williams v. Taylor***, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 1519-20, 146 L.Ed.2d 389 (2000); see also ***Bell v. Cone***, 535 U.S. 685, 694, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002); see also ***Fountain v. Kyler***, 420 F3d 267, 273 (3d Cir. 2005), and ***Werts v. Vaughn***, 228 F3d 178, 196-197 (3d Cir. 2000), ***Howard v. Clark***, 608 F3d 563 (9th Cir. 2010). The "unreasonable application" prong of 2254(d)(1) permits a federal habeas court to grant the writ if the state court identifies the correct governing legal principle from the Supreme Court but unreasonably applies that principle to the facts of the petitioner's case. ***Wiggins v. Smith***, 539 U.S. 510, 520, 123 S.Ct. 2527, 2534-35, 156 L.Ed.2d 471 (2003)(quoting ***Williams***, 529 U.S. at 413, 120 S.Ct. at 1523). The "unreasonable application" test is met "only if the state court identified the correct governing rule but unreasonably applied to the particular case or if the state court either unreasonably extended a legal principle from Supreme Court precedent to a new context in which it should not apply or where it unreasonably refused to extend such a principle to a new context in which it should apply. ***Fountain, supra*** at 273. However, in order for a federal court to finds a state court's application of Supreme Court precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. It must have been objectively unreasonable. ***Wiggins,*** 529 U.S. at 520-21, 123 S.Ct. at 2535, ***Jamison v. Klem***, 544 F3d 266 (3d Cir. 2008). In determining whether the state court's application of Supreme Court precedent was objectively unreasonable, habeas courts may consider the decisions of inferior federal courts. ***Fischetti v. Johnson***, 384 F3d 140, 149 (3d Cir. 2004)[stating, "The Supreme Court itself appears to adopt this approach, since it has pointed to decisions of federal and state appeals courts as evidence that an interpretation of Supreme Court precedent was not objectively unreasonable."].

The "unreasonable application" clause includes the failure to use the method of analysis prescribed in relevant Supreme Court precedent. For example, the failure to follow the three step method of analysis for Batson error would render the state decision either contrary to or an unreasonable application of Batson. ***Bond v. Beard***, 539 F3d 256, 264 (3d Cir. 2008), ***Coombs v. DiGuglielmo***, 2010 U.S. App Lexis 15771 (3d Cir. 2010).

Section 2254(d)(1) limits a federal court's habeas review to clearly established federal law as set forth by the Supreme Court at the time the state court made its decision. ***Greene v. Fisher***, 2011 U.S. App. Lexis 8077 (2011). The record subject to review is the record that was reviewed by the State court that adjudicated the claim on the merits. ***Cullen v. Pinholster***, 563 U.S.___, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011).

Section 2254(d)(2) regards a factual determination by a state court as "unreasonable" when the factual determination is not supported by the record, or is clearly against the weight of the evidence. ***Morgan v. Hardy***, 662 F3d 790, 798 (7th Cir. 2011).

Section 2254(e)(1) and (2) indicate that a State court's factual determination is not entitled to deference if the state court rejects a request to hold an evidentiary hearing, and it turns out that an evidentiary hearing is necessary to resolve the claim. ***Perez v. Rosario***, 459 F3d 943, 950 (9th Cir. 2006), ***Hurles v. Ryan***, 650 F3d 1301, 1313 (9th Cir. 2011).

Principles of clearly established federal law are to be determined solely by resort to Supreme Court rulings. Even so, decisions of lower federal courts may be instructive in assessing the reasonableness of the state court's resolution of an issue. ***Williams v. Bowersox***, 340 F3d 667, 671 (8th Cir. 2003), ***Stewart v. Irwin***, 503 F3d 488 (6th Cir. 2007). "Ignoring the fundamental principles established by our most relevant precedents" is a factor that leads to the conclusion that the decision is "contrary to" or an "unreasonable application" of Supreme Court precedent. ***Abdul-Kabir v. Quarterman***, ___U.S.___, 127 S.Ct. 1654, 1671, 167 L.Ed.2d 585 (2007), ***Smith v. Patrick,*** 508 F3d 1259-1260 (9th Cir. 2007).

