

The University of Akron
IdeaExchange@UAkron

Akron Law Review

Akron Law Journals


July 2015

Tyler v. Cain: A Fork in the Path for Habeas Corpus or the End of the Road for Collateral Review?

Ronn Gehring

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Human Rights Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Gehring, Ronn (2003) "Tyler v. Cain: A Fork in the Path for Habeas Corpus or the End of the Road for Collateral Review?," *Akron Law Review*: Vol. 36 : Iss. 1 , Article 5.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol36/iss1/5>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

TYLER V. CAIN:¹ A FORK IN THE PATH FOR
HABEAS CORPUS OR THE END OF THE ROAD
FOR COLLATERAL REVIEW?

“If men were angels, no government would be necessary.”²

I. INTRODUCTION

*Tyler v. Cain*³ is the latest decision in the ongoing evolution of the retroactivity doctrine in habeas corpus proceedings.⁴ The main issue this note presents is whether a state or federal inmate may apply a new constitutional rule promulgated by the Supreme Court retroactively on collateral review through a second or successive petition for habeas corpus, even though the rule was not applicable to the inmate’s original case.⁵ Under English common law, all new rules applied retroactively

1. *Tyler v. Cain*, 533 U.S. 656 (2001).

2. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

3. *Tyler*, 533 U.S. 656 (2001).

4. See generally John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine “As Applied”*, 61 N.C. L. REV. 745 (1983) (providing a general background of retroactivity in habeas corpus proceedings). In this article, Corr summarizes the problems inherent in the doctrine of retroactivity:

At first glance, retroactivity analysis seems quite straightforward. It is a process by which courts determine whether a new judge-made rule of law should be applied to events arising before the new law was promulgated. In order that those determinations be marked with some degree of fairness and predictability, retroactivity analysis involves an attempt to develop rules or guidelines helpful to judges in their efforts to make just retroactivity decisions. Implicit in that effort is the prospect that in an appropriate circumstance a given decision will not have retroactive effect, but will apply only to cases or events arising after some particular date. Much of the difficulty in retroactivity analysis has arisen in the attempt to formulate workable rules or guidelines for determining when a decision will be held wholly or partially prospective.

Id. at 745-46.

5. See *id.* See *Bousley v. United States*, 523 U.S. 614, 616 (1998) for a good example of a petitioner seeking to apply a new rule retroactively to his case on collateral review. In *Bousley*, the petitioner sold drugs out of his garage and had weapons in his bedroom. 523 U.S. at 616. The petitioner was charged with possession of methamphetamines with intent to distribute under 21 U.S.C. § 841(a)(1) (1990) and the use of a firearm during the commission of drug trafficking under 18 U.S.C. § 924(c)(1) (imposing minimum sentences for using a firearm to further the commission of a crime of violence or drug trafficking). *Id.* Petitioner plead guilty to both charges. *Id.* After an unsuccessful appeal, the petitioner filed a petition for federal habeas corpus alleging that he made the pleas unknowingly and involuntarily. *Id.* at 616-17. The District Court denied relief, and the

on both direct and collateral review.⁶ However, a divergence has occurred under American jurisprudence as to when new constitutional rules announced by the Court apply retroactively.⁷ Because of the

petitioner appealed this decision. *Id.* During the appeal, the Supreme Court decided *Bailey v. United States*, 516 U.S. 137 (1995). *Id.* In *Bailey*, the Court held the use prong in 18 U.S.C. § 924(c)(1) requires the Government to show “active employment of the firearm,” which includes “brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire” the gun. *Bailey v. United States*, 516 U.S. 137, 144, 148 (1995). However, the Court held the term use, under 18 U.S.C. § 924(c)(1) did not include the “mere possession of a firearm.” *Id.* at 143. On appeal, the petitioner argued the rule from *Bailey* should apply retroactively to his case on collateral review, and that, as such, the petitioner could not be charged with use of a firearm under 18 U.S.C. §924(c)(1) because he simply had the weapons in his house and did not use them to further the commission of the crime. *Bousley*, 523 U.S. at 617-18. The Court of Appeals affirmed the District Court’s denial of relief. *Id.* The Supreme Court granted certiorari, and held that, although the petitioner’s claim was procedurally defaulted, the petitioner might be able to have a hearing on the merits, if he made the necessary showing to relieve the default. *Id.* In addition, the Court held Petitioner’s claim could still be reviewed if he could show the constitutional error in his plea agreement “probably resulted in the conviction of one who is actually innocent.” *Id.* at 623 (quoting *Murry v. Carrier*, 477 U.S. 478, 496 (1986)). *See also* Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999). In this article, Roosevelt illustrates the unique problems of retroactivity. *Id.* He states:

The question of retroactivity is what to do when the law changes. More precisely, it is to whom the new law should be applied, and to whom the old. There are different answers to the question of differing degrees of plausibility. Some are quite old and others fairly new. But lurking behind the various instances of the question and its proposed solutions is a distinct intellectual difficulty, which I will call the problem of retroactivity.

Id. at 1075 (citations omitted).

6. Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 347 (1997) (presenting a general overview of the history of habeas corpus in both England and the United States).

7. *Id.* In the United States, new constitutional rules announced by the Court generally apply retroactively on direct review (appeal). *Id.* However, new rules generally do not apply retroactively on collateral review. *Id.* *See* *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part). Justice Harlan argued new rules should always apply retroactively on direct review, but generally not on collateral review. *Id.* *See also* Roosevelt III, *supra* note 5, at 1076-79. In this article, Roosevelt explains the unique problems with retroactivity. *Id.* at 1076. More specifically, Roosevelt notes that law changes through judicial and legislative action, and retroactivity at least partially depends on the “positive source” of each type of law. *Id.* Legislative action is “presumptively treated as non-retroactive” because the positive source of the law is the bill itself. *Id.* at 1075. Judicial action is more complex and requires a greater analysis of the different types of law encompassed within the arena of judicial action. *Id.* at 1076. The three types of law that fall under the broad category of judicial action are common law, interpretation of statutes, and constitutional law. *Id.* Judicial decisions interpreting statutes are “evidence of what the law is, but they are not, except in a purely predictive sense, the law.” Roosevelt III, *supra* note 5, at 1076-79. “The [positive source of the law] is the statute; take it away, and the judicial decisions lose their force.” *Id.* at 1076.

Since an unchanging statute backs the judicial interpretations, it makes sense to say that while decisions may change, the law remains the same. An overruled decision is simply wrong; it is not and was never the law. Consequently, retroactivity in statutory interpretation is not very difficult. The new, correct decision is applied to everyone.

divergence in American law, the doctrine of retroactivity has gradually taken shape over the past forty years, with the Court solidifying its stance in *Tyler v. Cain*.⁸

This note explores the effect that *Tyler v. Cain* has on habeas corpus. More specifically, this note focuses on the Court's interpretation of section 2244(b)(2)(A).⁹ Part II documents the evolution of the retroactivity doctrine.¹⁰ Next, Part III sets forth the facts, procedural history, and holding of *Tyler v. Cain*.¹¹ Part IV, Sections A and B

Id. The next type of law encompassed in judicial action is common law. *Id.*

[The] positive source of the common law is just the judicial decisions in which it is embodied. With no positive source independent of judicial decisions, the law must change as the decisions change. Consequently, it makes sense to distinguish between old law and new law. When law changes, there is a real question as to *when* it does so, and there are real questions about to whom the new law should be applied.

Id. Thus, new judicial decisions based on common law only apply prospectively. *Id.* at 1124. The final and probably most confusing type of law encompassed under judicial action is constitutional law. Roosevelt notes that the complexity of determining decisions based on constitutional law applying retroactively stems from difficulties surrounding the source of constitutional law. *Id.* at 1110-36. Indeed, Roosevelt points out that:

An analysis that works in terms of positive source is difficult, since the origin of constitutional law proves surprisingly hard to identify [if] Constitutional law has a positive source—the hallowed document—*independent of judicial decisions*. But the view that the Constitution means now what it always has, and always will, has serious difficulties. This is not to say that it does not have redoubtable defenders, nor that, as a normative theory of interpretation, it is unattractive. The difficulty is rather that it is hard to keep a straight face while suggesting that the current panoply of substantive and procedural rights has always existed, or, to take a less controversial example, that the First Amendment has always embodied its current congeries of doctrines and distinctions. The idea of an unchanging Constitution, as a descriptive matter, is a poor fit with the realities of doctrinal evolution. Functionally, constitutional law more closely resembles common law than statutory interpretation.

Roosevelt III, *supra* note 5, at 1076-77. Because of this doctrinal confusion, issues concerning the retroactivity of constitutional decisions still trouble courts. A prime example is the issue in the case at bar. In *Tyler*, the petitioner sought to apply the new rule in *Cage v. Louisiana*, 498 U.S. 39 (1990) (invalidating certain jury instructions because they violated Due Process) retroactively on collateral review. *Tyler*, 533 U.S. at 659-60. The lower courts pondered whether the rule in *Cage* applied retroactively. *Id.* However, the Supreme Court may have resolved the confusion by holding the only time a new constitutional rule applies retroactively on collateral review is when the Court holds the rule applies retroactively. *Id.*

8. The gradual evolution of the doctrine of retroactivity in habeas corpus proceedings started in *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Linkletter*, the Court addressed the issue of whether new constitutional rules should apply retroactively on collateral review, and held that a court “must then weigh the merits and demerits in each case” to determine if the rule should apply retroactively. *Id.* at 629. *See infra* Part II.

9. *See infra* Part II.

10. *See infra* Part II. Generally, the problem with retroactivity has been described as a “question of . . . what to do when the law changes. More precisely, it is to whom the new law should be applied, and to whom the old.” Roosevelt III, *supra* note 5, at 1075.

11. *See infra* Part III.

analyze the procedures inmates¹² must follow under the Antiterrorism and Effective Death Penalty Act (AEDPA) to file petitions for habeas corpus and the effect *Tyler v. Cain* has on this procedure.¹³ Finally, Part IV, Sections C and D explore the constitutionality of *Tyler v. Cain*.¹⁴

II. BACKGROUND

A. Habeas Corpus and the Retroactivity Standard

1. A Historical Review of Habeas Corpus

In its most basic form, the writ of habeas corpus allows a prisoner that is wrongfully detained to obtain immediate relief from illegal confinement.¹⁵ Habeas corpus, also known as the “Great Writ,” is “the most celebrated writ in the English law”¹⁶ because it allows prisoners to have their convictions and sentences reviewed by a neutral court. Under English Common Law, anyone convicted of a crime and sentenced under the authority of the Crown could demand immediate review of the conviction and sentence from the judges on the King’s Bench.¹⁷

In the founding years of the United States, the citizens¹⁸ valued the writ of habeas corpus so much that the framers incorporated the writ into the United States Constitution.¹⁹ However, the people of the early Republic were skeptical about the concept of Federalism and were afraid of a dominant federal government.²⁰ As such, the writ of habeas corpus

12. *Parker v. Ellis*, 362 U.S. 574, 575-76 (1960) (holding the writ of habeas corpus is meaningless without a restraint of liberty).

13. *See infra* Part IV.A., IV.B.

14. *See infra* Part IV.C., IV.D.

15. *See Fay v. Noia*, 372 U.S. 391 (1963). Habeas corpus is based on the principle that “in a civilized society, government must always be accountable to the judiciary for a man’s imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.” *Id.* at 402.

16. 3 WILLIAM BLACKSTONE, COMMENTARIES *129. *See also Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (discussing habeas corpus and jurisdictional requirements for granting relief under the writ).

17. *See Hartman, supra* note 6, at 338-39. Under the English doctrine of habeas corpus, inmates could challenge their sentences or convictions imposed by a court, a government body, or the King himself. *Id.*

18. Habeas corpus was important to early American citizens because they feared a corrupt and tyrannical federal government. *Id.* at 339. Indeed, the people feared the new “King George Washington” would abuse his power much like the old “King George of England.” *Id.*

19. “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.

20. *See Hartman, supra* note 6, at 339. Hartman stated:

originally was available only to inmates confined in federal prisons.²¹ Congress extended the availability of habeas corpus to state prisoners in the Judiciary Act of 1867.²² Today, the federal writ of habeas corpus allows any inmate to have a federal court review the constitutionality of his or her conviction and sentence.²³

2. *Brown v. Allen*²⁴

The Supreme Court paved the foundation for the modern writ of habeas corpus in *Brown v. Allen*.²⁵ In *Brown*, the petitioners, who were all inmates in a state penitentiary, challenged their death sentences.²⁶ After exhausting all of the available state remedies, the petitioners

The American habeas was an essential element of the political compromise engendered by the “Anti-Federalist State’s Rights vs. Federalist Strong Central Government” conflict and tensions which began at the founding of our nation and continues throughout our nation’s history . . . the colonists viewed the writ of habeas corpus, like the Bill of Rights, as a protection for citizens only against the new federal government Conversely, the colonists had no fear that their states might abuse their power.

Id. Thus, American habeas was only made available to inmates confined in federal prisons. *Id.*

21. *Id.* In the Judiciary Act of 1789, ch. 20 § 14, Congress limited the availability of habeas corpus to inmates of federal prisons, but prohibited federal courts from reviewing state court decisions because of the fear of corruption within the federal government. *Id.* See also *Felker v. Turpin*, 518 U.S. 651, 659 (1996).

22. The Judiciary Act of 1867 gave all federal courts the power to grant writs of habeas corpus “where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States” The Judiciary Act of 1867, ch. 28 § 1, 14 Stat. 385 (1867). The change in federal habeas jurisprudence stems from the concern of protecting American citizens from state governments in the aftermath of the Civil War. See *Hartman*, *supra* note 6, at 339.

