No. 98-942

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM FIORE,
Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh;
THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Respondents

BRIEF FOR THE RESPONDENT

Filed June 25, 1999

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Does the Due Process Clause obligate the states to apply new state appellate decisions interpreting state law to cases that are final on direct appeal before the new decision is announced ?

II. May the federal courts announce and apply a federal constitutional rule requiring the states to apply new state appellate decisions on questions of state law in a habeas case involving a state prisoner ?

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COUNTER-STATEMENT OF THE CASE

1. Petitioner, William Fiore ("Fiore") and his plant manager, Dave Scarpone ("Scarpone"), were charged with numerous criminal acts pertaining to the operation of a solid waste disposal plant. Both were convicted of numerous offenses, J. A. 6-7, including Disposing of Hazardous Wastes and Operating a Hazardous Waste Facility Without a Permit in violation of section 401 of the Solid Waste Management Act ("SWMA"), Pa. Stat. Ann. tit. 35, §6018.401(a) (West 1993), on the theory that the operation of the plant was so outside the permitted operation as to be tantamount to operation without a permit.[1]

The SWMA does not define the term "permit." *See* Pa. Stat. Ann. tit. 35, § 6018.103 (West 1993), Definitions. While the word "permit" tends to call to mind a wallet-sized card, Fiore's permit to operate the solid waste disposal facility was eight pages long. *See* Appendix to Petitioner's Brief at, Superior Court No. 485 Pittsburgh 1988, A2-A9. The length obtained from the fact that a permit to operate a solid waste disposal facility is not a "one-size fits all" authorization. Unlike a permit to drive a car or to carry a firearm, or a license to fish, all of which impose the same terms and conditions on all who hold them, a permit to operate a hazardous waste disposal facility in Pennsylvania is site and "waste stream" specific. The original permit, for the disposal of fly ash and pond ash produced by an electricity plant at a site designated as "Site B," incorporated

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[1]Fiore was additionally sentenced for convictions of bribery, obstructing administration of law and criminal conspiracy as well as conspiracy to commit murder. J.A. 242-43, n.l.

nine documents and was subject to six specific conditions. The permit was amended to include disposal of Class III demolition wastes within an area designated as "Site C," and further amended to include the disposal of industrial waste within an area designated as "Phase I Industrial Waste Pit," located within the original Site B. The amendments imposed numerous conditions on the Phase I pit, including the construction of a groundwater underdrain, liner monitoring drain, and groundwater monitoring wells. Appendix to Petitioner's Brief on direct appeal, A-8.

Obtaining a permit is a lengthy process. A prospective landfill operator submits to the Department of Environmental Resources ("DER"), now called the Department of Environmental Protection, a detailed form known as a "module" for each type of waste or "waste stream" intended to be received at the site. The "module" sets out "the type of waste to be accepted, how it is generated, its chemical and physical characteristics, where it will be placed and how it will be disposed." (J. A. 8) DER's technical staff reviews the module to determine, among other things, whether the particular "waste stream" is compatible both with other waste deposited on that site and with the site liner. "Modules" often are returned to the prospective operator several times for inclusion of more data before final disposition by the DER staff. (J.A. 9)

2. Fiore's problems with DER began when a DER inspector noticed "a strong organic odor" coming from a

manhole near the Phase I pit. (J.A. 10) The manhole was the site of the convergence of an under-drain, known as pipe 810, and pipe 711. The permit designated the under-drain as a monitoring point for the integrity of the pit liner. If the liner were to fail, materials seeping out of the pit through the liner would appear in the under-drain. Numerous samples of the discharge from the 711 and 810 pipes were collected and analyzed by DER. The samples tested positive for the presence of organic chemicals. (J. A. 10). Consequently, Fiore and DER officials agreed that Fiore would apply for a water quality permit which would set limits on the chemicals discharged from the site. If the discharge exceeded those limits, Fiore agreed to establish either a treatment plant on the site or to collect the discharge and transport it to a treatment plant. (J. A.11)

In November of 1983, a DER employee present at the landfill to obtain samples for testing noticed that the discharge flow from the 810 pipe had lessened significantly.(J. A. 11) When the DER employee returned in July of 1984, he observed no discharge coming from the 810 pipe. Curious, the employee climbed down into the manhole and maneuvered himself up into the 810 pipe. When he did so, he discovered that the 810 pipe had been capped with three or four metal plates.(J.A.11)

In the summer of 1983, Fiore had hired a welder to cap the 810 pipe, install an elbow pipe and another smaller pipe which lead to an as yet unused disposal pit. Fiore observed the installation of the pipe and told the welder to hide it with a

rock.(J. A. 11) Fiore hired another welder to install a two-inch pipe below ground between two large pipes. A stand pipe stemmed from the two-inch pipe and reached the surface of the ground. A valve which could be turned on an off with a socket-wrench was inside this stand pipe and attached to the two-inch pipe. (J.A.11-12)

Capping the 810 pipe prevented water from under the Phase I pit from flowing into the 810-711 monitoring point. The organic odors from this discharge had lead to the discovery that hazardous wastes were seeping into the aquifer running under the pit.(J.A. 12) The newly installed connecting pipe brought water from an as yet unopened pit to a point in front of the cap. Had this alternation not been made, there would have been no flow at all to the monitoring point. A third alteration consisted of a hidden pipe operated by a buried valve covered over with rocks. When the valve was opened, this pipe permitted the drainage which had backed up behind the cap of the 810 pipe to flow through the monitoring point and into an unnamed tributary of the Youghiogheny River. (J. A. 10-12)

3. Based on these facts, both Fiore and Scarpone were convicted and sentenced. After sentencing, each pursued his appeal independently. At the outset of his State appellate process, Fiore filed post verdict motions with the trial court as was then required by State rules. Among his claims was a challenge to the sufficiency of the evidence underlying his conviction for violating section 401. Relying on settled case law

from Pennsylvania's Supreme Court, the trial court rejected Fiore's sufficiency argument. (J. A. 38-44) After exhaustively reviewing the evidence, the court concluded that Fiore's "alterations ... represented such a significant departure from the terms of the existing permit that the operation of the hazardous waste facility was 'un-permitted' after the alterations were undertaken by [Fiore]." (J. A. 44)

Fiore then filed a notice of appeal to the Pennsylvania Superior Court, the intermediate appellate court of general jurisdiction, including jurisdiction over criminal cases. 42 Pa. Cons. Stat. Ann. § 742 (West 1993) Superior Court, acting *sua sponte*, transferred Fiore's appeal to Commonwealth Court, the intermediate appellate court with jurisdiction to hear appeals from criminal actions arising from the violation of regulatory statutes administered by a Commonwealth agency. 42 Pa. Cons. Stat. Ann. § 762(a)(2)(ii)(West 1993). Fiore petitioned Commonwealth Court to return his appeal to Superior Court. Commonwealth Court granted the petition because "the facts and issues of [Fiore's] appeal were closely related to [the bribery] appeal taken by [Fiore] to [Superior] Court." (J. A.144) In contrast, Scarpone took his appeal of the denial of post verdict motions to the Pennsylvania Commonwealth Court which ultimately decided his appeal.