The United States Supreme Court has held that the state courts do not have to know any federal law as long as neither the reasoning nor the result of any given decision contradicts federal law. ***Early v. Packer***, 537 U.S. 3, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002). This makes for an interesting situation when the State court decides a claim on the merits but does not identify the reasons for its decision. When that happens, the federal court conducts an independent review of the record and applicable law to determine whether the state court decision is contrary to or an unreasonable application of clearly established federal law or is based on an unreasonable determination of the facts in light of the evidence presented. ***Harris v. Stovall***, 221 F3d 940, 943 (6th Cir. 2000), ***Miller v. Stovall***, 608 F3d 913 (6th Cir. 2010). This provision applies if and only if the state court's determination of the facts is supported by the record. ***Berryman v. Morton***, 100 F3d 1089, 1104-05 (3d Cir. 1996). Put in a slightly different way, if the State court's findings of fact are not supported by the record, then the State court's decision is unreasonable. ***Bond v. Beard***, 539 F3d 256, 291 (3d Cir. 2008). Importantly, decisions involving mixed questions of law and fact such as ***Giglio/Brady*** violations are not regarded as "facts" subject to this stringent standard.

Where the State court system does not decide a claim or issue presented for adjudication, the standard of review is de novo and the scope of review is plenary. ***Appel v. Horn***, 250 F3d 203, 210 (3d Cir. 2001), ***Wilson v. Beard***, 589 F3d 651, 658 (3d Cir. 2009), ***Bronstein v. Horn***, 404 F3d 700, 710 n. 4 (3d Cir. 2005).

Renico v. Lett, 559 U.S.___, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) states, "When assessing whether a state court's application of federal law is unreasonable, 'the range of reasonable judgment can depend in part on the nature of the relevant rule' that the state court must apply…Because AEDPA authorizes federal courts to grant relief only when state court's act unreasonably, it follows that 'the more general the rule at issue--and thus the greater potential for

reasoned disagreement among fair minded judges--the more leeway [state courts have in reaching outcomes in case-by-case determinations.'" Id. at 1864.

As a rule of thumb, the more general the standard, the more likely the State court decision will be considered reasonable.

XI. COLLATERAL REVIEW: CERTIFICATE OF APPEALABILITY

If the 2254 habeas corpus petition is denied, the next step is to file a notice of appeal with the district court, and an application for a certificate of appealability ("COA"). The deadline for filing the notice of appeal is thirty (30) days from the date the district court denied the 2254 habeas corpus petition. If the district court denies the application for a COA, the next step is to file an application for COA with the court of appeals. The application for COA must allege the denial of a constitutional right. If the application is granted, the Court of Appeals issues a briefing schedule and the case proceeds as if it were a direct appeal of a criminal conviction. If the COA is granted, the case is assigned to a panel of the court of appeals, and handled like any other appeal. The Clerk of the appellate court issues a briefing schedule. The petitioner-appellant files the initial brief. The State may or may not choose to file a brief. The court may or may not hold oral argument.

If the application for COA is denied, the next step is to file a petition for rehearing which must be filed within fourteen (14) days of the date of the decision or file a petition for certiorari with the United States Supreme Court, which must be filed within ninety (90) days of the date the court of appeals denied the COA. If not application for COA is filed, the petition for certiorari must be filed within 90 days of the date the COA was denied.

XII. RULE 60 MOTION

Rule 60, Federal Rules of Civil Procedure provides a procedure to have a case reviewed based on a change of facts or an intervening change in the law.

Gonzalez vs. Crosby, 544 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005) ruled that a motion for reconsideration under Rule 60(b) F.R.Civ.P. is not to be regarded as a second or successive habeas corpus petition provided the motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings."

Pridgen v. Shannon, 380 F3d 721, 727 (3d Cir. 2004) states, "We…hold that in those instances in which the factual predicate of a petitioner's Rule 60(b) motion attacks the manner in which the earlier habeas judgment was procured and not the underlying conviction, the Rule 60(b) motion may be adjudicated on the merits."

XIII. SECTION 2241 PETITION FOR HABEAS CORPUS

If the 2254 habeas corpus petition is denied, the Rule 60 motion is denied, and there is no other procedure available, the next step is to file a petition for habeas corpus under 28 U.S.C.

2241. The district court will not entertain a petition for habeas corpus unless the 2254 remedy is "inadequate or ineffective" to test the legality of the detention. The courts have given the term "inadequate or ineffective" a very narrow construction. Ordinarily, the 2241 remedy is limited to extraordinary situations where literal application of the rules restricting access to a 2254 habeas leads to a miscarriage of justice. That said, a 2241 habeas corpus is available to individuals who can prove that a change in substantive criminal law decriminalized the offense behavior. In addition, the 2241 remedy is available to DC prisoners claiming ineffective assistance of appellate counsel. Finally, the 2241 remedy can always be used to challenge the manner of execution of a sentence including conditions of confinement.