23. 39 C.J.S. *Habeas Corpus* § 6 (1976). Habeas Corpus is designed to give a person whose liberty is restrained an immediate hearing to inquire into and determine the legality of the determination. *Id.*

24. 344 U.S. 443 (1953) (addressing the issue of when a federal court could hear a writ of habeas corpus from a state inmate if the state court’s treatment of the legal claims were full and fair).

25. *Id.* In *Brown*, the Supreme Court consolidated for review the three cases of *Brown v. Allen*, *Daniels v. Allen*, and *Speller v. Allen*. *Id.*

26. *Brown*, 344 U.S. at 446-47. On direct appeal, the North Carolina Supreme Court affirmed all of the inmates’ convictions. *Id.* The inmates filed federal habeas petitions, and the United States District Court for the Eastern District of North Carolina dismissed the applications for review in all three cases. *Id.* The U.S. Supreme Court held if a state prisoner’s claim of a federal constitutional right has been decided against him by a state supreme court and he has filed an application for certiorari to this Court, he has satisfied the requirements that he exhaust all of his state remedies before a federal court may grant an application of habeas corpus. *Id.* at 447. See also *Engle v. Isaac*, 456 U.S. 107, 125-26, 135 (1982) (holding that a petitioner’s claims can be exhausted when state procedural bars prevent consideration of some claims that could have been raised). *But see* *Castille v. Peoples*, 489 U.S. 346 (1989) (holding that a petitioner has not exhausted all available state remedies for federal habeas review if the federal claim has not been presented in the state courts, even if the petitioner raised other claims in the state supreme court).

sought review of their convictions and filed writs of habeas corpus in the federal district court.²⁷ The inmates alleged their federal constitutional rights had been violated and, as such, the federal district court could review their claims through the writ of habeas corpus.²⁸

The Supreme Court held the violation of a constitutional right can be remedied through federal habeas corpus and a federal court may independently review state court adjudications of federal questions, even though the state court's treatment of those legal claims was full and fair.²⁹ Nonetheless, the decision was silent on the question of whether new rules made by the Court apply retroactively on collateral review.³⁰ In fact, the Court did not address the issue of retroactivity until twelve years later in *Linkletter v. Walker*.³¹

B. The Evolution of the Retroactivity Doctrine

1. *Linkletter v. Walker*³²

In *Linkletter v. Walker*, the Court faced the issue of whether the new constitutional rule announced in *Mapp v. Ohio*,³³ providing that

27. *Brown*, 344 U.S. at 447. In each of the three cases under *Brown*, the federal district court considered the effect of the United States Supreme Court's denial of certiorari on the same issues raised on direct appeal by the inmates in deciding whether to grant federal habeas corpus review. *Id.* at 450. The federal district court dismissed all three petitions because the issues had been decided fairly in the state courts and the U.S. Supreme Court denied certiorari. *Id.* The dismissals of the federal habeas petitions were affirmed on appeal. *Id.* at 446. After granting certiorari, the Supreme Court held the reviewing federal court should not place any weight on the Supreme Court's denial of certiorari if the Court does not provide a reason for the denial. *Id.* at 489-90 (Frankfurter, J., noting the position of the Court).

28. *Id.*

29. *Id.* at 462-63.

30. See *Brown*, 344 U.S. at 443.

31. 381 U.S. 618 (1965).

32. *Id.* In *Linkletter*, the petitioner was convicted of burglary. *Id.* at 621. After his arrest, the police took the petitioner to the police station and searched him. *Id.* In addition, police officers entered and searched his home and his place of business and seized property and papers without a search warrant. *Id.* The district court found probable cause incident to the arrest and held the seizures were valid because the officers had reasonable cause for the arrest. *Id.* The petitioner filed a writ of habeas corpus in the federal district court after exhausting all his state remedies, and sought to apply the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), to his case on review. *Linkletter*, 381 U.S. at 621.

33. 367 U.S. 643 (1961). In *Mapp*, the petitioner was convicted for possessing lewd and lascivious books, pictures and photographs. *Id.* at 644. Three Police officers arrived at the petitioner's residence on a tip that a person was hiding out in the home in connection with a recent bombing. *Id.* at 644. Upon their arrival, the officers knocked on Mapp's door and demanded entrance into the home, but Mapp refused to admit the officers without a search warrant. *Id.* The officers set up surveillance of the home, and again tried to enter the house a few hours later when

illegally obtained evidence is inadmissible in criminal trials, should apply retroactively to habeas corpus proceedings.³⁴ The Court determined the U.S. Constitution neither prohibits nor requires the retroactive effect of new rules.³⁵ In addition, the Court held that a reviewing court must weigh the merits and demerits in each case³⁶ to determine if a new rule should apply retroactively.³⁷ Finally, the Court promulgated a three-pronged balancing test for reviewing courts to follow to determine if new rules should apply retroactively on collateral review.³⁸ First, a reviewing court should consider the prior history of the new law.³⁹ Next, the reviewing court should look at the purpose and effect of the law.⁴⁰ Finally, the reviewing court should determine whether retrospective operation of the rule would further or retard its operation.⁴¹

more officers arrived at the scene. *Id.* However, Mapp did not come to the door this time, so the officers forcibly opened one of the doors of the house. *Id.* Mapp's attorney arrived in the middle of the affray, but the officers did not allow him to see Mapp or enter the house himself. *Id.* During this incident, Mapp demanded to see a search warrant. The officer held up a piece of paper claiming it to be a warrant. *Id.* at 645. Mapp grabbed the paper out of the officer's hand and a struggle ensued between the officer and Mapp. *Id.* Because of this altercation, the officer handcuffed Mapp claiming she was being belligerent in resisting an official warrant. *Id.* Next, an officer grabbed Mapp and twisted her hand even though she pleaded with him to stop because it was hurting her. *Id.* Finally, Mapp was taken upstairs in handcuffs while the officers searched her dresser, a chest of drawers, and her closet without her consent. *Id.* The search ultimately produced the obscene materials that Mapp was later convicted of possessing. *Id.*

34. In *Mapp*, the Court held all evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court. *Mapp*, 367 U.S. at 658-59. The Court also held the exclusionary rule was applicable to the states. *Id.*

35. *Linkletter*, 381 U.S. at 629. *See also Mackey v. United States*, 401 U.S. 667, 676 (1971) (Harlan, J., concurring and dissenting).

36. *Linkletter*, 381 U.S. at 629.

37. *Id.* *See also Stovall v. Denno*, 388 U.S. 293, 296-97 (1967). In *Stovall*, the Court held a case-by-case analysis was necessary to determine whether a new constitutional rule would apply retroactively. *Id.* In addition, the Court established a three-prong balancing test to determine if a rule applies retroactively. *Id.* at 297. The relevant factors are: (1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. *Id.*

38. *Linkletter*, 381 U.S. 618, 629. *See also Tehan v. U.S. ex rel. Shott*, 382 U.S. 406 (1965) (reaffirming its position in *Linkletter* that retroactivity requires an inquiry into the merits and demerits in each case by looking at the prior history of the rule, its purpose and effect, and whether retrospective operation will further or retard its operation).

39. *Linkletter*, 381 U.S. at 629.

40. *Id.*

41. *Id.*

2. Justice Harlan's Theory on Retroactivity

Although *Linkletter* prevailed for over twenty-years as the standard for retroactivity on collateral review,⁴² the doctrine was substantially influenced by two dissenting opinions penned by Justice Harlan in the late 1960's and early 1970's.⁴³ In *Desist v. United States*⁴⁴ and *Mackey v. United States*,⁴⁵ Justice Harlan advocated the need for federal courts to have more control over habeas corpus review and stricter standards for applying new rules retroactively on collateral review.⁴⁶ The theories

42. See *Teague v. Lane*, 489 U.S. 288, 305 (1989). The Court abandoned the *Linkletter* standard and adopted the standard for retroactivity advocated by Justice Harlan. *Id.*

43. See *infra* notes 43-47 and accompanying text.

44. 394 U.S. 244 (1969) (Harlan, J., dissenting). In *Desist*, the petitioners were convicted of conspiring to import and conceal heroin. *Id.* A substantial portion of the Government's evidence was obtained from tape recordings made by federal agents in an adjoining hotel room. *Id.* at 245. The agents taped a microphone to the petitioners' door at the hotel and recorded the conversations pertaining to the drug offenses. *Id.* At trial, the court admitted the evidence of the petitioners' conversations over the defendant's objection because there was no "trespass" or "actual intrusion into a constitutionally protected area." *Id.* at 245-46. The petitioners appealed their convictions, arguing the evidence was inadmissible because eavesdropping violated their rights under the Fourth Amendment. *Id.* at 246. The Court of Appeals rejected the petitioners' argument. *Desist*, 394 U.S. at 246. Meanwhile, the United States Supreme Court held in *Katz v. United States*, 389 U.S. 347 (1967) that a warrant showing probable cause was necessary to conduct electronic eavesdropping because electronic eavesdropping is a search and seizure. *Id.* at 246. The petitioners sought to apply the decision in *Katz* retroactively to their case on review, but the Court held the rule in *Katz* only applied prospectively. *Id.* The Court rationalized that because *Katz* was a clear break from precedent, the rule had only prospective application to electronic surveillance conducted after December 18, 1967 (the day *Katz* was decided). *Id.*

45. 401 U.S. 667 (1971) (Harlan, J., concurring in part and dissenting in part). In *Mackey*, the petitioner was indicted for five counts of evading payment of income taxes by willfully preparing false and fraudulent tax returns. *Id.* at 668. A jury found Mackey guilty on all five counts. *Id.* The court sentenced the petitioner to five years' imprisonment, and a 10,000-dollar fine for each count. *Id.* at 669 n.1. The conviction was affirmed on appeal. *Id.* at 669. Meanwhile, the United States Supreme Court held that the Fifth Amendment privilege against compulsory self-incrimination was a valid defense to a prosecution for failure to register as a gambler and to pay the related occupational and gambling excise taxes. *Id.* See also *Grosso v. United States*, 390 U.S. 62 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968). The petitioner filed a federal petition for habeas corpus to vacate his sentence based on the rule established in *Marchetti* and *Grosso*. See *Mackey*, 401 U.S. at 670. The Supreme Court held that under the circumstances, the principles established in *Marchetti* and *Grosso* were not retroactively applicable on collateral review. *Mackey*, 401 U.S. at 672.

46. In *Desist v. United States*, Justice Harlan identified two functions of habeas corpus -- to protect innocent people from wrongful convictions and to deter state courts from ignoring or otherwise not vindicating federal constitutional rights. *Desist*, 394 U.S. at 262-63. In *Mackey*, Justice Harlan stated the:

[Retroactivity] doctrine was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field. Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound.

found in these opinions are the foundation of the modern doctrine of retroactivity in collateral proceedings.⁴⁷ In *Teague v. Lane*, the Court finally accepted the approach advocated by Justice Harlan.⁴⁸

3. *Teague v. Lane*⁴⁹

The next significant modification of the retroactivity doctrine in the context of habeas corpus is *Teague v. Lane*. In *Teague v. Lane*, the petitioner, a black man, was convicted by an all-white jury of three counts of attempted murder, two counts of armed robbery, and one count of aggravated burglary.⁵⁰ The Court faced the issue of whether the new constitutional rule announced in *Taylor v. Louisiana*⁵¹ applied

Mackey, 401 U.S. at 676. Thus, Justice Harlan argued that new constitutional rules should not apply retroactively to cases on collateral review. *See id.* at 691-92. However, Justice Harlan recognized two exceptions in which new rules should have retroactive affect. *Id.* at 692-93. The first exception for when new rules could apply retroactively on collateral review is when new substantive due process rules place “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” *Id.* at 692. The second exception for when new rules apply retroactively on collateral review is for claims of nonobservance of procedures that are “implicit in the concept of ordered liberty.” *Id.* at 693. Justice Harlan stated about the second exception that:

[I]n some situations [sic] it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.

Id.

47. *See* *United States v. Johnson*, 457 U.S. 537 (1982). The Court, guided by Justice Harlan’s approach to retroactivity, held the rule announced in *Payton v. New York*, 445 U.S. 573 (1980), should be applied retroactively to the respondent’s case because a decision by the Court construing the Fourth Amendment is applied retroactively to all convictions that were not final at the time the decision was rendered. *Id.* *See also* *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) (embracing Justice Harlan’s theories that new rules should not be applied retroactively in all situations and adopting a rule similar to that advocated by Justice Harlan). *But see* Larry W. Yackle, *The Habeas Hagnioscope*, 66 S. CAL. L. REV. 2331, 2347 (1993) (stating that Justice Harlan’s theories on retroactivity might be wrong).

48. *Teague v. Lane*, 489 U.S. 288 (1989).

49. *Id.*

50. *Id.* at 292-93. In *Teague*, the Court described the petitioner’s trial as follows:

During jury selection for petitioner’s trial, the prosecutor used all 10 of his peremptory challenges to exclude blacks. Petitioner’s counsel used one of his 10 peremptory challenges to exclude a black woman who was married to a police officer. After the prosecutor had struck six blacks, petitioner’s counsel moved for a mistrial. The trial court denied the motion. When the prosecutor struck four more blacks, petitioner’s counsel again moved for a mistrial, arguing that petitioner was “entitled to a jury of his peers.” The prosecutor defended the challenges by stating that he was trying to achieve a balance of men and women on the jury. The trial court denied the motion, reasoning that the jury appeared to be a fair one.

Id. at 293 (citations omitted).