In Superior Court Fiore again advanced the argument that section 401 did not reach his conduct since he had a permit. (J. A. 65, V; 68, 5; 71-79; 87-94) His argument was largely one of

statutory construction as it had been in the trial court. In advancing this argument Fiore did not claim any federal due process right to reversal or cite to any federal cases supporting such a right. He urged reversal only because "[t]he charge and the verdict ... [were] contrary to law and evidence." (J. A. 94) Noting that Fiore raised 22 issues in his appeal (J. A. 67-70), the Superior Court unanimously affirmed his convictions and sentence "on the basis" of the "comprehensive and analytic opinion" of the trial court. (J. A. 99-100) Fiore sought discretionary review in the Supreme Court of Pennsylvania which was denied on March 13, 1990. When the time for certiorari elapsed, Fiore's conviction was final.

More than a year later, Commonwealth Court, in Scarpone's appeal, decided that section 401 did not reach the conduct alleged since the hazardous waste facility was permitted. *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991). (J. A. 104-114) Consistent with applicable Pennsylvania law, the Commonwealth Court remanded Scarpone's case to the trial court for resentencing. (J. A. 113-114) Fiore sought extraordinary relief from the Supreme Court based on the opinion issued in Scarpone's case. (J. A. 224, D) That application was denied. Thereafter, the Supreme Court affirmed the reversal of Scarpone's conviction, accepting the statutory construction argument that section 401 did not reach the conduct alleged because the hazardous waste facility was permitted. *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993)

("*Scarpone*"). (J. A. 123) Again, Fiore sought extraordinary relief from the Supreme Court seeking application of the decision in *Scarpone* despite the fact that his conviction had been final for more than three years. (J. A. 225, E) That application, too, was denied.

Fiore then sought collateral relief under Pennsylvania's Post Conviction Relief Act, 42 Pa. Cons. Stat. Ann. §§ 9541 *et seq.* Fiore asserted entitlement to relief only as a matter of state law because, as a result of the *Scarpone* decision, Fiore's conviction resulted "from 'a violation of the ... laws of this Commonwealth ... which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.' "[2] (J. A. 130) He advanced no federal constitutional claim under the Due Process Clause or otherwise. The Common-

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[2]The statute at the time Fiore filed his state post conviction petition provided that relief could be obtained if the conviction or sentence resulted from, among other things:

> (2)(i) A violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

42 Pa. Cons. Stat. Ann. § 9543 (a)(2)(i) (West 1998).

wealth's response asserted, *inter alia*, that the decision in *Scarpone* could not be applied retroactively to Fiore's case. (J. A. 137 and 139)

The post conviction court denied relief, first concluding that the issue which Fiore was then attempting to raise "ha[d] been 'previously litigated.' " *See* Appendix to Petitioner's Brief at Superior Court No. 1892 Pittsburgh 1994, A-2. (J. A. 225, I)[3] The court explained that it had earlier "concluded that the fact that ...Fiore had a permit to discharge hazardous waste into the Phase 1 pit, did not insulate him from prosecution for the discharge of hazardous waste into an unnamed tributary of the Youghiogheny River," and that "[t]his continued to be the law at the time that the Superior Court affirmed the decision ... and at the time that the Supreme Court denied Fiore's petition for allocatur."[4] *Id.*, pp.1-2. (J. A. 225, I) The court observed, "The

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[3]When Fiore filed his State post conviction petition, the statute provided, in pertinent part, that to be eligible for relief, a petitioner must prove the allegation of error had not been "previously litigated." 42 Pa. Cons. Stat. Ann §9543(a)(3). An issue was "previously litigated" if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa. Cons. Stat. Ann. § 9544 (a)(2) (West 1998).

[4]A petition for allocatur is the vehicle by which the Supreme Court exercises discretionary authority to review decisions of the State's intermediate appellate courts. Pa. R. A. P., Rule 1311 (West 1999); *see Castille v. Peoples*, 489 U.S. 346 (1989).

fact that the Supreme Court [of Pennsylvania] interpreted the law differently some years later in the case of ... *Scarpone* ... does not alter the state of the law at the time of [Fiore's] conviction and direct appeal." *Id.*, pp.1-2 (J. A. 225, I) After opining that Fiore had previously litigated this state law claim and was ineligible for relief under the terms of the statute, the post conviction court determined that, under the decisional law of the Pennsylvania Supreme Court, "[Fiore] is not entitled to a retroactive application of the ruling in *Scarpone* on collateral review because the decision was handed down after [Fiore's] direct appeal had concluded." *Id.*, p.3.

Fiore appealed. He advanced the same "laws of the Commonwealth" contention he had advanced in the post conviction court. Superior Court Brief for Appellant, p.8 (J. A. 225, I) He also raised three federal constitutional claims that had not been raised in the post conviction court. The Commonwealth complained that under State law and procedure, issues not raised in the lower court may not be raised for the first time on appeal. *See* Pa.R.A.P., Rule 302 (West 1998); *Commonwealth v. Baker*, 728 A. 2d 952, 953 (Pa. 1999).

Superior Court affirmed the denial of post conviction relief. (J. A. 161) At the outset, the court recited that Fiore's claim was based on the fact that Scarpone had obtained relief from his conviction under section 401 but that Fiore had not and that, as a result, Fiore was deprived of due process and equal protection and subjected to cruel and unusual punishment. (J. A.

141) The court never again mentioned Fiore's constitutional claims. After addressing a State procedural matter, the court agreed with the post conviction court that the statutory construction issue which Fiore raised had been "previously litigated."[5]

Superior Court recognized the "uniqueness" of Fiore's situation, but decided his case under settled Pennsylvania law on the retroactivity of new appellate decisions rendered after a conviction is final on direct appeal, citing *Commonwealth v. Gillespie*, 516 A. 2d 1180 (Pa. 1986), as had the post conviction court. After citing a number of Pennsylvania cases in accord with *Gillespie*, the court concluded "there is no support in the case law of this Commonwealth for the result sought by [Fiore] in this case." (J.A. 157-160)

Fiore was again denied discretionary review in the Supreme Court. He filed a petition for writ of habeas corpus in the federal district court in which he claimed he was incarcerated for conduct which the state supreme court determined did not constitute a crime, (J. A. 166), and that he was denied due process and equal protection by the State courts' refusal to apply *Scarpone* to his case. (J. A. 167) In apparent response to the

[5]Under state law, "[a]n issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining an issue that has already been decided." *Commonwealth v. Senk*, 437 A. 2d 1218, 1220 (Pa. 1981) (plurality); *See Commonwealth v. Lark*, 698 A. 2d 43, 47 n. 3 (Pa. 1997).

contention raised during Fiore's appeal from the denial of post conviction relief that these constitutional claims had not been properly raised in the state courts, Fiore asserted that

> [t]o extent he did not specifically raise the denial of his right to due process and equal protection, that issue was not ripe until he has exhausted all avenues of relief, and been denied. It would be futile for him to return to the state court system with this claim in light of the courts' previous decisions.