XIV. LEGAL RECOURSE FOR ALIENS CONVICTED OF CERTAIN CRIMES

An "alien" is defined as a person who is not a citizen or national of the United States. If an alien has been convicted of an aggravated felony, or crimes of moral turpitude, the Government will initiate removal proceedings. The alien will be given a hearing before an Immigration Judge who works for the Department of Justice, Executive Office of Immigration Review. At the hearing, the alien has the right to an attorney at his own expense, and will be given the opportunity to present whatever defenses he might have to removal. Defenses include claims of derivative citizenship, which is U.S. citizenship derived through a family member, violations of the Convention Against Torture ("CAT"), or violations of the Convention Against Transnational Organized Crime ("CATOC"). All defenses must be presented to the Immigration Judge or they are waived. If the Immigration Judge enters an order of removal, the alien has a right to appeal to the Board of Immigration Appeals ("BIA"). If the appeal is denied, the alien has the right to appeal to the Court of Appeals provided the appeal involves constitutional questions or questions of law. 8 U.S.C. 1252(a)(2)(D).

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Conhaim, 160 F3d 893 (2d Cir. 1998), ***United States v. DiPina***, 178 F3d 68 (1st Cir. 1999), ***In re Weatherwax***, CTA3 No. 99-3550 [Hazel-Atlas independent action is not a second or successive 2255 motion], ***Cullen v. United States*****,** 194 F3d 401 (2d Cir. 1999), ***Dabelko v. United States***, 211 F3d 1268 (6th Cir. 2000), ***United States vs. Carmichael*****,** 216 F3d 224 (2d Cir. 2000***), United States vs. Williams***, 247 F3d 353 (2d Cir. 2001), ***United States ex rel. Bryant v. Warden***, 50 Fed. Appx. 13 (2d Cir. 2002), ***United States v. Peyton***, 12 Fed. Appx 145 (4th Cir. 2001), ***United States vs. Smith***, 348 F3d 545 (6th Cir. 2003), ***Blount v. United States***, 330 F.Supp.2d 493 (EDPA 2004), ***Commonwealth v. Hanna***, 964 A2d 923 (PA Super. 2009). Important unpublished cases include: ***United States v. Lopez,*** 93-246-01 (EDPA, Hutton, J.)[2255 granted], ***United States v. Garcia-Cintron***, 93CV1771 (EDPA, Gawthrop)[2255 granted, sentence reduced], ***United States v. Fazekas***, C.A. No. 94-1542 [WDPA 1994][misclassification as career offender, sentence reduced from 30 years to 10 years], ***Henry Jones v. United States***, 2:90CV 4291 [DNJ, Sarokin, J.][2255 motion granted for ineffective assistance, prisoner released], ***Hearn v. United States***, C.A. 93-464 [WDVA], [misclassification of methamphetamine, sentence reduced from 180 months to 90 months], ***United States v. Richard H. Wilson***, 90 CR169-01, 91 CIV 3326 [EDPA][2255 granted; actual innocence; immediate release], ***United States v. Gevares***, 961 F.Supp. 192 (NDOH, ED 1996)[2255 granted; firearms sentence vacated; government motion to resentence denied], ***United States vs. Cross,*** CTA6 No. 03-3562 (sentence vacated, and reduced on remand), ***United States vs. Alexander***, CTA3 No. 96-1696 [sentence reduced, and case remanded for hearing on distinction between cocaine base and crack cocaine], ***United States v. Kostrick***, 103 F3d 114 (3d Cir. 1996)[848 vacated], ***United States v. Michaels***, 2001 U.S. Dist. Lexis 19115 (EDPA, Fullam, J.)[term of supervised release reduced], ***United States v. Williams***, 146 Fed. Appx. 656 (2d. Cir. 2002)[sentence vacated and reduced], ***United States v. R. Thomas***, 273 Fed. Appx. 103 (2d Cir. 2008)[sentence vacated and reduced], ***United States v. Matos***, 92 Cr 39-A (EDVA, Ellis, J.)[2255 granted, sentence reduced], ***United States v. Diaz,*** Crim. No. 92-78-02 [EDPA][sentence reduced for miscalculation of criminal history category], ***United States v. Eberly***, 5 F3d 1491 (3d Cir. 1993)[2255 granted, sentence vacated], ***United States v. Forde***, 92-429-A [EDVA, Hilton][2255 granted, life sentence vacated; sentence reduced]; ***United States v. Cruz-Pagan***, 91-0063 [EDPA][2255 granted, life sentence vacated; sentence reduced], ***United States v. Ostreicher***, 91cv 3576 [EDNY, Weinstein, J.][2255 motion vacated, special parole term vacated]; ***United States vs. S. Jones***, 22 F3d 304 (3d Cir. 1994)[2255 granted, sentence vacated]; ***United States vs. S. Jones***, 47 F3d 1162 (3d Cir. 1995)[2255 granted, sentence vacated, sentence reduced]; ***United States ex rel. Maurice Roberts vs. Warden***, 93-CV-1064 [NDNY][Probation Department's imposition of restrictions on employment violated due process], ***Darryl Pierce v. United States***, 89CR176 (MDPA, Rambo, J.)[2255 granted in part, sentence reduced], ***Baron vs. United States***, 97CV290 [DUT][2255 granted, sentence reduced and prisoner released]; ***Simpkins vs. United States***, C.A. 5:01CV12 [NDWVA][2255 granted; failure to properly file 851 special information; sentence reduced]; ***United States vs. Vernon***, 92-340-01 [EDPA, Dalzell, J.] [2255 granted, restitution order vacated and modified]; ***United States vs. Cora Love,*** 92-504-16 [EDPA, Giles, C.J.][2255 granted, sentence reduced]; ***United States vs. Rosa***, 90-38 [DNJ][2255 granted; sentence reduced]; ***United States vs. Arevalo***, 94CR702, 97 CV 946 [SDFLA, Moreno, J.][2255 granted, sentence reduced]; ***United States vs. H. Cruz***, 93CR341 [SDFLA, Highsmith, J.][2255 granted, sentence reduced]; ***Stocker* vs. *Warden*****,** 2004 U.S. Dist. Lexis 5395 [EDPA, Giles, C.J.][Habeas corpus granted based on actual innocence, sentence vacated], ***Stovall v. Warden***, 2005 U.S. Dist. Lexis 6758 (EDPA Diamond)[2254 habeas granted