51. 419 U.S. 522 (1975). The Court held under the Sixth Amendment, the jury venire must

retroactively to the petitioner on collateral review. The Court held that generally, new rules made by the Court do not apply retroactively to cases on collateral review.⁵² Following Justice Harlan's example,⁵³ the Court noted two exceptions for when new rules should apply retroactively on collateral review.⁵⁴ First, a new rule should apply retroactively if it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."⁵⁵ Second, a new rule should be applied retroactively if the rule requires observance of "those procedures that . . . are implicit in the concept of ordered liberty."⁵⁶ However, the Court followed Justice Harlan's theory that the second exception should only apply to

be drawn from a fair cross section of the community. *Id.*

52. *Teague*, 489 U.S. at 305.

53. In *Mackey v. United States*, Justice Harlan stated that retroactivity for cases on collateral review:

[Can] be responsibly made only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise. The relevant frame of reference . . . is not the purpose of the new rule whose benefit the petitioner seeks, but instead the purposes for which the writ of habeas corpus is made available.

Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in part and dissenting in part).

54. *Teague*, 489 U.S. at 305.

55. *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part)). See also Benjamin Robert Ogletree, Comment, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603 (1998). Under *Teague*, a new constitutional rule does not apply retroactively to convictions that have been affirmed on direct review by a state supreme court before to the new rule's announcement. *Id.*

56. *Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)). See also Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160 (1991). In this note, the author analyzes the effects of *Teague* on habeas corpus and notes:

The result of the *Teague* decision was that the framework for review of habeas corpus petitions had been redesigned, but not completely settled. After *Teague*, the doctrine stood as follows: A presumption of non-retroactivity, and hence against consideration, attached to every "new" claim raised in a petition for habeas corpus. If the claim at issue were not "new," there would be no barrier to a hearing on the merits. Unfortunately, the *Teague* court provided two very different definitions of "new," each subject to its own interpretation, and both very broad. If the claim was indeed classified as "new," the presumption against consideration on the merits could be overcome only if one of two exceptions were satisfied. The first allowed a consideration on the merits if the desired rule would place the individual conduct in question beyond the enforcement power of the state, that is, if the rule sought would declare certain activity legal rather than illegal. The second exception allowed consideration on the merits if the rule sought was a "watershed rule of criminal procedure" or if it implicated "those new procedures without which the likelihood of an accurate conviction is seriously diminished."

Id. at 167-68 (citations omitted).

watershed rules⁵⁷ of criminal procedure.⁵⁸

4. The Antiterrorism and Effective Death Penalty Act of 1996

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 was the last significant modification of habeas corpus and retroactivity before *Tyler v. Cain*.⁵⁹ Before AEDPA, the gatekeeper

57. In *Mackey*, Justice Harlan refers to a watershed rule in his opinion:

Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime.

Mackey, 401 U.S. at 693-694.

58. See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 419 & nn.424, 425 (1995) (arguing the standard in *Teague v. Lane* harms inmates on death row because it invites federal courts to hold that a decision in a case decided after a petitioner has exhausted his direct appeals is a new rule that cannot be applied retroactively). But see Linda Meyer, “*Nothing We Say Matters*”: *Teague and New Rules*, 61 U. CHI. L. REV. 423, 424 & n.3 (1994) (stating the policy behind *Teague* is to prevent prisoners from endlessly attacking long-stale convictions on the basis of new constitutional decisions).

59. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in various sections of 8, 18, 22, 28, 40, & 42 U.S.C.); See generally Hartman, *supra* note 6 (containing a good summary of the AEDPA). In addition, the AEDPA imposed significant restriction on other areas of law including immigration law and the law governing the investigation and prosecution of terrorism. See Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999). In this article, Akram discusses some of the other legal consequences of the AEDPA. *Id.* at 70-76. In particular, the author focuses on the new provisions of the AEDPA serving as a pretext to conduct otherwise unconstitutional investigations and prosecutions of potential terrorists. See *id.* at 70-76. The author states:

Congress and the Administration passed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) comprising a number of far-reaching provisions designed to “combat terrorism.” [The] AEDPA authorizes the executive agencies to use sweeping powers to investigate, charge, convict, and remove so-called “alien terrorists.” Among [the] AEDPA’s provisions is one permitting the administration to criminally sanction even peaceful activities of groups the government labels “terrorist organizations.” The State Department published its list of terrorist organizations annually. Of the thirty organizations published on that list, one third are either Muslim groups or from the Middle East or North Africa. Under AEDPA, once a group is designated a “terrorist organization,” none of its members are eligible for a visa, and any individual who has been a member of that organization is deportable. Moreover, it is a crime to contribute money or give material support to a designated “terrorist organization,” even if the support is for humanitarian or charitable purposes. Finally, banks are required to freeze the funds of such an organization and its “agents.” The most critical of AEDPA’s

provisions gave reviewing courts discretion to determine whether they would hear second or successive petitions for habeas corpus.⁶⁰ A reviewing court could dismiss a second or successive petition if the court determined the petition was not based on different grounds for relief than the first petition, or that the issue in the second or successive petition had been decided already on the merits.⁶¹

Under the AEDPA, Congress eliminated a reviewing court's discretion to determine if it should hear a second or successive habeas petition by mandating the dismissal of second or successive petitions.⁶² One of the main goals of the AEDPA is to curb the abuse of the federal writ of habeas corpus.⁶³ More specifically, the AEDPA aimed at

provisions [concerning terrorism and immigration] . . . is the provision permitting the use of secret evidence to remove or deport "alien terrorists" residing temporarily or permanently in the United States.

Id. at 70-71 (citations omitted).

60. Before the AEDPA, the gatekeeper provision provided "the sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." Deborah L. Stahlkopf, Note, *A Dark Day for Habeas Corpus: Successive Petitions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1122 (1998); 28 U.S.C. § 2255 (1994). See also 28 U.S.C. § 2254 (1994). But see Federal Document Clearing House Inc., Political Transcripts; News Conference, Webwire Anti-Terrorism Bill, Senate Judiciary Committee, U.S. Senator Orrin G. Hatch, Chairman (April 15, 1996) (statement of Senator Orrin Hatch) (arguing the AEDPA will curb the endless, frivolous, costly appeals of death sentences).

61. Stahlkopf, *supra* note 60, at 1121.

62. 28 U.S.C. § 2244(b)(1) (1996). The AEDPA gatekeeper provision in § 2244 provides in part:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed

unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the offense.

Id.

63. Before the AEDPA, there was no limit on how many times a person could file for habeas relief. See *Dorsey v. Gill*, 148 F.2d 857, 862 (D.C. Cir. 1945). In turn, this led to abuses of the writ

eliminating the ability of death row inmates to prolong their executions by filing second or successive habeas corpus⁶⁴ petitions that are without merit.⁶⁵

C. *Cage v. Louisiana*⁶⁶

In *Tyler v. Cain*, the petitioner sought to apply the new rule announced in *Cage v. Louisiana* retroactively to his case on collateral review.⁶⁷ In *Cage*, the petitioner was convicted of first-degree murder

because inmates were able to file successive and unfounded petitions. *See id.* These multiple petitions harass courts and cause unwarranted delays. *See id.* The court describes abuse of the writ in more detail:

[P]etitions for the writ are used not only as they should to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial, and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions – an average of 5.

Id.

64. 28 U.S.C. § 2244(b)(3)(A) states “Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate courts of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). Section 2244(b)(3)(C) states that “[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.”

65. In 1996, President Clinton signed The Antiterrorism and Effective Death Penalty Act of 1996 into law and stated the goal of the AEDPA is to “streamline Federal appeals for convicted criminals sentenced to the death penalty.” President William J. Clinton, President Statement on Antiterrorism Bill Signing (April 24, 1996), *in* 1996 WL 203049, *2. In addition, the President stated:

There are three other portions of this bill that warrant comment. First, I have long sought to streamline Federal appeals for convicted criminals sentenced to the death penalty. For too long, and in too many cases, endless death row appeals have stood in the way of justice being served. Some have expressed the concern that two provisions of this important bill could be interpreted in a manner that would undercut meaningful Federal habeas corpus review. I have signed this bill because I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary.

Section 104(3) provides that a Federal district court may not issue a writ of habeas corpus with respect to any claim adjudicated on the merits in State court unless the decision reached was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. Some have suggested that this provision will limit the authority of the Federal courts to bring their own independent judgment to bear on questions of law and mixed questions of law and fact that come before them on habeas corpus.

Clinton, 1996 WL 203049, at *2-3.

66. 498 U.S. 39 (1990).

67. *Tyler v. Cain*, 533 U.S. 656, 659-60 (2001).

and sentenced to death.⁶⁸ Cage appealed this decision, arguing that the jury instructions on the standard of reasonable doubt given at his trial were unconstitutional.⁶⁹ The Supreme Court agreed with Cage and held that phrases such as “moral certainty” and “grave uncertainty,” as they are commonly understood, suggest a higher degree of doubt than is required by the Constitution for acquittal under the reasonable doubt standard.⁷⁰ The Court further held that when these statements are “then considered with the reference to ‘moral certainty,’ rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.”⁷¹

III. STATEMENT OF THE CASE

A. *Statement of the Facts*

In 1975, Melvin Tyler got into an argument with his estranged girlfriend.⁷² Later that night, Tyler went to his girlfriend’s house and fired several shots from a .22 caliber pistol into one of her windows.⁷³

68. *Cage*, 498 U.S. at 40.

69. In *Cage*, the jury instruction pertaining to reasonable doubt was as follows:

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant’s guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.

Id. (emphasis added).

70. *Id.* at 41.

71. *Id.*

72. *Tyler*, 533 U.S. at 659. In Tyler’s brief to the Supreme Court, the petitioner describes the chain of events as follows:

On March 20, 1975, Melvin Tyler got into a fight with his girlfriend over whether she would reconcile with her husband. After drinking himself into a rage, he went to her house, stood in the alleyway outside the house, and fired a .22 caliber pistol into a draped and enclosed window. Unbeknownst to him, Tyler’s twenty-day-old daughter lay asleep under the window. Tyler’s shots ricocheted, hitting the infant, causing her death. Tyler was arrested, prosecuted, and convicted of second-degree murder in the Criminal District Court for the Parish of Orleans, State of Louisiana.

Petitioner’s Brief at 2-3, *Tyler v. Cain*, 533 U.S. 656 (2001) (No. 00-5961).

73. *Id.*

2002]

TYLER V. CAIN

195

The shots ricocheted from the window and killed their 20-day-old daughter.⁷⁴ A jury found Tyler guilty of second-degree murder and sentenced him to life without parole.⁷⁵

B. Procedural History

Tyler appealed the trial court's decision,⁷⁶ but the Louisiana Supreme Court affirmed the decision.⁷⁷ Tyler then turned to both federal and state post-conviction relief. By 1986, Tyler had filed five (5) state petitions for habeas corpus relief, all of which were denied.⁷⁸ In addition, the federal district court denied Tyler's first federal habeas petition, which was then affirmed on appeal.⁷⁹

Next, Tyler filed a sixth state petition for habeas corpus after the United States Supreme Court handed down the decision of *Cage v.*

74. *Id.* at 3.

75. *State v. Tyler*, 363 So. 2d 902 (La. 1978).

76. *Tyler*, 533 U.S. at 659. Tyler challenged the jury instructions at his trial. Petitioner's Brief at 3, *Tyler* (No. 00-5961). More specifically, Tyler challenged the definition of reasonable doubt the court gave to the jury, which is as follows:

If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. If, after giving a fair and impartial consideration of all the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

The prosecutor must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be an actual or *substantial doubt*. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt for which you could give good reason.

Id. at 3-4 (emphasis added).

77. *Tyler*, 533 U.S. at 659.

78. *State ex rel. Tyler v. Blackburn*, 494 So. 2d 1171 (La. 1986), *State v. Tyler*, 446 So. 2d 1226 (La. 1984), *State ex rel. Tyler v. State*, 437 So. 2d 1142 (La. 1983), *State v. Tyler*, 430 So. 2d 92 (La. 1983), *State ex rel. Tyler v. Maggio*, 428 So. 2d 483 (La. 1983) (all denying Tyler's state habeas corpus applications).

79. *Tyler v. Butler*, No. 88cv4929 (E.D. La.), *aff'd*, *Tyler v. Whitley*, 920 F.2d 929 (5th Cir. 1990) (decision denying Tyler's federal habeas corpus application).

Louisiana in 1990.⁸⁰ In this petition, Tyler claimed his rights had been violated under the new rule established in *Cage* because the jury instructions in his case were similar to the instructions the Supreme Court found unconstitutional in *Cage*.⁸¹ Again, the state trial court denied the petition, and then the Louisiana Supreme Court denied the petition.⁸²

Finally, in 1997, Tyler filed a petition in the United States Court of Appeals for the Fifth Circuit⁸³ requesting permission to file a successive petition in the federal district court for habeas corpus relief under section 2254.⁸⁴ The Fifth Circuit ruled that it could not grant the habeas petition unless Tyler made a prima facie showing⁸⁵ that his successive petition relied on a new rule of constitutional law made retroactive on collateral review by the United States Supreme Court.⁸⁶ The Court of Appeals found that Tyler made the requisite showing and granted him leave to file the successive petition.⁸⁷ Tyler then presented his claim to the Federal District Court, which held the new constitutional rule in *Cage* regarding jury instructions should apply retroactively,⁸⁸ but that Tyler

80. *Cage v. Louisiana*, 498 U.S. 39 (1990) (holding the jury instructions violated the Due Process clause of the Fourteenth Amendment because the words “substantial” and “grave” suggested a lower degree of proof than the “beyond a reasonable doubt” standard requires). *See supra* notes 66-69 and accompanying text.

81. *Tyler*, 533 U.S. at 659. The jury instructions the Court condemned in *Cage* defined reasonable doubt using the following phrases:

It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof . . . it is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Cage, 498 U.S. at 40. The jury instructions in *Tyler v. Cain* contained similar phrases. *See supra* note 76.

82. *State ex rel. Tyler v. Cain*, 684 So. 2d 950 (La. 1996).