(*Id.*)

In his brief in support of his petition Fiore again asserted denial of his rights under the Due Process, Equal Protection and Cruel and Unusual Punishments Clauses. (J. A. 184) In discussing exhaustion of state remedies, Fiore noted that Respondents had taken the position during the post-conviction proceedings that he had waived his "unequal treatment claim." He asserted that the facts did not support this contention. (J. A. 193) He argued that the state court determinations that he had "previously litigated" his claim demonstrated exhaustion.(J. A. 193-194) Fiore said that his constitutional claims were based on the theory that he was entitled to the "retroactive benefit of the Pennsylvania Supreme Court's decision in . . . *Scarpone*." (J. A. 194)

In answering the petition, Respondents pointed out that Fiore raised no constitutional claims in his state post conviction petition but framed his issues on appeal from the denial of post

conviction relief as, *inter alia*, a denial of due process. (J.A. 215) Respondents said that Fiore exhausted a *Jackson v. Virginia*, 443 U.S. 307 (1979), sufficiency of the evidence claim during his direct appeal, but that any issue concerning the construction of the SWMA was not exhausted. (J.A. 217). Respondents did not expressly waive exhaustion as to any claim and took the position that any statutory construction claim could not form the basis of federal habeas corpus relief because it presented a state law question and habeas relief is unavailable for alleged violations of state law. (J. A. 217-218) Respondents argued, based on controlling decisions of the Pennsylvania Supreme Court on this state law question, and consistent with this Court's precedent, that the state courts were not required to give Fiore the retroactive benefit of *Scarpone*. (J. A. 218-223)

The magistrate judge recommended that the writ be granted and that Fiore be released from any sentence resulting from his conviction for violating section 401, determining that due process and equal protection required the retroactive application of the decision in *Scarpone*. (Pet. App. E-18) Respondents objected to the report and recommendation, asserting, among other things, that if any relief was appropriate it extended only to Fiore's resentencing, the same relief obtained by Scarpone. The district court rejected the objections and ordered the relief recommended by the magistrate judge. (Pet. App. D-2)

Respondents appealed and the Court of Appeals reversed. The Court of Appeals determined that the district court's conclusion that due process required retroactive application of *Scarpone* "is at odds with [this] Court's longstanding position that 'the federal constitution has no voice upon the subject' of retroactivity." (Pet. App. A-8) The court recognized that "[s]ince 'it is not the province of a federal habeas court to reexamine state-court determinations of state-law questions,'. . .Fiore is entitled to relief only if federal law requires retroactive application of *Scarpone*." (*Id.*) The court concluded that the Due Process Clause does not require retroactive application of *Scarpone* and reversed the district court. (*Id.*, at A-13) After reargument was denied, Fiore sought certiorari which was granted.

SUMMARY OF ARGUMENT

1. Fiore crafts his argument as one of actual innocence so as to avoid the precedential effect of *Great N.Ry. Co v. Sunburst Oil Ref. Co.*, 287 U.S. 358 (1932), and *Teague v. Lane*, 489 U.S. 288 (1989), which together work to deny him relief. As a state prisoner Fiore is subject to the limitations imposed by section 2254, yet he ignores these requirements and asserts actual innocence without the necessary cognizable constitutional claim. The Pennsylvania courts resolved this case on the basis of state law. Because it is the sole prerogative of state courts to say what state law is, state construction of state law is not a

constitutional violation which federal habeas relief may remedy. This Court acknowledges that litigants on direct appeal and those on collateral attack may obtain disparate results without a violation of due process. The result Fiore seeks requires that *Sunburst Oil* be overruled and that the distinction recognized in *Teague* and its progeny be eliminated.

2. When the Pennsylvania courts adjudicated Fiore's request to apply the new decision in *Scarpone* to him, clearly established federal law, as determined by this Court in the 1932 decision in *Sunburst Oil*, and never questioned thereafter, held that the federal constitution had "no voice" on the subject of retroactivity. It necessarily follows that a state court does not offend due process when it decides as a matter of state law not to apply an appellate decision giving a new construction to a state statute to a case that was final when the new decision was announced. Whether a state rule is "new" for state retroactivity purposes is itself a question of state law, not subject to federal oversight.

3. *Teague* prohibits a federal court from announcing a new rule on habeas review of a state prisoner's conviction. Because no existing precedent requires states to apply new appellate decisions on state law questions to cases that were final before the new decision was announced, establishing such a precedent would constitute a "new rule" outside either of the two *Teague* exceptions. Such a result would violate, as well, the concerns of federalism which come to the fore when this Court

reviews habeas claims of state prisoners. Over the years this Court has understood that the states serve as "laboratories" for the evolution of state law. This function cannot be served if state construction of state statutes, absent any federal constitutional claim, can be upset by federal courts.

4. The due process claim presented here was raised in the states courts in a procedurally defective manner that precluded consideration on the merits. The state courts decided Fiore's case solely on state law grounds. Any federal claim is now jurisdictionally barred in state court. There is no cause for this default. "Actual innocence" as a gateway to habeas relief could be established only if a new rule is announced and the states are required to apply new appellate decisions to cases already final when the new decision is announced. Such a result would extend federal habeas relief to state prisoners in a manner directly contrary to the past three decades of this Court's habeas jurisprudence and to the Congressional intent expressed through the 1996 amendments to the federal habeas statute.

ARGUMENT

I. Fiore Is Not Innocent, Having Been Convicted by a Jury Upon Proof Beyond A Reasonable Doubt.

1. Without directly acknowledging the Blackstonian theory that courts discover old law, rather than create new law,

1 Blackstone, Commentaries 69 (15th ed. 1809), Fiore builds his argument on that foundation. Since the Pennsylvania Supreme Court decision in *Scarpone*, was not "new," he argues, there is no question of its "retroactive" application to him. In the past he asked for the retroactive application of *Scarpone*. Now he does not ask for the application of *Scarpone* at all, but merely for his due process rights. The Court of Appeals was wrong to engage in retroactivity analysis. Fiore is "innocent" and always has been. Because he is both "factually and legally innocent," he should be free. Because he is not free, Pennsylvania is violating his due process rights. This Court, he believes, should give him relief.

Framing the argument this way has great utility for Fiore, for it frees him, in his eyes, of both the precedential force of *Great N. Ry. Co. v. Sunburst Oil Ref. Co.*, 287 U.S. 358, 364 (1932) (federal constitution has no voice upon the subject of retroactivity) and the restrictions of *Teague v. Lane* 489 U.S. 288 (1989)(plurality)("new rule" may not be announced on habeas review, except within two narrow exceptions). But the issue which this Court must decide is not whether Fiore should now get the same relief as Scarpone, but whether *Sunburst Oil* should be over-turned. For to give Fiore the relief he requests would require this Court to over-rule *Sunburst Oil*. Such a decision would have vast implications. If *Sunburst Oil* were to be over-ruled in the context of Fiore's case, a habeas claim brought by a state prisoner, this Court would impose the "new

obligation" that states make available to prisoners seeking collateral relief the application of state appellate decisions construing state law and announced long after the petitioner's direct appeal was final. Such a holding would be in direct contravention of *Teague* and its progeny and contrary to the last three decades of this Court's habeas jurisprudence which has retracted, not extended, the scope of habeas relief to state prisoners.

2. In asserting his claim of "innocence," Fiore evidences little appreciation that habeas relief for a prisoner in state custody must be obtained within the framework of 28 U.S.C. § 2254 which, as a starting point, requires a claim that the state prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." When, as in *Scarpone*, a state supreme court construes a state statute and when, as on appellate review of the denial of collateral relief to Fiore, a state appellate court follows state law on retroactivity and denies application of that construction, where does a claim cognizable under section 2254 lie? It lies nowhere because it is the prerogative of state courts to say what state law means, *Engle v. Isaac*, 456 U.S. 107, 128 (1982), and because it is the prerogative of state courts to determine whether state laws are to be applied prospectively or retroactively. *Sunburst Oil*, 287 U.S. 358.

Evolution of state law by state courts is precisely what the founders intended of our federal system of government. Standing alone, evolution of state law by state courts is not a

constitutional violation which federal habeas review is to correct. "It is not the province of a federal habeas court to re-examine state-court determinations of state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1998).