in part restoring right to appeal]; ***United States v. Broadus***, 97CV607 [MDNC Tilley][2255 granted in part and denied in part, sentence reduced by 20 years]; ***Pedretti v. United States***, 1996 U.S. Dist. Lexis 6315 (NDNY, McAvoy C.J.)[2255 granted, sentence reduced]; ***United States v. Boggi***, 1997 U.S. Dist. Lexis 14165 (EDPA 1997)[2255 granted, sentence reduced]; ***United States ex rel. Shriner v. Warden***, 1:CV03-0481 (MDPA, Rambo, J.) [[2241 habeas granted, sentence reduced], ***Commonwealth v. Keeman Copeland***, [CP 9607-1215 1/3 Greenspan, J.] [PCRA granted based on ineffective assistance of trial and appellate counsel. Conviction for first degree murder vacated. Life sentence vacated], ***Boyd v. Nish et al.,*** 2007 U.S. Dist. Lexis 7176 (EDPA 2007, Tucker, J.)[Section 2254 habeas corpus granted to state prisoner based on ineffective assistance of trial counsel], ***Dockery v. DiGuglielmo, et al.,*** Civil No. 04-6025 (EDPA 2007, Buckwalter, J.)[2254 granted, sentence reduced], ***Jones v. Piazza***, CTA3 No. 07-1868 (3d Cir. 2007)[reversed order denying habeas corpus under 28 U. S.C. 2254; remanded for resentencing, sentence reduced on remand], ***McKeever v. Warden***, 2005 U.S. Dist. Lexis 4714 (EDPA, Diamond, J.)[2254 habeas granted, remanded to state for resentencing], ***United States v. Futch***, CR. 402-232 [SDGA, Savannah Div.][2255 granted, sentence reduced], ***United States v. Danon***, Cr. 90-43 [DNJ, Lifland][treaty transfer to Israel prior to completion of term of imprisonment], ***Commonwealth v. Maurice Jones,*** October Term, 1989, No. 0185-0187 [The Third Circuit Court of Appeals granted habeas corpus. Subsequently, the sentencing judge reduced the sentence], ***United States v. Coleman***, 206 Fed. Appx. 80 (2d Cir. 2006) [remanded for resentencing, sentence reduced], ***United States v. Fermin***, 277 Fed. Appx. 28 (2d Cir. 2008)[Sentence vacated and reduced], ***United States v. Manigault***, 2010 U.S. App. Lexis 20350 (3d Cir. 2010)[sentence reduced pursuant to 18 USC 3582(c)(2) despite career offender classification], ***Commonwealth v. Hanna***, 2009 PA Super. 3 (PA Super. 2009). [Vacated and remanded order denying expungement of criminal record], ***In re: Fredrick Pereira*** A 027 489 318: Removal order voided and petitioner allowed to remain in the United States, ***United States v. Omar Mendoza***, 2009 U.S. Dist. Lexis 48720, 2:05 CV 294 (NDTX, Amarillo) [2255 motion granted based on claim of ineffective assistance of trial counsel, sentence reduced to time served], ***United States v. Johnson***, 2011 U.S. App. Lexis 15677 (3d Cir. 2011)[sentence reduced from 360 months to 222 months as a result of a 2255 motion].

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