83. *Tyler*, 533 U.S. at 660.

84. *Id.* 28 U.S.C. § 2244(b)(3)(A). This provision requires that a prisoner seeking a second successive habeas petition must seek an order from the court of appeals authorizing the district court to consider the petition. *Id.*

85. 28 U.S.C. § 2244(b)(3)(C) states “[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.” *Id.*

86. 28 U.S.C. § 2244(b)(2)(A).

87. The Court of Appeals granted the motion for the successive application, but limited the issue in the application to “whether *Cage v. Louisiana* should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt given to his jury was unconstitutional under *Cage* and *Victor v. Nebraska*.” Petitioner’s Brief at 5-6, *Tyler v. Cain*, 533 U.S. 656 (2001) (No. 00-5961) (citations omitted).

88. *Tyler v. Cain*, 533 U.S. at 660 (2001). The District Court determined the rule in *Cage* applied retroactively on collateral review because of the decision by the Fifth Circuit Court of Appeals in *Humphrey v. Cain*, 138 F.3d 552, 553 (5th Cir. 1998) (en banc) (holding the new rule established in *Cage* falls into the second *Teague* exception and thus can be applied retroactively on

was not entitled to collateral relief.⁸⁹ The Fifth Circuit Court of Appeals affirmed the decision on different grounds.⁹⁰ The United States Supreme Court granted certiorari due to the conflict among the circuit courts⁹¹ as to whether the new rule in *Cage v. Louisiana* should apply retroactively on collateral review.⁹²

C. *The United States Supreme Court Decision*

The Supreme Court affirmed the judgment of the Fifth Circuit Court of Appeals.⁹³ The Court focused on whether the new rule announced in *Cage v. Louisiana* applied retroactively to cases on collateral review, in order to determine whether the successive habeas petition brought by Tyler fell within the exception under the gatekeeper

collateral review). Petitioner's Brief at 6, *Tyler* (No. 00-5961).

89. *Tyler*, 533 U.S. at 659. However, the District Court determined that the AEDPA changed the standard of review and that a jury instruction similar to that in *Cage* was acceptable. *Id.* The District Court also held "a state prisoner can only prevail if the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Tyler*, 533 U.S. at 660. The District Court found that Tyler did not overcome this barrier. *Id.*

90. *Id.* The Fifth Circuit held the District Court erred because it did not determine if Tyler met the AEDPA's successive habeas standards. *Id.* The AEDPA requires a district court to dismiss a second or successive habeas petition unless the applicant shows the claim relies on a new rule made retroactive to cases on collateral review by the U.S. Supreme Court. 28 U.S.C. § 2244(b)(2)(A). The Court of Appeals determined that Tyler did not meet this standard because, based on Circuit precedent, Tyler could not point to any cases in which the Supreme Court made the rule in *Cage* retroactive to cases on collateral review. *Tyler*, 533 U.S. at 660.

91. The First, Fourth, Fifth, and Eleventh Circuits all held that the new rule in *Cage v. Louisiana* (pertaining to jury instructions) did not apply retroactively in collateral proceedings because the plain language of 28 U.S.C. § 2244(b)(2)(A) required a petitioner to point to a Supreme Court decision that made the rule retroactive in collateral proceedings. *See id.* *See also In re Smith*, 142 F.3d 832, 833 (5th Cir. 1998) (holding the rule in *Cage* is not retroactive because it was not made retroactive by the Supreme Court); *Rodriguez v. Superintendent, Bay State Correctional Ctr.*, 139 F.3d 270, 271 (1st Cir. 1998) (holding *Cage* is not retroactive because no Supreme Court decision expressly declares the availability of the rule or actually applied the rule in a collateral proceeding); *In re Vial*, 115 F.3d 1192, 1193 (4th Cir. 1997) (holding *Cage* is not retroactive because a new constitutional rule is made retroactive when the Supreme Court states the rule is made retroactive to collateral proceedings, or applies the rule in a collateral proceeding); *In re Hill*, 113 F.3d 181, 181-82 (11th Cir. 1997) (holding the *Cage* rule is not applicable in successive habeas petitions because it was not made retroactive by the Supreme Court). However, the Third Circuit and the Ninth Circuit held the rule in *Cage v. Louisiana* did apply retroactively in collateral proceedings. *See West v. Vaughn*, 204 F.3d 53, 55 (3d Cir. 2000) (holding the *Cage* rule is retroactive on collateral review based on the decision in *Sullivan v. Louisiana*); *Nevius v. Sumner*, 105 F.3d 453, 462 (9th Cir. 1996) (allowing successive habeas petition because the rule in *Cage* was made retroactive in *Adams v. Evatt*, 511 U.S. 1001, 1001 (1994), (vacating the decision from the Fourth Circuit Court of Appeals that held *Cage* was not retroactive, and remanding the case for further consideration in light of *Sullivan v. Louisiana*)).

92. *Tyler*, 533 U.S. at 660.

93. *Id.*

provision in section 2244(b)(2)(A).⁹⁴ The majority, per Justice Thomas, interpreted the meaning of the gatekeeper provision.⁹⁵ Based on the plain meaning of section 2244(b)(2)(A),⁹⁶ the Court held a new constitutional rule can only apply retroactively on collateral review if the Supreme Court holds the law applies retroactively on collateral review.⁹⁷ This being so, the Court held the new rule in *Cage v. Louisiana* does not apply retroactively to cases on collateral review because the rule was not made retroactive by any holding of the Court.⁹⁸ Therefore, Tyler could

94. *See id.*

95. *See id.* at 661-63. *See supra* note 62. Under the exception in § 2244(b)(2)(A), the petitioner must pass three prerequisites to qualify for relief in a second or successive habeas petition. *Tyler*, 533 U.S. at 661-63. “First, the rule on which the claim relies must be a ‘new rule’ of constitutional law; second, the rule must have been ‘made retroactive to cases on collateral review by the Supreme Court’; and third, the claim must have been ‘previously unavailable.’” *Id.* Louisiana did not dispute that *Cage* created a new rule of constitutional law that was not previously available. *Id.* Thus, the only issue in the case was whether the new rule applied retroactively to cases on collateral review by the Supreme Court. *Id.*

96. *Tyler*, 533 U.S. at 662. Under the plain meaning analysis, the Court stated:

As commonly defined, “made” has several alternative meanings, none of which is entirely free from ambiguity Out of context, it may thus be unclear which meaning should apply in § 2244(b)(2)(A) and how the term should be understood. We do not, however, construe the meaning of statutory terms in a vacuum. Rather, we interpret the words “in their context and with a view to their place in the overall statutory scheme.” In section 2244(b)(2)(A), the word “made” falls within a clause that reads as follows: “A new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*” Quite significantly, under this provision the Supreme Court is the only entity that can “make” a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.

The only way the Supreme Court can, by itself, “lay out and construct” a rule’s retroactive effect, or “cause” that effect “to exist, occur, or appear” is through a holding. The Supreme Court does not “make” a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts We thus conclude that a new rule is not “made retroactive to cases on collateral review” unless the Supreme Court holds it to be retroactive.

Tyler, 533 U.S. at 662-63 (emphasis in original) (citations omitted).

97. *Id.* The Court stated the word “made,” in the context of § 2244(b)(2)(A), is synonymous with the word “held.” *Id.* at 664. Congress does not need to use the word “held” to have the same effect because Congress is permitted to use synonyms. *Id.* Indeed, the Court already determined in *Williams v. Taylor* that Congress does not need to use the word “held” to mean as much. *Williams v. Taylor*, 529 U.S. 362, 364 (2000). In *Williams*, the Court held that in the phrase “clearly established Federal law, as determined by the Supreme Court of the United States,” the word “determined” refers to holdings in the context of § 2254(d)(1) as opposed to dicta. *Id.* at 412 (O’Connor, J., concurring).

98. *Tyler v. Cain*, 533 U.S. 656 (2001). Tyler argued that the Court made the rule in *Cage* retroactive on collateral review in *Sullivan v. Louisiana*, when combined with the “watershed exception” established in *Teague v. Lane*. *Id.* This argument failed because the Court held the new rule did not meet the two requirements under the “watershed requirement.” *Id.* at 665-66. *See also* *Sawyer v. Smith*, 497 U.S. 227, 229, 244-45 (1990) (holding that to fall under the second *Teague*

not avail himself to the new constitutional rule in *Cage*, and thus his successive petition was barred under 28 U.S.C. § 2244(b)(2)(A).⁹⁹

Justice O'Connor cast the fifth vote in this case, which was necessary for the Court to achieve a majority.¹⁰⁰ In her concurring opinion, Justice O'Connor more fully explained the ways the Court could expressly make a rule retroactive to cases on collateral review.¹⁰¹ Indeed, Justice O'Connor noted the most unmistakable instance when the Court makes a new rule retroactive is by expressly holding the new rule applies retroactively on collateral review and, in turn, applying the rule retroactively on collateral review.¹⁰² In addition, Justice O'Connor recognized that the Court could make a new rule retroactive through multiple holdings that "logically dictate the retroactivity of the new rule."¹⁰³ By this, Justice O'Connor argued the Court could make a new rule retroactive over the span of multiple cases if the rule falls into one of the two exceptions found in *Teague v. Lane*.¹⁰⁴

exception (the watershed exception), the new rule must meet two requirements: infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter the bedrock procedural elements necessary for the fairness of a proceeding). However, the majority did agree it could make a rule retroactive over the course of two cases, but that it did not do so for the rule in *Cage*. *Tyler*, 533 U.S. at 665-66. In addition, the Court stated that the only holding in *Sullivan* was an error like the one in *Cage* - structural error - and that a structural error does not *per se* alter a bedrock principle. *Id.* at 666. The Court stated, at most, Tyler's argument amounts to evidence that the Court should make the rule retroactive. *Id.* However, the Court declined to make the rule retroactive. *Id.* at 668.

99. *Tyler*, 533 U.S. at 667-68.

100. *Tyler*, 533 U.S. at 668 (O'Connor, J., concurring).

101. *Id.* at 668.

102. *Id.*

103. *Id.* at 669. Justice O'Connor stressed that for a new rule to be made retroactive over multiple decisions, the conclusion must be strictly logical, and "the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively." *Id.* Therefore, Justice O'Connor argued that a rule can be made retroactive under section 2244(b)(2)(A) "only where the Court's holdings logically permit no other conclusion than that the rule is retroactive." *Id.*

104. *Tyler*, 533 U.S. at 669. Justice O'Connor noted that "[i]t is relatively easy to demonstrate the required logical relationship with respect to the first exception articulated in *Teague v. Lane*" (a new rule making certain private conduct criminal that is beyond the government's authority to proscribe). *See id.* She stated:

When the Court holds as a new rule in a subsequent case that a particular species of primary, private individual conduct is beyond the power of the criminal lawmaking authority to proscribe, it necessarily follows that this Court has "made" that new rule retroactive to cases on collateral review. The Court has done so through its holding alone, without resort to dicta and without any application of principles by lower courts.

Id. As to a rule falling under the second *Teague* exception, Justice O'Connor argues the Court can give a new rule retroactive effect without expressly holding as much if the rule alters a bedrock procedural element necessary to the fairness of a proceeding. *Id.* at 670. If this is the case, the rule could apply retroactively to cases under collateral review as long as logic dictates that the holdings

In the dissenting opinion, Justice Breyer argued the Court did make the rule in *Cage v. Louisiana* retroactive on collateral review.¹⁰⁵ Justice Breyer maintained the Court could make a new rule retroactive in two cases when taken together, and in fact did with the rule in *Cage*.¹⁰⁶ Therefore, the dissent would allow Tyler to avail himself of the reasonable doubt jury instruction rule established in *Cage v. Louisiana*.¹⁰⁷

IV. ANALYSIS

A. A Closer Look at Habeas Corpus under the AEDPA

1. Time Limitations under the AEDPA

To understand the affect of *Tyler v. Cain* on both state and federal inmates seeking federal habeas corpus, it is important to understand the process under the AEDPA that inmates must follow to file petitions for federal habeas corpus review. First, sections 2244 and 2255 provide

over the span of cases make the new rule retroactive under section 2244(b)(2)(A). *See id.*

105. *Tyler*, 533 U.S. at 670-71. In the Dissent, Justice Breyer agreed with Tyler's argument that the Court made the rule in *Cage* retroactive on collateral review in *Sullivan v. Louisiana*, when taken together with the watershed exception in *Teague v. Lane*. *Id.* In *Cage*, the Court announced the rule that certain jury instructions "violated the Constitution because [they] inaccurately defined 'reasonable doubt,' thereby permitting a jury to convict 'based on a degree of proof below that required by the Due Process Clause.'" *Id.* at 670. Justice Breyer explained his rationale in the form of a syllogism. *See id.* at 672-73. First, in *Sullivan*, the Court held that *Cage* falls within the watershed exception in *Teague* because it alters the understanding of a bedrock procedural element essential to fair trials. *Id.* at 671. Next, in *Sullivan*, the Court held that a "*Cage* violation can never be harmless because it leaves the defendant with no jury verdict known to the Sixth Amendment." *Id.* at 672. Therefore, the rule in *Cage* applies retroactively to cases on collateral review because it is a watershed rule and falls under the exception in *Teague*. *Id.* at 673. Justice Breyer states "Ordinarily, in law, to hold that a set of circumstances falls within a particular legal category is simultaneously to hold that, other things being equal, the normal legal characteristics of members of that category apply to those circumstances." *Id.* As such, the dissent urges that the rule in *Cage* should apply retroactively on collateral review. *Id.*

106. *Tyler*, 533 U.S. at 671.