Superior Court resolved Fiore's statutory construction issue on direct appeal consistent with existing case law interpreting other regulatory statutes involving unpermitted activity and relied upon by the Commonwealth in seeking to uphold Fiore's conviction. *See Commonwealth, DER v. Fleetwood Borough Auth.*, 346 A. 2d 867 (Pa. Commw. 1975); *Trevorton Anthracite Co. v. Commonwealth, DER*, 400 A. 2d 240 (Pa. Commw. 1975). At the time of Fiore's direct appeal, the Pennsylvania courts were willing to accept an interpretation of section 401 that allowed broad exercise of the state's police powers. Such an interpretation was consistent with the articulated legislative intent that the SWMA was intended to "protect" "the public health, safety and welfare," Pa. Stat. Ann. tit. 35, § 6018.12(4)(West 1993) and that it should "be liberally construed, so as to best achieve and effectuate the goals and purposes hereof." Pa. Stat. Ann. tit. 35, § 6018.901(West 1993). The Pennsylvania Supreme Court retracted the reach of section 401 in *Scarpone* in an opinion squarely contrary to the construction of the statute approved by Superior Court in Fiore's direct appeal. In this course of events, where does the constitutional claim lie?

If federal habeas relief is able to reverse the accretion of state law, then state courts will be reluctant to revisit prior holdings, regardless of a demonstrated need for reassessment. A significant disincentive for the corrective process of the state courts will be in place and states will place the highest priority on preserving already obtained convictions "so as to forestall an impact upon the administration of their criminal law so devastating as to need no elaboration." *Tehan v. Shott*, 382 U.S. 406, 418 (1966). Under such a system, the law will suffer and so will later litigants who have arguably valid claims.

3. Certainly, the claim of "innocence" which Fiore advances is in no way cognizable under section 2254. Fiore wants the same relief as Scarpone, *i.e.*, he wants the *Scarpone* decision applied retroactively to him. Retroactivity presents no constitutional claim. *Sunburst Oil*, 287 U.S. at 364. Claims of innocence independent of a constitutional violation are not cognizable in federal habeas. *Herrera v. Collins*, 506 U.S. 390, 400 (1993). "This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution - - not to correct errors of fact." *Id.* As Justice Holmes recognized, on habeas review federal courts examine "not the petitioners' innocence or guilt but whether their constitutional rights have been preserved." *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923), cited in *Herrera*, 506 U.S. at 400. Four decades later, Chief Justice Warren made a similar

observation in *Townsend v. Sain*, 372 U.S. 293, 317 (1963), saying of newly discovered evidence:

> Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.

See Herrera, 506 U.S. at 400.

4. The disparate results obtained by Fiore and Scarpone do not implicate core due process concerns. Due process does not require the retroactive application of new appellate decisions by state courts to convictions that had obtained finality on direct appeal before the new decision was rendered. "With respect to retroactivity in criminal cases, there remains even now the disparate treatment of those cases that come to the court directly and those that come here in collateral proceedings." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) If Fiore is right, then the decisions of this Court which apply new rules to cases on direct review, *Griffith v. Kentucky*, 479 U.S. 314 (1987), but deny such application to cases on collateral review, *Teague,* 489 U.S. 288, are suspect.

> [D]ue process does not require that every conceivable step be taken at whatever cost, to eliminate the possibility of convicting an innocent person. Punishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail.

New York v. Patterson, 432 U.S. 197, 208 (1977)

5. Fiore is not without recourse. A state forum exists in which he may seek relief. Under Pennsylvania law, Fiore may seek executive clemency from the Pennsylvania Board of Pardons and the Governor. Pa. Const., art. 4, § 9 (West Supp.. 1998); Pa. Stat. Ann., Tit. 61. § 2130 (West Supp. 1992). *See Herrera*, 506 U.S. at 414 n. 14. "Clemency. . .is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* at 411. "Executive clemency has provided the 'fail safe' in our criminal justice system." *Id.* at 415.

II. Due Process Does Not Obligate The States To Apply New State Appellate Decisions Interpreting State Law To Cases That Are Final On Direct Review Before The New Decision Is Announced.

1. The situation in which Fiore finds himself is virtually identical to that of the habeas petitioner in *Wainwright v. Stone*, 414 U.S. 21 (1973). Stone had been convicted under a statute which he argued was vague. Before he was charged, the Florida Supreme Court had construed the statute and held that the acts

that Stone was accused of committing were clearly within its ambit. After his conviction was affirmed, the Florida Supreme Court revisited the question in another case and determined that the statute was unconstitutionally vague. The Florida court chose not to apply its decision to earlier convictions and the Florida courts specifically refused to apply it to Stone's case as he requested on collateral review. Citing *Sunburst Oil*, this Court said that state courts were not "constitutionally compelled to [apply the new decision to convictions like Stone's which were obtained before the new decision] or to make retroactive its new construction of the Florida statute." *Stone,* 414 U.S. at 23-24.

When the Pennsylvania courts adjudicated Fiore's request to apply the new decision in *Scarpone* to him, "clearly established Federal law, as determined by" this Court[6] in *Sunburst Oil* and not questioned thereafter, held that the federal Constitution had "no voice" on the subject of retroactivity. The Pennsylvania courts rejected Fiore's request to apply the new construction of a state statute in *Scarpone* to himself, based on Pennsylvania Supreme Court decisional law that prohibited the application of the new rule to cases already final on direct appeal when the new decision was announced. Since the state law

[6]*See* 28 U.S.C. § 2254(d)(1). While this is the appropriate standard for resolution of a properly presented habeas claim, citation to this provision is not a concession that any federal constitutional claim was fairly presented to the State courts or that such a claim was adjudicated on the merits. Those questions will be addressed, *infra*.

determination in *Scarpone* involved no recognized constitutional right, it may not form the basis of habeas corpus relief, nor may such a right be announced on habeas review of a state prisoner's conviction. *See Teague,* 489 U.S. at 316 (1989)(*plurality*); *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989).

2. A state court does not offend due process when it decides as a matter of state law not to apply an appellate decision giving a new construction to a state statute to a case that had achieved finality before the new decision was rendered. "[W]hether this division of time of the effects of a decision is a sound or an unsound application of the doctrine of *stare decisis* as known at the common law ... there is no denial of a right protected by the Federal Constitution." *Sunburst Oil,* 287 U.S. at 364. In *Sunburst Oil*, the state supreme court had decided to overrule an earlier decision at issue in the case then before the court, but to apply the new interpretation of state law only prospectively. On certiorari, the oil company complained, saying the Constitution required the state court to give it the benefit of the new ruling.

This Court disagreed and rejected the"novel stand" that the Constitution "is infringed by the refusal" of a state court to apply a new state law decision to a case before the state courts. *Id.* "The choice for any state may be determined by the juristic philosophy of the judges of its courts, their conceptions of law, its origins and nature." *Id.* at 365. "A state in defining the limits of adherence to precedent may make a choice for itself between

the principle of forward operation and that of relation backward." *Id.* at 364. The wisdom of the choice made by state courts on questions of state law is not subject to review by the federal courts. *Id.* at 365.

> If this is the common-law doctrine of adherence to precedent as understood by the courts of [the state], we are not at liberty, for anything contained in the Constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.

Id. at 365. "[T]he Federal Constitution has no voice upon the subject." *Id.* at 364.

In crafting state law on the retroactive application of new judicial decisions, the Pennsylvania Supreme Court specifically recognized this principle. *Blackwell v. Commonwealth, State Ethics Comm'n*, 589 A.2d 1094, 1098 (Pa. 1991) (retroactivity is question for state courts as Constitution neither requires nor prohibits retroactive or prospective application of new decision; *citing Sunburst Oil*; *Linkletter v. Walker*, 381 U.S. 618 (1965); *United States v. Johnson*, 457 U.S. 537 (1982)).