107. *See id.* at 675. Justice Breyer also argues that nothing in the AEDPA supports, let alone requires, the decision of the Court. *Id.* at 676. He states the purpose of the AEDPA was to "bar successive petitions when the lower courts, but not the Supreme Court, have held a rule not to be 'new' under *Teague* because dictated by their own precedent, or when lower courts have themselves adopted new rules and then determined that the *Teague* retroactivity factors apply." *Id.* (citations omitted). Justice Breyer also noted the majority decision will most likely add not only more procedural complexity, "along with its attendant risk of confusion, but also serious additional unfairness." *Id.* at 677.

temporal guidelines that inmates must follow.¹⁰⁸ Under section 2244(d)(1),¹⁰⁹ a state inmate must file a petition for federal habeas corpus no later than one-year after the date when the judgment became final in his case.¹¹⁰ Section 2255 imposes a similar one-year limitation on federal inmates seeking federal habeas corpus review.¹¹¹ The combined goal of these provisions is to curb the abuse of the writ by preventing inmates from filing numerous habeas petitions years after the final determination of the merits of their cases.¹¹²

108. 28 U.S.C. §§ 2244(d), 2255 (1996)

109. 28 U.S.C. 2244(d)(1). Section 2244(d)(1) states the one-year period of limitation shall start to run from the latest of:

- (A) the date on which the judgment 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 an 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; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. However, section 2244(d)(2) is a tolling provision, which provides that the time state post-conviction remedies or claims are pending does not count towards the one-year limitation in § 2244(d)(1). *See also* Hartman, *supra* note 6, at 352-55 (containing a good review of sections 2244(d)(1) & (2)).

110. *Compare* 28 U.S.C. § 2244(d) (imposing time limits on habeas corpus), *with* United States v. Smith, 331 U.S. 469, 475 (1947) (holding that habeas corpus is a remedy without a time limit). Based on this comparison, statutory law has deviated from the traditional common-law approach that there should be no time limits on when a petitioner can file for federal habeas corpus review.

111. 28 U.S.C. § 2255. Much like its counterpart for state inmates in § 2244, the one-year limitation for federal inmates contained in § 2255 starts to run from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

112. *See* statement by Senator Hatch, *supra* note 60. Hatch argues the AEDPA will eliminate abusive and excessive habeas petitions filed by the same inmates. *Id.* One way the AEDPA will achieve this goal is to eliminate the ability of inmates to file petitions one-year after the final judgment in their cases. *Id.* *But see* Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414 (1998). Woolley argues that constitutional remedies such as habeas corpus do not have time limits and the remedy of federal habeas corpus is worthless because of the time limits imposed by Congress. *Id.* at 421. Additionally, Woolley argues the AEDPA will not eliminate frivolous petitions because the

2. Federal Inmate Procedure under the AEDPA

The AEDPA imposes different procedural requirements that state and federal inmates must follow to file a petition for federal habeas corpus review.¹¹³ Federal inmates must file a petition for habeas corpus under section 2255 or section 2241.¹¹⁴ Under section 2255, federal inmates may only challenge the imposition or validity of their sentence.¹¹⁵ On the contrary, the remedies under section 2241 are much broader.¹¹⁶ Under this section, federal inmates can challenge the

shortened time limits will encourage more inmates to file pro se petitions for habeas review to avoid the expiration of the one-year deadline. *Id.* at 429. In turn, the increase in the number of inmates filing pro se petitions to comply with the time limits will in fact increase the amount of meritless or frivolous petitions filed each year. *Id.* Thus, the procedures imposed under the AEDPA effectively undermine its own goals of eliminating frivolous petitions because it encourages inmates to file petitions in order to comply with the one-year requirements to ensure their claims are not barred. *Id.*

113. 28 U.S.C. §§ 2254, 2255 (1996). *See also* Deborah L. Stahlkopf, Note, *A Dark Day for Habeas Corpus: Successive Petitions Under the AntiTerrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1119-1120 (1998) (containing a good overview of the procedures inmates must follow to file federal habeas corpus petitions). In addition, there are special provisions governing the procedure for inmates filing for habeas review in capital cases. *See* 28 U.S.C. §§ 2261-2266 (1996).

114. *See* 28 U.S.C. §§ 2241, 2255 (1996).

115. 28 U.S.C. § 2255 states:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was *imposed in violation* of the Constitution or laws of the United States, or that the *court was without jurisdiction* to impose such sentence, or that the *sentence was in excess of the maximum* authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. (emphasis added).

Id. For example, a federal inmate may challenge the constitutionality of his sentence, or that the district court did not have jurisdiction to impose the sentence. *See e.g.*, *Pruitt v. United States*, 274 F.3d 1315, 1316 (11th Cir. 2001). In *Pruitt*, the petitioner filed a habeas petition under section 2255 challenging the validity of the sentence because it violated the *ex post facto* clause of the Constitution. *Id.*

116. 28 U.S.C. § 2241(c) provides in that:

The writ of habeas corpus shall not extend to a prisoner unless:

- (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
- (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
- (3) He is in custody in violation of the Constitution or laws or treaties of the United States

Id.

Compare 28 U.S.C. § 2241(c), *with* 28 U.S.C. § 2255. The remedy in section 2255 is much broader than the remedy in section 2241. *Id.* In *United States v. Scott*, the Tenth Circuit held it was appropriate for an inmate to raise a claim for immediate release under section 2241 after the expiration of his sentence. *United States v. Scott*, 803 F.2d 1095 (10th Cir. 1986). *See also* Stahlkopf, *supra* note 113, at 1120 (arguing that Section 2241 acts like a catch-all category, which is broad enough to encompass claims that federal inmates cannot bring under section 2255).

2002]

TYLER V. CAIN

203

execution of their sentences.¹¹⁷

3. State Inmate Procedure under the AEDPA

State inmates must bring petitions for federal habeas corpus under section 2254 or section 2241.¹¹⁸ First, however, state inmates must exhaust all available state remedies before they can file a federal habeas petition under section 2254.¹¹⁹ In addition, state inmates must meet one of the threshold requirements under section 2254(d) for a reviewing court¹²⁰ to grant a petition.¹²¹

If the state inmate meets one of the threshold requirements, the inmate may proceed to file a federal habeas corpus petition under section 2254 or section 2241.¹²² Under section 2254(a), a state inmate may file

117. *Id.* For instance, a federal inmate can bring a claim under section 2241 if the correctional facility does not carry out the sentence as required by law, or if the correctional facility does not release the inmate after the expiration of his stated prison term. *See, e.g.,* *Garza v. Lappin*, 253 F.3d 918, 920 (7th Cir. 2001). In *Garza*, the petitioner filed a habeas petition under section 2241, arguing the execution of his sentence was illegal because it violated a treaty. *Id.* *See also* Stahlkopf, *supra* note 113, at 1119. Stahlkopf explains the dichotomy between section 2255 and section 2241 as follows:

Section 2255 is a statutory remedy distinct from habeas corpus itself, which is a non-statutory remedy granted under § 2241. [S]ection 2255 has been treated by courts as the remedy of first resort, and only when a court lacks jurisdiction under § 2255 can a federal prisoner bring a habeas corpus petition under § 2241.

Id. Thus, federal inmates cannot challenge the execution of their sentence under section 2255 because section 2255 is not broad enough to encompass matters dealing with the execution of sentences. *Id.* at 1120. *See also* *United States v. Scott*, 803 F.2d 1095, 1096 (10th Cir. 1986) (holding that section 2255 cannot be used for a claim challenging the execution of a sentence).

118. *See* 28 U.S.C. §§ 2254(a), (b) and 28 U.S.C. § 2241(c).

119. *Id.* Section 2254(b)(1) states that a court shall not grant a state inmate habeas relief unless:

- (A) the Applicant has exhausted the remedies available in the courts of the State; or
- (B) (i) there is an absence of available State corrective process; or
- (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Id.

120. Under 28 U.S.C. § 2254(d), the standard of review for a federal habeas corpus claim is a deference standard based on reasonableness, under which a reviewing federal court shall defer to the state court as long as the decision was reasonable. Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 412-13 (1996).

121. 28 U.S.C. § 2254(d). Section 2254(d) provides that a reviewing court shall not grant a habeas petition if a state court has already ruled on the merits of the case 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 . . . 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.

Id.

122. 28 U.S.C. §§ 2254(a), 2241(a).

a petition “only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”¹²³ Furthermore, it is unclear as to whether state inmates can avail themselves to section 2241 if the remedy under section 2254 is inadequate because the two provisions provide similar relief.¹²⁴ As such, it is unclear if there is a distinction between the claims state inmates must file under section 2254 or section 2241, or if state inmates can pursue a remedy under section 2241 if the remedy under section 2254 does not provide adequate relief.¹²⁵ However, if state inmates follow the same procedures as federal inmates and file challenges to the validity of their sentence under section 2254 and challenges to the execution of their sentence under section 2241, their claims will probably be valid.¹²⁶

4. The Gatekeeper Provision of the AEDPA

The above process is not the final obstacle inmates must face before a court will grant federal habeas corpus review under the AEDPA.¹²⁷

123. 28 U.S.C. § 2254(a).

124. See Stahlkopf, *supra* note 113, at 1121. Stahlkopf argues that there may be no real distinction between the remedy provided in section 2241 and the remedy in section 2254. *Id.* This results from the vague language in section 2254(a), which states that habeas relief shall be granted “only on the ground that [the inmate] is in custody in violation of the Constitution” See § 2254(a). This language is strikingly similar to the language in section 2241(c) which provides that “[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [H]e is in custody in violation of the Constitution” See § 2241(c)(3). As such, there may be no difference in the remedy available. See Stahlkopf, *supra* note 113, at 1121. In addition, Stahlkopf notes there is little case law to determine if state inmates may use section 2241 in the same way federal inmates can. *Id.* Indeed, she states:

[T]he Supreme Court’s conflation of the two statutes, both in stating the substance of petitioners’ claims and in citing the jurisdiction of the district courts, implies that there is no sharp line to be drawn between the two when a state prisoner brings a petition challenging the validity of his sentence.

Id. Stahlkopf concludes that state inmates, like federal inmates, can use section 2241 if the remedy under section 2254 is unsatisfactory because of the similar language of each provision and because there is no language in either provision barring state inmates from filing a petition under either section. *Id.*

125. See Stahlkopf, *supra* note 113, at 1121. Some courts hold the remedies are the same under section 2241 and section 2254. See, e.g., *O’Neal v. McAninch*, 513 U.S. 432 (1995). In *O’Neal*, the petitioner filed his federal habeas petition under section 2254. *Id.* at 535. In the decision, the Court used section 2254 and section 2241 synonymously when referring to habeas corpus. See *id.* at 444. *But see* *Newlin v. Helman*, 123 F.3d 429 (7th Cir. 1997). In this case, the Seventh Circuit held that section 2241 and section 2254 provide distinct forms of relief. *Id.* at 437-38. Thus, the Seventh Circuit concluded that, parallel to the requirements on federal inmates, state claims challenging the validity of a conviction or a sentence should be filed under section 2254, and those challenging the execution of a sentence should be filed under section 2241. *Id.*

126. See 28 U.S.C. §§ 2254(a), (b) & 2241(c).

127. Compare 28 U.S.C. §§ 2244, 2255 (1996) (containing the current gatekeeper provisions

Indeed, the gatekeeper provision of section 2244(b) is perhaps the most challenging obstacle inmates must overcome to have a court grant a second or successive petition.¹²⁸ The gatekeeper provision in section 2244(b) eliminates a reviewing court's discretion to hear second or successive petitions for habeas corpus.¹²⁹ Under this provision, a claim presented in a second or successive petition that was presented in a previous petition must be dismissed.¹³⁰ In addition, a claim presented in a second or successive petition that was not presented in a previous petition must also be dismissed unless the petitioner demonstrates that the new claim "relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable."¹³¹

Inmates must also jump through additional hoops when filing second or successive petitions for federal habeas review (such as in *Tyler*).¹³² First, an inmate must file a motion with the appropriate United States court of appeals for permission to file a second or successive petition for federal habeas corpus review.¹³³ If the circuit court grants permission to file a second or successive petition, the inmate can then file the habeas petition in the appropriate district court.¹³⁴ For the

eliminating the reviewing court's discretion in hearing second or successive petitions), with 28 U.S.C. §§ 2244, 2255 (1994) (containing the former gatekeeper provisions giving reviewing courts discretion to hear a second or successive petition for federal habeas corpus). The new gatekeeper provision eliminates the discretion that reviewing courts possessed before the enactment of the AEDPA. *Id.* The prior system was more effective because it allowed reviewing courts to determine if the claim in the second petition was a valid claim, and if so, the court could hear the case. *Id.* Now, by eliminating a reviewing court's discretion, the AEDPA closes the door to claims that do have merit and should be heard. *Id.* The AEDPA makes it nearly impossible for a person whose rights have been violated to file a second petition for habeas relief. *Id.* As such, the new provisions do not afford inmates a chance for relief as provided by the United States Constitution. Thus, the AEDPA bars claims with potential merit. *Id.* *But see* Statement of President Clinton, *supra* note 65 (supporting the AEDPA and the elimination a reviewing court's discretion to review second or successive petitions in order to stop the massive amounts of frivolous petitions).

128. See 28 U.S.C. § 2244(b).

129. The state gatekeeper provision is in section 2244(b), and the federal gatekeeper provision is in section 2244(b) and section 2255. See 28 U.S.C. §§ 2244(b), 2255.

130. 28 U.S.C. § 2244(b)(1).

131. 28 U.S.C. § 2244(b)(2)(A).

132. See *Tyler v. Cain*, 533 U.S. 656 (2001). The procedure *Tyler* had to follow to be granted review is a good example of the numerous procedural hurdles that inmates must comply with in order to file a second or successive petition. *Id.* at 659-60.

133. 28 U.S.C. § 2244(b)(3)(A). In this motion, the inmate must make a prima facie showing under section 2244(b)(2)(A) that his claim relies on a new rule made retroactive on collateral review. 28 U.S.C. § 2244(b)(3)(C).

134. 28 U.S.C. § 2244(b)(4). Section 2244(b)(4) provides that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."

district court to grant the petition, the inmate must actually show the new claim falls within the standard set forth in section 2244(b)(2)(A).¹³⁵

Finally, courts have treated the gatekeeper provision in section 2244(b)(2)(A) as barring second or successive petitions filed under sections 2254 or 2255.¹³⁶ However, courts have treated second or successive petitions filed under section 2241 differently because section 2241 provides a different remedy than sections 2254 and 2255.¹³⁷ For example, section 2241 is the only method for federal inmates to challenge the execution of their sentence.¹³⁸ Moreover, section 2244(b) and section 2255 are silent as to whether second or successive petitions filed under the same section are barred.¹³⁹ Section 2241 is also silent as to whether a second petition filed under this section is barred.¹⁴⁰ Therefore, a second petition filed under section 2241 is presumably allowed because had Congress intended otherwise, they specifically would have barred second or successive petitions filed under section 2241 as they did in sections 2254 and 2255.¹⁴¹

135. *Id.*

136. *See* 28 U.S.C. § 2244(b)(2)(A). *See also* Stahlkopf, *supra* note 113, at 1122. For example, if a federal inmate filed his first petition under section 2255 (challenging the imposition of his sentence) and later filed another petition under section 2255, a reviewing court must dismiss the second petition pursuant to section 2244(b)(1). *Id.* The same outcome would occur for a second petition filed by a state inmate under section 2254 if that inmate also filed the first petition under section 2254. *Id.*

137. *See* *Chambers v. United States*, 106 F.3d 472, 475 (2d Cir. 1997). In *Chambers*, the Second Circuit held the remedies under section 2241 and section 2255 are different. As such, the court held that a second petition filed under section 2255 is not considered a second or successive petition under the gatekeeper provision if the previous petition was filed under section 2241. *Id.* The remedy under section 2241 is different from section 2255 because section 2255 allows federal inmates to challenge the imposition of their sentence, while section 2241 allows federal inmates to challenge the execution of their sentence. *Id.* Section 2255 is not broad enough to allow federal inmates to challenge issues dealing with the execution of their sentence. *Id.*

138. *Compare* 28 U.S.C. § 2241, *with* 28 U.S.C. § 2255. Section 2241 is the only provision in the AEDPA that courts have interpreted broadly enough to allow federal inmates to raise challenges based on the execution of their sentences. *See* Stahlkopf, *supra* note 113, at 1121-22.

139. *See* 28 U.S.C. §§ 2244(b), 2255.

140. *See* 28 U.S.C. § 2241.

141. *See* Stahlkopf, *supra* note 113, at 1124. A second or successive petition filed under either section 2254 or section 2255 is barred if the inmate filed the first petition under the same section. *See id.* However, if the inmate files the first habeas petition under either section 2254 or section 2255, and the second petition under section 2241, the second petition is probably not barred. *Id.* This is because section 2244 explicitly states a second claim filed under 2254 is barred, and section 2255 explicitly forbids the filing of a second petition. *Id.* However, section 2241 has no language forbidding a second or successive petition. *Id.* As such, there presumably are no restrictions to filing a second petition under section 2241 because had the drafters of the AEDPA intended there to be a bar, they would have included it within the statute as they did with the other provisions. *See id.*

B. The Effect of Tyler v. Cain on the “Great Writ”

It is premature to speculate as to all of the affects *Tyler v. Cain* will have on federal habeas corpus. It is apparent, however, that the Court’s myopic interpretation of the gatekeeper provision significantly narrows federal habeas review.¹⁴² The decision virtually eliminates both federal and state inmates’ ability to challenge their conviction or sentence through second or successive habeas petitions.¹⁴³ The majority in *Tyler* reached its decision by focusing on the construction¹⁴⁴ of section 2244(b)(2)(A).¹⁴⁵ The Court interpreted this provision to mean that new rules of constitutional law¹⁴⁶ could apply retroactively to cases on

142. 28 U.S.C. § 2244(b)(2) provides that a second or successive petition is barred unless: (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. . . .

Id. Many scholars have criticized the Court’s narrowing of habeas corpus. *See, e.g.,* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995) (criticizing the Court’s decision in *Teague v. Lane*). *But see* Sharad Sushil Khandelwal, Note, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. 2254(d)(1)*, 96 MICH. L. REV. 434 (1997). In this article, the author provides a justification for narrowing federal habeas corpus:

Victims and their families found habeas corpus a torturous process, prolonging their agony by adding another layer of “appeals” to an already overburdened criminal justice system. It also led to inefficient expenditures of courts’ time and attention, with federal judges facing towering stacks of barely legible handwritten petitions, very few of which were likely to raise valid constitutional claims.

Id. at 436 (citations omitted).

143. *See Tyler v. Cain*, 533 U.S. 656, 661 (2001). Inmates have already felt the effects of *Tyler*. *See, e.g.,* *Forbes v. United States*, 262 F.3d 143, 145 (2d Cir. 2001). In *Forbes*, the petitioner filed a successive petition under section 2255 claiming that the decision in *Apprendi v. New Jersey* (pertaining to jury instructions) should apply retroactively to his case. *Id.* The Second Circuit noted that the Supreme Court has never held that *Apprendi* applied retroactively to cases on collateral review. *Id.* at 144-45. As such, the Second Circuit denied the petition pursuant to section 2255 because the petitioner could not establish that the Court made the new rule retroactive as required under section 2244(b)(2)(A). *See id.*

144. *See* Kimberly Woolley, *supra* note 112, at 424-25. Many scholars and courts agree that the provisions of the AEDPA are vague. *Id.* These ambiguities are one reason why the doctrine of habeas corpus is misunderstood and why different courts interpret the provisions to mean different things. Woolley argues the vagueness of the AEDPA “leaves room for a variety of interpretations.” *Id.* at 425. For instance, section 2241(c) states “the writ of habeas corpus shall not extend to a prisoner unless . . . (3) He is in custody in violation of the Constitution” 28 U.S.C. § 2241(c)(3). In addition, Justice Souter criticized the AEDPA, stating “in a world of silk purses and pigs’ ears, the Act is not a silk purse of the art of statutory drafting.” *Id.* at 424-25 (quoting *Lindh v. Murphy*, 521 U.S. 320, 336 (1997)). *But see Tyler*, 533 U.S. 656. In *Tyler*, the Court recognized section 2244(b)(2)(A) was somewhat vague, but the rules of statutory construction could resolve any ambiguity within the provision. *Id.* at 662.

145. *See id.* at 662-63.

146. A new rule of constitutional law is one that breaks new ground, imposes a new obligation on the States or the Federal government, or is a holding whose result was not dictated by precedent

collateral review only if the Court holds the new rule applies retroactively on collateral review.¹⁴⁷

Before *Tyler v. Cain* and the AEDPA, inmates that filed second or successive petitions stood a better chance of obtaining federal review because of the more relaxed standards of retroactivity.¹⁴⁸ Under the former statute, a petitioner could argue that a new rule of constitutional law promulgated by the Court (which could potentially exonerate the inmate) should apply retroactively on collateral review if the rule fell under one of the two exceptions found in *Teague v. Lane*.¹⁴⁹ For example, an inmate could have argued the new rule was a watershed rule, and thus the discretionary gatekeeper provision under former section 2244 would not bar the second petition.¹⁵⁰ As such, inmates could still file a second or successive petition that relied on a new rule, while the reviewing courts still maintained the power to deny the petition if it was without merit.¹⁵¹

After the adoption of the AEDPA, inmates could still attempt to have the reviewing court entertain a second or successive petition based on the two exceptions found in *Teague*.¹⁵² Congress codified the Court's

existing at the time the defendant's conviction became final. Joanne T. Hannaway, Note, *O'Dell v. Netherland: A Bedrock Principle of Fundamental Fairness?*, 29 LOY. U. CHI. L.J. 943, 960 (1998). See also *Teague v. Lane*, 489 U.S. 288, 301 (1989).

147. *Tyler*, 533 U.S. at 662. The Court interpreted the phrase "made retroactive to cases on collateral review by the Supreme Court" by using the plain meaning of the text read as a whole. *Id.* The Court acknowledged the word "made" was somewhat ambiguous. *Id.* However, the Court stated the meaning of a statutory term should be interpreted "in their context and with a view to their place in the overall statutory scheme," not in a vacuum. *Id.* (quoting *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 809 (1989)). Under this standard, the Court held that, based on the definition of "made" as "to make" found in Webster's Dictionary and the context of its use in the statute, the word "made" is synonymous with the word cause, or hold. See *id.* As such, the Court concluded the only way a rule can be "made" retroactive per section 2244(b)(2)(A) is if the Court "holds" that the rule applies retroactively to cases on collateral review. See *id.*

148. See former 28 U.S.C. § 2244 (1994).

149. See *supra* notes 53-57 and accompanying text. Before the AEDPA and *Tyler*, courts reviewing second or successive petitions for habeas corpus had the discretion to determine if they should entertain the claim. 28 U.S.C. § 2244 (1994). Thus, an inmate filing a second petition could have argued that the reviewing court should entertain the petition because the new rule falls under one of the *Teague* exceptions. See *Teague*, 489 U.S. 288.

150. See former 28 U.S.C. § 2244 (1994) (giving the reviewing court discretion to grant a second petition).

151. *Id.*

152. See *supra* notes 55 and 56. For example, imagine the Supreme Court holds that police interrogation is unconstitutional under the Fourth Amendment. A federal inmate who was interrogated by police had previously challenged the validity of his conviction by filing a habeas petition under section 2255. Now, the inmate wants to challenge his conviction and take advantage of the new constitutional rule promulgated by the Court by filing another habeas petition under section 2255. Before *Tyler*, the inmate could have argued the new rule should apply retroactively

decision in *Teague v. Lane* in the AEDPA, but left out the two exceptions when new rules apply retroactively on collateral review.¹⁵³ Thus, it was not clear if the two exceptions in *Teague* were still good law or if a new rule could apply retroactively on collateral review if it fell into the one of the two *Teague* exceptions.¹⁵⁴ As such, the AEDPA by itself did not close the door on second or successive habeas corpus petitions.¹⁵⁵ It was not until the decision in *Tyler v. Cain* that the door to second or successive petitions was closed.¹⁵⁶

because it qualified as a watershed rule under *Teague* and thus, the successive petition would not be barred under the gatekeeper provision in section 2244(b)(2)(A). Although this approach might not have been successful, the inmate at least had a chance to be heard and had a remote possibility the reviewing court would grant the petition. Now, under *Tyler*, the same inmate's claim is barred under the gatekeeper provision in section 2244(b)(2)(A) unless the Court specifically holds the new rule applies retroactively to cases on collateral review. Therefore, the decision in *Tyler* places a significant limitation on an inmate's ability to file petitions for federal habeas corpus.

153. Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 590 (1999). Chen states:

[T]he new statute doesn't codify *Teague's* exceptions. Under *Teague*, a federal court could enforce an otherwise non-retroactive new constitutional rule in a habeas proceeding if the new rule: (1) went to the fundamental fairness of the state criminal proceeding and could affect the accuracy of the guilt determination; or (2) placed the conduct for which the petitioner was convicted beyond the realm of the criminal law to prohibit. To illustrate the conflict between *Teague* and [section] 2254(d)(1), imagine that the Court announces a watershed new rule that fits into one of *Teague's* exceptions after a prisoner's state conviction becomes final, and that the rule would have benefited her had it been the law during her direct appeal. She could successfully seek review under *Teague*, but the new statute would supersede *Teague's* application In other words, the statute by its own terms appears to forbid any retroactive application of a constitutional rule.

Id. at 590-91 (citation omitted).

154. *See infra* notes 157-61 and accompanying text. Inmates could argue that new rules should apply retroactively on collateral review if the rule falls under one of the exceptions in *Teague*. *Id.*

155. For example, before *Tyler*, inmates seeking habeas review could make other, more complex arguments that new rules should apply retroactively on collateral review. For example, an inmate could argue the Court made the new rule retroactive to cases on collateral review over a span of two or three cases. An inmate could also claim, as the defendant did in *Tyler*, that a new rule in one decision was made retroactive through a subsequent decision because the second decision qualified the rule under one of the exceptions in *Teague*, thus implicitly making the rule retroactive on collateral review. *See Tyler v. Cain*, 533 U.S. 665 (2001). In *Tyler*, the defendant argued the new rule of constitutional law in *Cage v. Louisiana* should be given retroactive effect because *Sullivan v. Louisiana* made the *Cage* rule fall under one of the exceptions in *Teague v. Lane*. *Id.* The Court disagreed. *Id.* However, the Court noted that it did have the power to make a rule retroactive over the span of two or more cases "with the right combination of holdings . . . only if the holdings in those cases necessarily dictate retroactivity of the new rule." *Id.* at 666.