While this question is no longer "novel," this Court has regularly cited *Sunburst Oil* for the proposition that the Constitution does not speak to the subject of the retroactivity of

new judicial decisions. *See Linkletter,* 381 U.S. at 629 n.14 (federal constitution "has no voice" on retroactivity)(citing *Sunburst Oil*)); *Wainwright v. Stone*, 414 U.S. at 23-24 (state not "constitutionally compelled" to apply new ruling declaring state statute void for vagueness after petitioner's conviction under now-infirm statute was final on direct appeal; *citing Sunburst Oil*); *Solem v. Stumes*, 465 U.S. 638, 642 (1984) ("retroactivity not compelled, constitutionally or otherwise"; *citing Sunburst Oil*); and *Harper v. Virginia Dept. Of Taxation*, 509 U.S. 86, 100 (1993) (recognizing "freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law"; *citing Sunburst Oil*).

3. Whether a state rule is "new" for state retroactivity purposes is itself a question of state law. *See Sunburst Oil*, 287 U.S. 358. In 1977, the Pennsylvania Supreme Court adopted the criteria of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), for determining when a judicial opinion announces a "new rule" as a matter of state law. Under Pennsylvania law, a decision establishes "'a new principle of law, either by overruling clear past precedent ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed .... " *Blackwell,* 589 A. 2d at 1100 (*quoting Schreiber v. Republic Intermodal Corp.*, 375 A. 2d 1285, 1289 (Pa. 1977), as having adopted the *Chevron* standard)).

Certainly it cannot be said that the Pennsylvania State Supreme decision in *Scarpone* was "clearly foreshadowed."

Superior Court's resolution of Fiore's statutory construction issue on direct appeal was consistent with existing, relevant case law. *See Fleetwood,* 346 A. 2d 867, and *Trevorton,* 400 A. 2d 240. Fiore sought to distinguish *Fleetwood* on appeal, noting that the Commonwealth relied upon it in making its argument. (J.A. 78). In reversing Scarpone's conviction, Commonwealth Court felt compelled to distinguish both *Trevorton* and *Fleetwood* which the Commonwealth had (successfully) argued required affirmance of Fiore's conviction on direct appeal. (J. A. 108-110) Further, the Superior Court opinion in Fiore's direct appeal was squarely contrary to the ultimate construction of the statute in *Scarpone,* a sure indication that *Scarpone* established "a new principle of law." The reference in *Scarpone* that the opinions of the Superior Court and the Commonwealth Court were in conflict on the statutory construction issue and left the Attorney General's office "ill-advised on how it should proceed in such situations" implies the same. (J. A. 121) Indeed, it can be said that *Scarpone* overruled the decision in Fiore's case *sub silentio.*

The decision by the Superior Court was a decision on the merits by that court of all of Fiore's claims (save one sentencing claim that was procedurally barred), contrary to the view expressed by Fiore's amicus. *See* Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner ("Petitioner's Amicus Brief"), p. 14, n.13 and related text. The Supreme Court recognized that this

statutory construction issue was resolved by Superior Court when it wrote, "[t]he Superior Court found the evidence sufficient ....upholding his conviction of operating a hazardous waste facility without a permit." (J. A. 121)

This passage also resolves, as a matter of state law, that Fiore's statutory construction claim was decided by Superior Court and not solely by the trial court. Superior Court reiterated this view when it upheld the denial of post conviction relief. All of this serves to refute the contention of Fiore's *amicus* that the opinion interpreting the statute in Fiore's case is entitled to no deference by the federal courts because the opinion was issued by a court of common pleas. (J. A. 157-158) In any event, the cases cited by Fiore's *amicus* for this proposition are inapposite and generally are not cases on habeas review of state court convictions. *See* Petitioner's Amicus Brief, pp. 6, 14, n.13.

One case cited by Petitioner's *amicus is* a habeas case and it does have relevance to Fiore. In *Wainwright v. Goode*, 464 U.S. 78, 84 (1983), the Court cites *Brown v. Ohio*, 432 U.S. 161, 167 (1967), which said that the decision of Ohio's intermediate appellate court then under review "authoritatively defined the elements" of the state crime. For this *Brown* cited *Garner v. Louisiana*, 368 U.S. 157, 169 (1961), being "mindful that the Ohio *courts* 'have the final authority to interpret. . . that State's legislation'." *Brown, supra* (emphasis added). This Court did not limit itself to pronouncements of the Ohio Supreme Court. *See also Shuttlesworth v. City of Birmingham*, 382 U.S.

87, 91 (1965) (looking to ruling of state's intermediate appellate court in another case as "authoritatively" construing state statute at issue).

Both the post conviction court and Superior Court concluded that Scarpone announced a "new rule" for State retroactivity purposes. The Court of Appeals accepted this as state law. Since "it is not the province of a federal habeas court to reexamine state-court determinations of state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), that *Scarpone* announced a new rule for state retroactivity purposes may not be questioned in habeas review. *See Bishop v. Wood*, 426 U.S. 341, 346-347 (1976) (this Court ordinarily defers to federal court of appeals' interpretation of state-law questions); and *O'Sullivan v. Boerckel*, No.97-2048, 1999 WL358962*10 (June 7, 1999) (Stevens, J., dissenting) (same).

III. The Extension Of Habeas Relief Which Fiore Seeks Would Constitute A New Constitutional Rule Of Procedure Which May Not Be Announced Or Applied On Habeas Review.

1. Until now, no decision of this Court requires state courts to apply a new state appellate decision interpreting a state criminal statute to a case which was final on direct appeal when the new decision was announced. *See Sunburst Oil*, 287 U.S.

358; *Harper*, 509 U.S. 86. Due process does not require it. *See Sunburst Oil*, 287 U.S. 358; *Linkletter*, 381 U.S. at 625 (describing *Sunburst Oil* as "denying a federal constitutional due process attack on the prospective application of a" state court decision).[7]

In *Linkletter*, a habeas petitioner whose conviction had become final before the decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), sought application of *Mapp* to overturn his conviction. The Court was asked to articulate an absolute rule that "retroaction prevails in constitutional adjudication." The Court refused, stating: "[W]e believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the Federal Constitution has no voice on the subject,'" *Linkletter*, 381 U.S. at 629 n.4 (*citing Sunburst Oil).*

A number of states have taken the Court at its word and fashioned their own retroactivity rules, adopting *Linkletter* or some other formulation for these state law questions. *See* Hutton, *Retroactivity in the States: The Impact of Teague v. Lane on State Postconviction Remedies*, 44 Ala L. Rev. 421, 460-76, Appendix (1993)(cataloguing various approaches states have taken on retroactivity of new state decisions).

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[7]Since Fiore is seeking habeas relief on a claim that has heretofore not been the basis of such relief, *see Wainwright v. Stone*, it is appropriate to examine this claim as one of procedural rather than substantive due process. *See Herrera v. Collins*, 506 U.S. at 407-408 n. 6.

2. To now say the Constitution requires the retroactive application of new state appellate decisions on state law questions to cases that were final on direct appeal before the new decision was announced would "impose[] a new obligation on the States." *Teague,* 489 U.S. at 301. Such a rule would clearly "break new ground." *Id.* Based on the clear and unequivocal pronouncements in *Sunburst Oil*, *Linkletter* and, most recently *Harper*, such a rule was not dictated by precedent at the time Fiore's conviction became final in 1990. Based on *Teague* and its progeny, such a pronouncement would be a "new rule."