156. *See Tyler*, 533 U.S. at 665-66. In *Tyler*, the Court held the only way under section 2244(b)(2)(A) for a new rule to apply retroactively is by a holding of the Court declaring that the rule applies retroactively. *Id.* at 662. As such, the Court has effectively eliminated any remaining discretion of reviewing courts by solidifying the language in section 2244 to mean that only the Court itself has the power to make a rule retroactive to cases on collateral review. *See id.* Thus, all

Moreover, the Court's decision in *Tyler* effectively eliminates the two exceptions found in *Teague v. Lane*, which in turn makes the doctrine in *Teague* obsolete.¹⁵⁷ A syllogism can best elucidate this argument. Section 2244(b)(2)(A) states that a second petition for federal habeas corpus cannot be heard unless the previously unavailable claim relies on a new rule of constitutional law made retroactively to cases on collateral review by the Supreme Court.¹⁵⁸ The Court held in *Tyler* that, pursuant to section 2244(b)(2)(A), a new rule of constitutional law can only be applied retroactively on collateral review if the Court holds the law applies retroactively on collateral review.¹⁵⁹ Therefore, based on a combination of the AEDPA and its interpretation by the Court, the only time a new rule of constitutional law can apply to a second or successive petition for habeas corpus is when the Court holds the rule applies retroactively.¹⁶⁰ As such, the exceptions in *Teague* can no longer apply to second or successive petitions for habeas corpus, thus making *Teague* obsolete.¹⁶¹

inmates filing a second or successive petitions seeking to use a new decision to exonerate themselves will be barred under section 2244(b)(2)(A) unless the Court makes the rule retroactive. Inmates can no longer argue their case falls under one of the two exceptions in *Teague* because the exceptions are now moot for the purposes of section 2244(b)(2)(A). *But see generally* Statement by Senator Hatch, *supra* note 60 (arguing that the need to curb abusive or frivolous petitions warrants the possible adverse effects the AEDPA will have on inmates).

157. *See Tyler*, 533 U.S. at 662, 665-66. *See, e.g., Banks v. Horn*, 271 F.3d 527, 542 n.13 (2001). In *Banks*, the Third Circuit stated:

Because we find *Teague* not to govern our analysis, our discussion of its principles are limited to explaining why it is not controlling here, despite the arguments of the parties.

We note, however, that recent decisions have called into question to what extent *Teague* has continued force independent of [the] AEDPA.

Id. (citations omitted).

158. 28 U.S.C. § 2244(b)(2)(A).

159. *Tyler*, 533 U.S. at 662.

160. *Id.* *But see Tyler*, 533 U.S. at 669 (O'Connor, J., concurring). Justice O'Connor noted the exceptions in *Teague* are still viable and as such, the Court could make a rule retroactive to cases on collateral review without expressly holding it to be retroactive by announcing a rule that fell into the second exception under *Teague*. *See also id.* at 671 (Breyer, J., dissenting).

161. Before *Tyler*, there were generally three ways an inmate could argue a new rule should apply retroactively to cases on collateral review — by direct ruling of the Court, by falling under one exceptions in *Teague*, or over multiple decisions that qualify a rule under one of the exceptions found in *Teague*. *See* 28 U.S.C. § 2244(b)(2)(A); *Teague v. Lane*, 489 U.S. 288, 311 (1989); *Tyler*, 533 U.S. at 666. However, the Court eliminated the second and third arguments by holding the only way a new rule can apply retroactively to cases on collateral review under section 2244(b)(2)(A) is if the Court holds the rule applies retroactively. *Tyler*, 533 U.S. at 665.

C. Tyler v. Cain Violates the Suspension Clause of the United States Constitution

The decision in *Tyler v. Cain* violates the Suspension Clause of Article I, Section 9, Clause 2 of the United States Constitution¹⁶² because it virtually eliminates habeas corpus review for a large group of inmates (those inmates filing a second or successive petition for habeas relief).¹⁶³ *Tyler*, when read in conjunction with the AEDPA, significantly restricts federal habeas by imposing procedural barriers that make it nearly impossible for inmates to raise meaningful claims after their first petition for habeas review.¹⁶⁴ The writ is suspended because the gatekeeper provision bars a second petition if it raises a claim previously presented in a prior petition.¹⁶⁵ Furthermore, a second petition raising a new claim is barred unless the claim relies on a new rule made retroactive by the Court.¹⁶⁶ Under the standard in *Tyler*, inmates have no further means to pursue a claim under federal habeas corpus if the Court has not held that the new rule applies retroactively on collateral review.¹⁶⁷ Thus, the decision in *Tyler* effectively suspends the

162. Article I, Section 9, Clause 2 provides that: “[T]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2. *See supra* notes 15-22 and accompanying text for an analysis of the writ during early American history.

163. Eric M. Freedman, Milestones in Habeas Corpus: Part I: *Just Because John Marshall Said It, Doesn’t Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 535-36 (2000). Freedman notes that Congress could violate the Suspension Clause by imposing restrictions on habeas corpus. *Id.* at 536. The AEDPA is an example of a restriction that could violate the Suspension Clause. *See generally id.*

164. *See* Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947 (2000). Hoffstadt maintains that Congress and the Supreme Court have significantly restricted the availability of federal habeas corpus, especially to state inmates on death row. *Id.* at 950-51, nn.1-4. Congress expanded procedural barriers to federal habeas, such as the gatekeeper provision in section 2244(b), and threshold requirements such as in section 2254(d). *Id.* In addition, the Court has narrowed the scope of federal habeas by their rulings which have “eliminated habeas review of Fourth Amendment claims and claims premised on developments in the law arising after a prisoner’s direct appeal is over.” *Id.* Furthermore, the Court interpreted the new provisions of the AEDPA narrowly, which also contributed to the restrictions on federal habeas. *See* Felker v. Turpin, 518 U.S. at 663-65. *See also* Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477, 1489 (1996) (arguing that the AEDPA narrows the availability of habeas corpus to a large group of inmates and has the hardest impact on death row inmates). *But see* Statement of President Clinton, *supra* note 65. President Clinton and Congress advocated streamlining the appeal process for prisoners sentenced to death by eliminating extra or frivolous delays in the execution. *Id.*

165. 28 U.S.C. § 2244(b)(1).

166. 28 U.S.C. § 2244(b)(2)(A).

167. *See id.*

writ of habeas corpus for a significant number of state and federal inmates.¹⁶⁸

For instance, in *Felker v. Turpin*,¹⁶⁹ the defendant challenged the constitutionality of the AEDPA under the suspension clause.¹⁷⁰ The Court held the gatekeeper provision of the AEDPA did not violate the Suspension Clause¹⁷¹ of the United States Constitution.¹⁷² The Court

168. *But see* Woolley, *supra* note 112, at 415. Woolley provides an explanation for suspending inmates' ability to file second or successive petitions. Woolley notes that Congress enacted the AEDPA shortly after the Oklahoma City bombing. *Id.* She states that "[t]he habeas corpus reform was added to the AEDPA, however, because Congress correctly believed that in the event someone was convicted of the Oklahoma bombing, he likely would receive the death sentence A primary goal of the AEDPA's habeas reform is to eliminate lengthy delays between sentencing and execution." *Id.* at 415. Thus, one of the main reasons Congress enacted the AEDPA was to prosecute and execute terrorists such as the Oklahoma City bomber in a more efficient way. *Id.*

169. 518 U.S. 651 (1996).

170. *Id.* In *Felker*, the defendant was convicted of capital murder, rape, aggravated sodomy, and false imprisonment and was sentenced to death. *Id.* at 655. The defendant pursued all state remedies and was denied relief, and then filed his first writ of habeas corpus in the United States District Court for the Middle District of Georgia. *Id.* at 655-56. The Federal District Court denied relief and the Eleventh Circuit Court of Appeals affirmed this decision. *Id.* The defendant filed a second petition for federal habeas corpus under section 2254 with the Eleventh Circuit Court of Appeals a few days before his scheduled execution. *Id.* The Eleventh Circuit denied his request for habeas relief as well. *Id.* The defendant then filed certiorari and a writ of habeas corpus with the Supreme Court, and the Court granted certiorari and a stay of his execution. *Id.* The defendant claimed the AEDPA violated the suspension clause of U.S. CONST. art. I § 9, cl.2 because section 2244(b) barred the second petition. *Id.*

171. The Court began its analysis by distinguishing the writ of habeas corpus as it existed when the framers drafted the Suspension Clause with the writ of habeas corpus as it exists today. *Felker*, 518 U.S. at 663-64. The Court stated:

The writ of habeas corpus known to the Framers was quite different from that which exists today. As we explained previously, the first Congress made the writ of habeas corpus available only to prisoners confined under the authority of the United States, not under state authority It was not until 1867 that Congress made the writ generally available in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States" But we assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789. The [AEDPA] requires a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court. But this requirement simply transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court as required by 28 U.S.C. § 2254 [and] Rule 9(b).

The Act also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners. But we have long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," and we likewise recognize that judgments about the proper scope of the writ are "normally for Congress to make."

Id. at 664 (citations omitted).

172. *Id.* at 664. The Court further held:

The new restrictions on successive petitions constitute a modified res judicata rule, a

implied that the new restrictions imposed by the AEDPA were part of the natural evolution of the doctrine in response to the growing abuse of the writ.¹⁷³ Thus, the gatekeeper provision of the AEDPA, by itself, does not violate the Suspension Clause of the United States Constitution.¹⁷⁴

The holding in *Tyler* however, when read in conjunction with the AEDPA, imposes restrictions on habeas corpus that violate the Suspension Clause. As noted above, the AEDPA imposes restrictions on habeas corpus to reduce the abuse of the writ, but it did not entirely suspend the availability review for inmates filing a second or successive petition.¹⁷⁵ In *Tyler*, the Court transforms the hurdles found in the

restraint on what is called in habeas corpus practice “abuse of the writ.” In *McCleskey v. Zant*, we said that “the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.” The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to “suspension” of the writ contrary to Article I, § 9.

Id. (citations omitted).

173. *Felker*, 518 U.S. at 664. In *Felker*, the Court provided a cursory explanation as to why the gatekeeper provision of the AEDPA does not violate the suspension clause. *See id.* at 664-65. However, the Court reserved its power to grant an original writ when exceptional circumstances warrant the use of this power. *Id.* at 665. Many scholars believe that the Court has been avoiding the constitutional issues dealing with habeas reform. *See, e.g.,* Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578, 1582 (1998). The author states:

The Supreme Court’s unanimous opinion in *Felker* is the most prominent example of constitutional avoidance in the habeas context. Relying in large part on *Yerger*, the Court explicitly adhered to the canon disfavoring repeals by implication and assumed that the Court continued to possess the broad power to issue an original writ in a deserving case, despite the AEDPA’s new restrictions on habeas jurisdiction. The Court did not delve into the debates over whether the new provisions violate the Suspension Clause or go beyond the Exceptions Clause, noting instead that the Court retained its powers to grant an original writ of habeas corpus when “exceptional circumstances” counsel in favor of granting relief. By following this approach, the Court both avoided having to rule decisively on the constitutionality of the provisions barring successive petitions and reiterated its authority to exercise judicial review (through the power to issue original writs) in cases raising serious constitutional concerns. Thus, although the outcome of *Felker* upheld the AEDPA’s gatekeeping provisions for successive petitions, the opinion also actively defended the Court’s jurisdiction.

Id. at 1582-83 (citations omitted).

174. *Felker*, 518 U.S. at 665.

175. *See id.* After *Felker*, inmates still had other avenues to obtain review for a second or successive petition for habeas corpus under the AEDPA. *See supra* notes 148-61 and accompanying text for a discussion about how federal inmates could still be heard on a second petition even under the limitations imposed by the AEDPA. For example, inmates could avail themselves to the exception in section 2244(b)(2)(A) by arguing that their claim relies on a new rule made retroactive by the Court by falling under an exception in *Teague v. Lane*.

AEDPA into brick walls.¹⁷⁶ For example, an inmate who raises the same claim from a prior petition in a second or successive petition is totally barred from raising the claim again, even if a new rule could demonstrate a violation of his constitutional rights at the trial.¹⁷⁷ Moreover, an inmate raising a claim in a second petition based on a new rule the inmate did not raise in the previous petition is still barred under the gatekeeper provision unless the new rule applies retroactively on collateral review through a holding of the Court.¹⁷⁸ Therefore, inmates filing second or successive petitions have no other avenue of obtaining habeas relief unless the Court has made the rule retroactive on collateral review. As such, the narrow interpretation of section 2244(b)(2)(A) unconstitutionally restricts the availability of habeas corpus to a substantial number of inmates.

D. The Social Consequences of Tyler v. Cain: A Cost-Benefit Analysis

In *Tyler v. Cain*, the Court's narrow interpretation of the gatekeeper provision of the AEDPA places significant limitations on the availability of the federal writ of habeas corpus, which in turn furthers the goals of the AEDPA.¹⁷⁹ One of the main goals of the AEDPA is to reduce the time between a death row inmate's conviction and sentence, and his execution.¹⁸⁰ Another, more widespread goal of the AEDPA is to curb

176. See generally *Tyler v. Cain*, 533 U.S. 656 (2001).

177. *Id.* at 660.

178. *Id.* at 662. This scenario happened in *Tyler*, where the defendant tried to apply the new rule in *Cage v. Louisiana* (concerning jury instructions) retroactively on collateral review to show that the jury instructions on the standard of proof in his trial were incorrect and could have been prejudicial to his case. *Id.* at 661-62. The new rule could have been beneficial to Tyler if he could have demonstrated the instructions in his case were indeed incorrect. *Id.* However, Tyler could not raise the claim because the Court held that it had not made the rule in *Cage* retroactive to cases on collateral review. *Id.* at 662.

179. See Statement of Senator Hatch, *supra* note 60 for a discussion of the benefits of narrowing the federal writ of habeas corpus. See also Statement of President Clinton, *supra* note 65 (supporting the narrowing of federal habeas corpus to eliminate abuse of the writ).