Fiore claims, relying on Pennsylvania rules of statutory construction, *Jackson v. Virginia*, 443 U.S. 307 (1979), and *In re Winship*, 397 U.S. 358 (1970), that by the time his case was decided on direct appeal the Constitution, as interpreted by this Court, already provided that a conviction not supported by proof beyond a reasonable doubt could not stand as a matter of due process. With these general statements there is no quarrel. Nor can it be seriously argued that when Fiore's case was decided on direct appeal these precepts, to the extent they were implicated, were violated. The Pennsylvania trial and appellate courts, relying on settled case law which tracks *Jackson*, rejected a sufficiency argument, concluding that the statute reached Fiore's conduct. He raised and lost a statutory construction argument. After Fiore's direct appeal was concluded, this argument was accepted in another prosecution under the same statute. It is irrelevant, for present purposes, that the other case

involved Fiore's co-defendant and co-conspirator. Fiore's *Jackson/Winship* claim cannot establish that the rule he now seeks is not "new." As this Court has recognized, "the test [for a new rule] would be meaningless if applied at this level of generality." *Sawyer v. Smith*, 497 U.S. 227, 236 (1990) (rejecting assertion that rule was not "new" for *Teague* purposes though earlier pronouncements had generally required reliability in capital sentencing).

3. Generally, a "new rule" may not be announced or applied on habeas review. *Teague*, 489 U.S. at 316. The two narrow exceptions to this general rule do not apply to Fiore's case. A "new rule" may be announced or applied on habeas "if it places 'certain kinds of primary, private conduct beyond the power of the criminal law-making authority to proscribe.'" *Caspari v. Bohlen,* 510 U.S. 383, 396 (1994) (quoting *Teague*, 489 U.S. at 307). While Fiore claims that the decision in *Scarpone* determined as a matter of state law that what he did is not criminal, that decision can hardly be said to have placed some kind of primary, private conduct beyond the power of the criminal law-making authority to proscribe. *Scarpone* said that Fiore's conduct "was execrable and constituted a clear violation of the permit." (J. A. 122) *Scarpone* did not say that the conduct charged could never be criminal. The decision simply said that it did not violate the statute charged and suggested another more appropriate and more serious charge. (J. A. 121-122)

Importantly, however, the focus of a *Teague* analysis is on the rule to be announced and applied in the case before the Court; here, whether due process requires state courts to apply new state appellate court decisions to cases already final by the time the new decision was announced. Such a rule could hardly be said to place any primary, private conduct beyond the criminal lawmaking authority. It is, instead, simply a rule of decision.

Nor does the suggested rule that Fiore seeks fit within *Teague*'s second exception. "New rules" in this category are "'those procedures that ... are "implicit in the concept of ordered liberty.' " *Id.* at 311. This second exception is "to be reserved for watershed rules of criminal procedure." *Id.* The *Teague* plurality said; "we believe it unlikely that many such components of basis due process have yet to emerge." *Id.* at 313.

> 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.

Id. 311(quoting *Mackey v. United States*, 401 U. S. 667, 693-94 (1971). In *Saffle v. Parks*, 494 U.S. 484, 495 (1990), the Court further explained this exception, saying: "The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* (citing *Teague*, 489 U.S. at 311; *Butler v. McKellar*, 494 U.S. 407, 416 (1990)).

The rule that Fiore seeks here is not of the type referred to in the second *Teague* exception which has been epitomized by citing to *Gideon v. Wainwright*, 372 U.S. 335 (1963). Requiring states to apply their new interpretations of state statutes to cases that were final on direct appeal when the new decision was announced will not make a case that was fair when it was decided more fair. Such a rule has nothing to do with the fundamental fairness and accuracy of the original trial. It is not of the ilk of *Gideon* and the right to counsel which impacts on the entire trial process. Nothing has occurred in the years since 1990, when Fiore's case became final on direct appeal, or since 1993, when this Court last said the states were free of constitutional restraint in deciding when to apply their new appellate decisions retroactively, which could possibly have altered the fundamental bedrock principles and changed the

judicial perception of fairness in this area. The "new rule" which Fiore seeks cannot be announced here.

4. Just as Justice O'Connor wrote in *Coleman v. Thompson*, 501 U.S. 722, 726 (1991), this, too, "is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas cases." As noted early in this Brief, our federalism recognizes the prerogative of state courts to say what state law means. *Engle v. Isaac*, 456 U.S. 107, 128 (1982). What "state law means" is often a matter of "accretion of case law." *Dobbert v. Florida*, 432 U.S. 282, 292 (1977). State courts alone should accrete state law.

Six decades ago Justice Brandeis wrote of the "happy incident[s] of the federal system that a single courageous state may, if is citizens choose, serve as a laboratory, and try novel social and economic experiment without risk to the rest of the country." *New York State Ice Co. v. Liebmann*, 285 U.S. 262, 322 (1932) (Brandeis, J., dissenting). Justice Brandeis' characterization of states as laboratories for evolving law has continued vitality six decades later. "[F]or the states may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581(1995) (Kennedy, J., concurring). But States cannot be laboratories for the evolution of state law if, when the states' highest courts construe state law, federal courts are then free to unravel previously obtained state

court convictions through the mechanism of federal habeas relief--even in the face of contrary state law with respect to the retroactive application of state law decisions.

Federalism also adheres to the principle that state courts are not inferior courts. *Ex parte Bollman*, 8 U.S. 75 (1807). Indeed, state courts are "coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, 497 U.S. 227, 239 (1990). *See also Kline v. Burke Constr. Co.*, 260 U.S. 226, 235 (1922) (rank and authority of state courts and lower federal courts are equal). In the past three decades, federal habeas jurisprudence has scaled back the availability of the writ to state prisoners in light of "the profound societal costs that attend the exercise of habeas jurisdiction" and "our enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 1500 (1998); *see also Barefoot v. Estelle*, 463 U.S. 880, 887-888(1983)(role of federal habeas is "secondary and limited; Federal courts are not forums in which to relitigate State trials.").

Teague signaled a major refocusing on both the "nature, function, and scope" of the writ. 489 U.S. at 306. These federalism concerns animated *Teague* and its calculus which

> validates reasonable, good-faith interpretations of existing precedents made by state courts . . . and thus effectuates the States' interest in the finality

> of criminal convictions and fosters comity between federal and state courts.

Gilmore v. Taylor, 508 U.S. 333, 340 (1993)(citations omitted).

In 1996 Congress also acted to preserve the states' interests and amended the federal habeas statute with the "apparent general purpose to enhance the States' capacities to control their own adjudications" by setting out a "highly deferential standard for evaluating state court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7(1997).

The considerations of "finality, federalism and fairness," *Withrow v. Williams* 507 U.S. 680, 697 (1992) (O'Connor, J. concurring) that inform our habeas jurisprudence are a prime reason why cases involving federal prisoners decided under 28 U.S.C. § 2255, relied on by Fiore and his *amicus*, have little, if any, application to Fiore's case. For example, Fiore urges this Court to grant him relief because, in his eyes, *Bousley v. United States*, 523 U.S. 614 (1998), stands for the proposition that "a post conviction challenge based on [a previously decided case of statutory construction] may raise a constitutional claim." Petitioner's Brief, p. 31. Such a reading of *Bousley* ignores its context. As a federal prisoner, Bousley may seek habeas relief for a violation of a federal statute, without any underlying constitutional claim (although he did, in fact, also assert a constitutional violation). *See* 28 U.S.C. § 2255. Fiore, a state prisoner, cannot seek the retroactive application of a state statute without an underlying constitutional violation. There is no

constitutional claim in Fiore's quest for retroactive application of *Scarpone* and he must fail. *Bousley* does nothing to change that inevitable result.