180. Woolley, *supra* note 112, at 415. Woolley states that to achieve this goal, the AEDPA "makes several changes to already existing habeas legislation," making it harder for inmates to file federal habeas petitions. See *id.* at 415-16. Woolley also states that:

Arguably, the AEDPA is unconstitutional. Such an argument is unlikely to prevail, however, in light of the Supreme Court's current composition. In Chief Justice Rehnquist's annual report on the state of the federal judiciary, he praised the AEDPA, stating that it contained "valuable reforms that will improve the administration of justice." In addition, the Supreme Court recently upheld the Act's provisions concerning second and successive petitions in *Felker v. Turpin*. Based on Rehnquist's assessment of the AEDPA and the Supreme Court's ruling in *Felker*, it seems futile to ask the Supreme Court to find the AEDPA facially unconstitutional.

Id. at 416 (citations omitted).

the general abuse of the federal writ of habeas corpus.¹⁸¹

Arguably, the main benefit of the decision in *Tyler* is the furtherance of the goals of the AEDPA.¹⁸² First, the holding in *Tyler* will most likely reduce the amount of time between a death row inmate's sentence and his subsequent execution.¹⁸³ Next, the decision in *Tyler* will probably reduce the number of federal habeas petitions actually heard by courts each year.¹⁸⁴ The narrow interpretation of the gatekeeper provision effectively bars second or successive habeas petitions unless they rely on a new rule of constitutional law made retroactive by the Court.¹⁸⁵ The fewer federal habeas petitions that

181. See Mark M. Oh, Note, *The Gateway for Successive Habeas Petitions: An Argument for Schlup v. Delo's Probability Standard for Actual Innocence Claims*, 19 CARDOZO L. REV. 2341, 2354-55 (1998). The author notes the legislative history of the AEDPA demonstrates Congress' intent "to accord greater finality to convictions and to prevent abuses of the writ of habeas corpus." *Id.* at 2354. These goals are accomplished by imposing the one-year time limit and the stricter procedural requirements under the gatekeeper provision. See Woolley, *supra* note 112, at 415-16.

182. See *Tyler*, 533 U.S. at 660-64.

183. See *id.* Under *Tyler*, the time between a death row inmate's sentence and execution will probably be expedited for two reasons. First, death row inmates will not be able to file second or successive petitions for federal habeas relief if the second or successive petitions are barred under the gatekeeper provision. As a result of the strict interpretation of the gatekeeper provision in *Tyler*, there will be less delays in the execution process because inmates will not be able to continuously file habeas petitions to delay the execution. As such, the time between sentencing and execution will be faster. Second, the overall effect of *Tyler* could also result in faster executions. Under *Tyler*, all inmates throughout the country are barred from filing a second or successive federal habeas petition unless they can prove the petition relies on a new constitutional rule made retroactive by the Court. Most petitioners will not be able to meet this burden. As such, the number of overall petitions should decrease because of the procedural bar, thus allowing for claims validly brought under the AEDPA to be heard in a more rapid manner. Reviewing courts will be able to dispose of habeas petitions validly filed by death row inmates more efficiently and speed up the time between sentencing and execution. *But see* Woolley, *supra* note 112, at 429-30. Woolley argues the AEDPA will not reduce the number of habeas petitions filed each year because more inmates would file pro se petitions for habeas review to avoid the expiration of the one-year deadline, thus increasing the amount of frivolous petitions filed each year. See *id.* at 430. This argument still holds force after the decision in *Tyler* because it will be likely that inmates will raise all possible issues in their first habeas petition because of the bar on second or successive petitions, thus increasing the amount of frivolous claims each year. *Id.*

184. See *Tyler*, 533 U.S. at 661-62.

185. *Id.* See also 28 U.S.C. § 2244(b)(2)(A). *Tyler* significantly limits the availability of federal habeas review by narrowing the interpretation of the gatekeeper provision in section 2244(b)(2)(A). *Tyler*, 522 U.S. at 661-62. Based on the Court's interpretation, the gatekeeper now bars all second or successive habeas petitions unless the petition raises a new claim that relies on a new rule made retroactive expressly by the Court. *Id.* Through this, state and federal inmates will not be able to bring a second or successive petition unless they can show the Court expressly made the new rule retroactive. As such, the decision in *Tyler* is a victory for the proponents of limiting habeas corpus like Senator Hatch. But with every victory comes a price. Under the doctrine established in *Tyler*, inmates whose constitutional rights have been violated will have no forum to present their claims after they have filed their first writ of habeas corpus, and, in turn, the constitutional violations will remain unheard based on this procedural bar. *Id.* at 662-63.

reviewing courts must entertain each year will in turn make the reviewing time of the petitions validly brought under the AEDPA faster. Finally, *Tyler v. Cain* might eliminate some confusion about federal habeas corpus and retroactivity.¹⁸⁶ Thus, *Tyler* may be beneficial because it may speed up the review process for petitions, narrow the abuse of the writ, and eliminate some confusion in the law of habeas corpus and retroactivity.

There are a number of negative consequences of the Court's narrow interpretation of the gatekeeper provision of the AEDPA in *Tyler v. Cain*.¹⁸⁷ First, death row inmates will have fewer opportunities to challenge their conviction and sentence.¹⁸⁸ As a nation, we place a significant value on human life. As such, judicial economy should not be the pivotal factor in carrying out executions of death row inmates, especially if there is a claim that an inmate's constitutional rights have been violated.¹⁸⁹ Instead, inmates sentenced to death should be afforded

186. See *Tyler*, 533 U.S. at 663. The rule promulgated by the Court in *Tyler* is that under section 2244(b)(2)(A) of the AEDPA, a new rule is only made retroactive if the Court holds the rule applies retroactively on collateral review. *Id.* The Court stated that it:

[D]oes not "make" a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court.

Id. Thus, the decision should eliminate confusion about whether a new rule made by the Court applies retroactively on collateral review because the only time it can be made retroactive is through a holding by the Court. See *id.* But see *Tyler*, 533 U.S. at 667 (Breyer, J., dissenting). In the dissent, Justice Breyer argues the decision in *Tyler* will only add further procedural complexity to this area of law. *Id.* He states:

After today's opinion, the only way in which this Court can make a rule such as *Cage's* retroactive is to repeat its *Sullivan* reasoning in a case triggered by a prisoner's filing a first habeas petition (a "second or successive" petition itself being barred by the provision here at issue) or in some other case that presents the issue in a posture that allows such language to have the status of a "holding." Then, after the Court takes the case and says that it meant what it previously said, prisoners could file "second or successive" petitions to take advantage of the now-clearly-made-applicable new rule. We will be required to restate the obvious, case by case, even when we have explicitly said, but not 'held' that a new rule is retroactive.

Id.

187. *Id.* at 661-62.

188. See *id.* After *Tyler*, death row inmates will have no ability to challenge their sentences and convictions after they have filed their first federal habeas petition unless the second or successive petition relies on a new rule made retroactive by the Court through a holding. *Id.*

189. See Tabak, *supra* note 164, at 1489. Although the article was written before the Court handed down *Tyler*, the arguments the author makes about habeas reform are still very relevant. The author states:

The principal reason why habeas "reform" legislation has been enacted is that Congress and much of the public assume that habeas claims are almost always frivolous, and they want death row inmates to get executed quickly. However . . . in a very significant

greater protections under the constitution and should have more chances to challenge their conviction and sentence.¹⁹⁰

In addition, the holding in *Tyler* also blindly eliminates federal habeas review for a substantial number of the inmates incarcerated throughout the country. The Court's narrow interpretation of section 2244(b)(2)(A) eliminates both frivolous and non-frivolous second or successive habeas petitions unless the petition relies on a new constitutional rule made retroactive by a holding of the Court.¹⁹¹ Inmates whose rights have been violated can no longer challenge their convictions through a second or successive habeas petition unless their claim relies on a new rule expressly made retroactive by the Court.¹⁹² As such, the holding in *Tyler* conflicts with the original purpose of the "Great Writ."¹⁹³ Federal habeas corpus is now worthless to a large group of inmates whose constitutional rights have been violated because

percentage of cases - well over forty percent - habeas claims of death row inmates are not only not frivolous; they concern serious, nonharmless violations of the Constitution Sadly, an inevitable effect of the habeas-curtailling law enacted in April 1996 will be to increase the number of executed people whose rights under the Constitution have been violated through harmful errors. Moreover, these "reforms" will not materially save on costs and will add to, not diminish, delays.

Id. (citation omitted).

190. See e.g., Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992). In this article, the authors focus on the problems with capital punishment and the need for greater safeguards in capital punishment cases. See *id.* The decision in *Tyler* narrows the availability of habeas corpus for death row inmates, and thus eliminates a vital procedural safeguard in capital cases. See *Tyler*, 533 U.S. at 661-62. However, the Court's apathy towards death row inmates is not a recent development. Chief Justice Rehnquist once stated "[I]ets get on with it" when referring to the execution of an inmate in the early 1990s. See Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1103 (1995). The decision in *Tyler* is another example of the Court's indifference towards death row inmates. *Id.* By limiting the availability of habeas corpus, the Court is doing as Rehnquist suggests — getting on with executions. *Id.* However, the consequences of executing an innocent person or a person whose rights have been violated are great. *Id.* Life is the most valuable human right. Death row inmates should not be denied a forum to challenge their convictions based on a violation of their constitutional rights, but the Court believes the benefits of such a rule outweigh the social costs. See *id.* at 1104.

191. *Tyler*, 533 U.S. at 662.

192. *Id.* See *Forbes v. United States*, 262 F.3d 143 (2d Cir. 2001). In *Forbes*, the petitioner filed a successive petition under section 2255. *Id.* at 145. The petitioner argued the new constitutional rule announced by the Court in *Apprendi v. New Jersey* (pertaining to jury instructions) should apply retroactively to his case on collateral review. *Id.* The Second Circuit Court of Appeals denied the successive petition as per section 2244(b)(2)(A) because the Supreme Court had not made the rule in *Apprendi* retroactive as required in *Tyler*. See *id.* at 145-46.

193. See *supra* notes 15-23 and accompanying text. Originally, federal habeas corpus was a vehicle under which inmates could challenge the validity of their conviction or sentence. See Hartman, *supra* note 6, at 348. The Court offends the original purposes of habeas corpus by further narrowing the already constricted habeas requirements under the AEDPA and making it harder for inmates to file second or successive petitions. See *id.* at 349-50.

these inmates can no longer challenge their convictions through second or successive habeas petitions.¹⁹⁴

The consequences of *Tyler v. Cain* outweigh the potential benefits. All inmates, especially death row inmates, should be able to challenge their convictions if the government violated their constitutional rights.¹⁹⁵ It should not matter how many petitions for the federal writ of habeas corpus inmates have filed. Judicial economy should not outweigh constitutional rights.¹⁹⁶ As such, the social consequences of the decision in *Tyler* outweigh the potential benefits of the Court's holding.

V. CONCLUSION

In *Tyler*, there were two general paths the Court could have followed to decide the case. The first path led to reducing the availability of federal habeas corpus. The second path led to lessening some of the procedural barriers contained in the AEDPA, making it easier for inmates to file a second or successive habeas petition. Unfortunately, the Court selected the wrong path when it narrowly interpreted the gatekeeper provision of the AEDPA.¹⁹⁷

The Court's narrow construction of the procedural limitations on habeas corpus in the gatekeeper provision make it nearly impossible for state and federal inmates to file a second or successive petition for habeas corpus.¹⁹⁸ In addition, the narrow interpretation of section 2244(b)(2)(A) violates the Suspension Clause of the United States Constitution because it "suspends" the "Great Writ" for inmates whose constitutional rights have been violated, but can no longer file a petition because it would be barred under *Tyler*.¹⁹⁹ Finally, the social

194. *Tyler*, 533 U.S. at 661-62.

195. *See, e.g.*, Hartman, *supra* note 6.

196. As noted above, one of the main concerns of the AEDPA is to speed up the execution process and to eliminate frivolous habeas corpus petitions. Woolley, *supra* note 112, at 415. However, there are less burdensome methods that Congress and the Court should consider that promote judicial economy and reduce frivolous claims, instead of the blanket procedural requirement that virtually eliminates all second or successive habeas petitions. *See Tyler*, 533 U.S. at 661. For example, Congress or the federal judiciary could enact some type of filter for federal habeas petitions to eliminate frivolous claims, but allow claims with merit to proceed. In addition, Article I, Section 8, Clause 9 of the United States Constitution states that Congress has the power to create inferior tribunals. U.S. CONST. art. I, § 8, cl. 9. Under this power, Congress could create special federal courts designed specifically to entertain habeas corpus petitions and thus reduce the burden on other federal courts.

197. *See Tyler*, 533 U.S. at 661.

198. *See supra* notes 142-61 and accompanying text.

199. *Tyler*, 533 U.S. at 662. The Court effectively denies review of a second or successive habeas petition by holding that the only time a new rule is made retroactive under section

2002]

TYLER V. CAIN

219

consequences of *Tyler* outweigh the potential benefits of the holding.²⁰⁰ All citizens of the United States, including inmates, deserve a forum to raise potential constitutional violations. Under *Tyler*, inmates barred from filing a second or successive petition are denied this forum and have no other alternative to collaterally challenge their convictions and sentences unless they fall into one of the narrow exceptions under the AEDPA.²⁰¹ Therefore, the procedural barriers of the AEDPA, when combined with the decision in *Tyler v. Cain*, signify the end of the road for collateral review.²⁰² Consequently, the voices of the inmates whose constitutional rights have been violated will remain unheard.

Ronn Gehring

2244(b)(2)(A) is when the Court holds that the rule applies retroactively on collateral review. *Id.*

200. *See supra* notes 179-96 and accompanying text.

201. *Tyler*, 533 U.S. at 662.

202. *See id.* at 661-62. *Tyler* is the end of the road for the collateral review of second or successive federal habeas petitions because the Court's narrow interpretation of section 2244(b)(2)(A) makes it almost impossible for inmates to file these petitions unless their claims fall into one of the exceptions. *Id.* As such, the Court has effectively eliminated federal habeas review of second or successive petitions. *See id.*