There is a fundamental difference between this Court deciding whether its own interpretation of a federal statute should be applied to cases on collateral review and a federal court "reexamin[g] state-court determinations on state-law questions," See *Estelle v. McGuire,* 502 U.S. at 67-68; *see Withrow v. Williams*, 507 U.S. at, 715 (Scalia, J. dissenting)(describing course of federal habeas review of federal conviction). The difference lies in our federalism. This Court has the prerogative to construe federal statutes. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). Without an underlying constitutional claim, this Court must be silent as to the meaning and application of state statutes. *See Webb v. Webb*, 451 U.S. 493, 499 (1981).

In *Bousley* the inherent tension was between the legislative and judicial branches of a single government, 118 S. Ct. at 1610 (only Congress, not the courts, can make conduct criminal). The same tension existed in the section 2255 cases occurring in the wake of this Court's construction of the federal mail fraud statute in *McNally v. United States*, 483 U.S. 350 (1987), also inappropriately relied on for relief by Fiore. Brief for Petitioner, pp 33-35.

The inherent tension in Fiore's case is not between the branches of a single government but is, instead, between the co-

equal state and federal courts. "The tension in federal habeas between the vindication of individual rights and federal concerns over comity. . .are peculiar only to the federal system, where comity and the federal-state balance play a major role in the Court's limiting the reach of federal habeas." *Hutton, supra.* The Court of Appeals understood this distinction and acted accordingly. (Pet. App. A-12)

> Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'

Alden v. Maine, No. 98-436, 1999 WL412617*5 (June 23, 1999) (quoting *Seminole Tribe of Fla v. Florida*, 517 U.S. 44, 71 n.4 (1996)). The states as sovereign entities are vested with the historic and primary police powers so as to protect "the lives, limbs, health, comfort and quiet of all persons." *Medtronic v. Lohr*, 518 U.S. 470, 474 (1996).

Finality of the criminal law serves the sovereign states in carrying out these powers.

> [W]e repeatedly have recognized that collateral attacks raise numerous concerns not present on direct review. Most profound is the effect on finality. It goes without saying that, at some point, judicial proceedings must draw to a close and the matter deemed conclusively resolved; no society can afford forever to question the correctness of its every judgment. "[T]he writ," however, "strikes at finality," depriving the criminal law "of much of its deterrent effect," and sometime preventing the law's just application altogether. "No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation"

Withrow v. Williams, 507 U.S. at 698 (O'Connor, J., concurring in part and dissenting in part).

No less today, than when the Constitution was adopted, "[t]he States thus retain 'a residuary and inviolable sovereignty.'" *Alden.* The relief Fiore seeks is contrary to that "inviolate sovereignty" which foresees state courts construing state statutes and making their own decisions as to the retroactive application of new state law decisions.

IV. The State Courts Did Not Adjudicate Fiore's Due Process Retroactivity Claim On The Merits.

1. As the Court of Appeals noted, Fiore's petition, filed after April 24, 1996, was "subject to the additional requirements of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19(1996).

(Pet. App. A-7, n.3). *Accord Lindh v. Murphy*, 521 U.S. 320 (1997). Since the Court of Appeals determined that Fiore could not succeed on the merits of his claim, the court found it unnecessary to decide whether Fiore had exhausted the claim that he was denied due process by the state courts' failure to apply *Scarpone* retroactively or whether the State courts had adjudicated the claim on the merits. *See* 28 U.S.C. § 2254(b) and (d). (Pet. App. A-7 n.3) In fact, the state courts never adjudicated that federal claim on the merits. The claim was never presented to the post conviction court. That failure was urged as a waiver under state law when Fiore attempted to raise it for the first time on appeal from the denial of post conviction relief. The Superior Court, while noting the federal claim, never addressed its merits. The Superior Court addressed Fiore's state law claim that he was entitled to relief "because [w]hat [Fiore] is charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts." (J. A. 149). The court concluded, first, that the state statutory construction claim had been "previously litigated" and could not be "litigated again in a post-conviction proceeding," relying on "settled [state] law." (J. A. 158) Next, the court said that, under state law, new state appellate decisions are not applied retroactively to cases that were final on direct appeal before the new decision was rendered. (J. A. 159-160)

2. Fiore was denied state collateral relief on the basis of these state law grounds. The Court of Appeals recognized that,

based on this Court's decisions, questions of retroactive application of new state appellate decisions are state law questions. (Pet. App. A.-8, A-9) After determining that no federal question was presented by Fiore's claim, the court reversed the granting of the writ. (Pet. App. A-13)

As explained above, the due process claim was not presented to the post conviction court and was considered waived as a matter of state law when Fiore tried to raise it for the first time on appeal from the denial of post conviction relief. *See Commonwealth v. Baker*; Pa. R. A. P., Rule 302 (West 1998). This is a separate state law ground for decision and constitutes a procedural bar to the federal courts' consideration of this due process claim.

Since the federal claim was presented in a procedurally defective fashion and since the state appellate court affirmed the denial of relief on Fiore's state law claim on state grounds, it is of no moment that the state court did not specifically mention this procedural ground as a basis for denial of relief. Fiore noted the waiver argument in his petition and disputed it. Respondents noted that Fiore had raised no due process issue in his post conviction petition but attempted to do so only when he appealed the denial of post conviction relief. Thus, as to this claim, it did not "appear[] that [Fiore] has exhausted the remedies available to him in the courts of the State ...." 28 U.S.C. § 2254 (b)(1)(A). Fiore did not "give [the] state courts a fair opportunity to act on [his] claims." *O'Sullivan v. Boerckel*, No. 97-2048, 1999 WL

358962*4 (June 7, 1999). Though exhaustion as to one claim was conceded, Respondents did not expressly waive exhaustion as to any other claim. 28 U.S.C. § 2254(b)(3). Accordingly, the contention that this claim was procedurally barred was before the district court. *See Trest v. Cain*, 522 U.S. 87 (1997).

Fiore now has no state forum in which to present this federal claim. Subject to exceptions not relevant here, all petitions for post conviction relief must be presented within a year after a petitioner's conviction becomes final on direct appeal. 42 Pa. Cons. Stat. Ann. § 9545 (b) (1) and (3)(West 1998). Fiore's conviction became final in 1990. A new petition would be time-barred. Pennsylvania courts would be without jurisdiction to entertain a second post conviction petition. *Commonwealth v. Banks*, 726 A.2d 374, 376 (Pa. 1999).

Fiore's present due process claim is, therefore, exhausted because it is procedurally barred. *See Coleman v. Thompson,* 501 U.S. at 732 (habeas petitioner who has defaulted federal claims in state court meets technical requirements for exhaustion; no state remedies are available to him).

It should be of no moment that the state appellate court did not rely on this specific procedural bar to avoid ruling on this federal claim. The opinion is quite clear that Superior Court based its ruling on state law. *See Coleman,* 501 U.S. at 734 and 739 (no "plain statement" required where federal claim not presented to state court and not exhausted so procedurally barred or where it does not "fairly appear" that state decision

rested primarily on federal law or was interwoven with such law). *Compare Castille v. Peoples*, 489 U.S. 346, 351 (1989)(no exhaustion "where the claim has been presented for the first and only time in a procedural context in which the merits will not be considered unless 'there are special and important reasons therefor'"); and Pa. R. A. P., Rule 302, 42 Pa. Cons. Stat. Ann. (West 1998) ("[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal"). Nothing more would have been served by the Superior Court specifically addressing the argument that the federal claim was barred under state law because it was not raised in the post conviction court. That was simply another state ground upon which Superior Court could have denied review, with the resultant denial of state post conviction relief.[8]

3. To overcome his default, Fiore must demonstrate cause for the default and actual prejudice resulting from it

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[8]This Court "may affirm on any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). Such a position "merely asserts additional grounds why the decree should be affirmed." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). A respondent "is entitled to rely on any legal argument in support of the judgment below." *Schiro v. Farley*, 510 U.S. 222, 228-229 (1994). This is particularly so where, as in this case, the Court of Appeals said it was avoiding the question of exhaustion and Respondents alerted the Court to an exhaustion issue in its Brief in Opposition. Respondents' Brief in Opposition, p. 7. *See Schiro v. Farley*, 510 U.S. at 229.

Murray v. Carrier, 477 U.S. 478, 485 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). In the alternative, he must demonstrate that he is actually, factually innocent of the offense with which he was charged and convicted in the State court. *Murray*, 477 U.S. at 496; *Smith v. Murray*, 477 U.S. 527, 537 (1986). He is unable to properly do either.

Fiore's due process claim would have met the same fate as his state law claim had he presented it to the post conviction court: any claim that the statute did not apply to him was previously litigated and, therefore, could not form the basis of post conviction relief, even when presented as a new theory. *See Commonwealth v. Senk*, 437 A.2d at 220. Moreover, this claim was just as clearly available when Fiore filed his post conviction petition as it was when he raised it belatedly for the first time on appeal. The legal basis for the federal claim was available to him at the procedurally required time. *Strickler v. Greene*, No. 98-5804, 1999 WL 392982 *12 (June 17, 1999); *Reed v. Ross*, 468 U.S. 1, 16 (1984).

Nor, is Fiore able to show a miscarriage of justice in the nature of factual, actual innocence necessary to overcome the bar. *Schlup v. Delo*, 513 U.S. 298 (1994), teaches that when a state habeas petitioner seeks to establish the "miscarriage of justice" exception of *Sawyer v. Smith* and *Murray v. Carrier* so as to give life to an otherwise procedurally barred claim, he must show that a constitutional error resulted in the conviction of one who is "actually innocent." "The meaning of actual

innocence as formulated by *Sawyer*, and *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Schlup*, 513 U.S. at 868.

Fiore has no new evidence. The jury which convicted him was well aware that Fiore had a permit to do particular things in particular ways. The evidence as to that was plain. And if by chance, a juror had misapprehended that fact, the trial court reiterated, in response to a question which arose during deliberations,

> that it was clear the facility had a permit but that the Commonwealth alleged: that Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and so significantly departed from the terms of the permit that the operation . . . was an unpermitted operation. . .

(J. A. 179)

Is it "more likely than not that no reasonable juror" could have convicted Fiore under the Commonwealth's theory of the case? Are we bound by the tautology that a permit is a permit is a permit, despite ample evidence that *in the context of this case* the permit was site and "waste stream" specific and that Fiore had no permit to alter the ground-water monitoring system as he did? Is it worthy of consideration that, years after Fiore' conviction, the judge who tried him wrote that Fiore was not an innocent man serving a sentence and deserving of post

conviction relief. Appendix to Petitioner's Brief at Superior Court No. 1892 Pittsburgh 1994, pp.5-6. Is it worthy of consideration that a Superior Court judge, in affirming that denial of relief, wrote that Fiore's conviction, despite the *Scarpone* decision, was neither a "miscarriage of justice" nor "an extraordinary circumstance warranting a departure from the provisions of the PCRA." (J .A. 162).

Fiore's argument of "actual innocence" is based on his insistence that he is entitled to the same relief as Scarpone because the Pennsylvania Supreme Court decision in *Scarpone* announced what the law had always been. The state courts denied him that relief as a matter of state law. Were this Court to grant relief on this claim it will have "extended" habeas corpus relief, to use Fiore's word, to an area where it has never before been extended in contravention of earlier decisions of this Court which the state courts relied on in denying relief and in fashioning state law on the retroactivity of new state appellate decisions. *See Sunburst Oil; Blackwell, supra.*

Habeas review of state court decisions, particularly in light of the recent amendments to the federal habeas corpus statute, is designed to guarantee that state courts "toe the constitutional mark." *Solem v. Stumes,* 465 U.S. at 653 (Powell, J., concurring in judgment); *Teague*, 489 U.S. at 307. The federal courts must examine the claim from the perspective of clearly established federal law as determined by this Court at the time the state courts decided the issue. 28 U.S.C. § 2254 (d)(1);

Teague; Saffle; Butler. When the state courts decided that *Scarpone* did not have to be applied retroactively to Fiore's case, nothing in this Court's retroactivity jurisprudence indicated that the Constitution required otherwise. The exact opposite was true. *See Sunburst Oil*; *Wainwright v. Stone*. To entertain this claim and grant relief would be an improper extension of the federal writ of habeas corpus.

CONCLUSION

"There is perhaps 'nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.' " *Calderon v. Thompson,* 118 S. Ct. at 1500, quoting Bator, *Finality in Criminal law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 451 (1963).

Pennsylvania's courts decided Fiore's appeals consistent with their understanding of the relevant law. Judge Novak of the Court of Common Pleas of Allegheny County, who was on the bench during trial, who denied Fiore's many post verdict motions and who denied post conviction relief, disposed of Fiore's claim for collateral relief, writing:

> The decision which we reach today is consistent with a long line of cases balancing the right to seek collateral relief after one's direct appeals

> have been exhausted with the need for some finality in the law. It is also consistent with Justice Harlan's view that cases on collateral review should be considered in light of the law as it stood when the conviction became final. *See Mackey v. the United States*, 401 U.S. 667 (1971).
>
> Finally, we point out that this is [Fiore's] second collateral attack on his conviction. . . . We recognize that the Court may entertain multiple collateral appeals, particulary in a case where the Court determines that an innocent man is serving a sentence. This, however, is not such a case. No court has decided that the evidence against either [Fiore] or [Scarpone] was insufficient to prove that [Fiore] discharge[d] hazardous waste into an unnamed tributary of the Youghiogheny River.

Appendix to Petitioner's Brief at Superior Court No. 1892 Pittsburgh 1994, pp 5-6.

In concurring in the affirmance of Judge Novak's denial of post conviction relief, Superior Court Judge Hoffman noted

> there are circumstances where a departure from the PCRA's stringent eligibility requirements is appropriate, such as where there are extraordinary circumstances or a miscarriage of justice.

(J.A. 161-162) Fiore's case, he found, was not one of those circumstances.

> In the instant case, the evidence at trial clearly demonstrated that [Fiore] deliberately altered the ground-water monitoring system, wrongfully discharged hazardous waste into an unnamed tributary of the Youghiogheny River and lied under oath to the Commonwealth Court. Although [Fiore] is serving a sentence for a conviction based on evidence which would no longer support a conviction in Pennsylvania, I believe [Fiore's] conviction was not a miscarriage of justice or an extraordinary circumstance warranting a departure from the provisions of the PCRA.

(J.A. 162)

For the reasons stated herein, Respondents respectfully ask this Court to affirm the decision of the Court of Appeals of the Third Circuit which reversed the grant of federal habeas relief.

Respectfully submitted

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