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Attacking Aggravating Prior Convictions in Federal Habeas: Using *Lackawanna* and *Daniels* for . . . Practically Anything?

BY GRAY PROCTOR

This article is meant to help people whose sentences have been enhanced by a prior conviction that was subject to a meritorious constitutional challenge that was never properly raised. By vacating the ''aggravating prior conviction,'' these defendants may receive a substantial reduction to their subsequent sentence.

There is reason to believe that such individuals exist. Especially for challenges that cannot be brought until collateral review (where counsel is usually not provided), the individuals may have discovered the claim only after the statute of limitations expired or after the first (and in many jurisdictions, only permissible) post-conviction motion was denied. A few others have the resources to hire an attorney but suffer from counsel's failure to identify and raise a meritorious claim. And while a few motivated by the stigma or collateral consequences attendant to their convictions may discover, upon their release from custody, that their jurisdiction permits relief through a writ of coram nobis, many will not.[1]

A relatively obscure gateway to further review of these aggravating prior convictions appears to exist and may be available both for federal defendants pursuant to 28 U.S.C. § 2255 and for state defendants pursuant to 28 U.S.C. § 2254.[2] Case law suggests that the prior conviction can be challenged as a component of a subsequent sentence but only when the claims could not reasonably have been brought earlier, rendering a challenge to the current sentence ''effectively [ ] the first and only forum available for review of the prior conviction.'' The unmotivated or negligent defendant should not expect to avail himself of this exception, which does not apply ''once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully).'' A more recent U.S. Supreme Court case may have made the gateway available for ''first-tier collateral claims,'' claims that can only be brought in proceedings for which no right to counsel exists.

Gray Proctor practices law in Florida, focusing on criminal appeals and post-conviction review in state and federal courts, as well as clemency and re-entry issues. You can learn more about his practice or contact him online at www.appealsandhabeas.com.

Review of Authority

Although the governing statutes grant federal courts jurisdiction to review aggravating prior convictions, courts will generally refuse to hear such claims on prudential grounds. The Supreme Court has held that the

[1] Daniel F. Piar, *Using Coram Nobis to Attack Wrongful Convictions: A New Look at an Ancient Writ*, 30 N. KY. L. REV. 505 (2003). Note that coram nobis relief does not appear to be available in federal court with respect to state convictions. See *Obado v. New Jersey*, 328 F.3d 716, 718 (3d Cir. 2003).

[2] Because the two cases establishing that aggravating prior convictions can be challenged in connection with a subsequent conviction are practically identical in reasoning (although Justice Antonin Scalia wrote separately to express his displeasure in the use of Section 2255 to reach a state conviction), I have not treated the issues separately here. See *Daniels v. United States*, 532 U.S. 382, 69 CrL 113 (2001).

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only claim that would always be cognizable would be a complete denial of appointed counsel in violation of *Gideon v. Wainwright*.[3] A plurality of justices (with which the dissenters would have agreed) also suggested that aggravating prior convictions could be challenged when the defendant never had a real chance to challenge the conviction earlier. Two circuit courts have recognized the plurality opinion as creating a gateway to review that is available at least in theory. However, the issue is far from resolved. Lower courts vary in their characterization (or even mention) of the plurality's position. Even courts that have recognized the theoretical availability of relief have relied on the procedural bars attendant to federal post-conviction review to avoid reaching the merits of challenges to aggravating prior convictions.

'Custody,' *Lackawanna* and Prudential Jurisdiction

In *Lackawanna County District Attorney v. Coss*,[4] the Supreme Court established that federal courts have habeas jurisdiction to review aggravating prior convictions that they could not entertain in a direct challenge to the prior conviction. In Section 2254 proceedings, federal courts enjoy jurisdiction over challenges to state convictions only when the individual is ''in custody'' pursuant to a state conviction.[5] Custody does not require incarceration; it includes probation, parole and other significant restraints on liberty.[6]

A person cannot be said to be directly in custody due to an aggravating prior conviction after the sentence has been completely served. Nevertheless, in *Lackawanna*, the Supreme Court ruled that federal courts have jurisdiction over aggravating prior convictions because the individual is in custody pursuant to a sentence that has been enhanced pursuant to those convictions.

Justice Sandra Day O'Connor wrote for a five-justice majority of Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy, Antonin Scalia and Clarence Thomas. The *Lackawanna* majority agreed that a subsequently convicted defendant is ''in custody'' pursuant to an aggravating prior conviction.[7] The majority also agreed that federal courts should refrain from reviewing aggravating prior convictions in most cases, on prudential considerations ''relating to the need for finality of convictions and ease of administration.'' Nevertheless, the majority recognized that aggravating prior convictions can always be challenged if the defendant was denied counsel.[8] Recognizing the unique importance of the right to counsel, the court decided that prudential considerations *demand* that the courts exercise jurisdiction over *Gideon* claims.[9]

A three-justice plurality of O'Connor, Kennedy and Rehnquist gave lower courts some guidance on how to exercise their prudential jurisdiction in individual cases. In Part III-B of the opinion, the plurality described some considerations that could justify relaxing the ''general rule'' against reviewing aggravating prior convictions:

> It is not always the case, however, that a defendant can be faulted for failing to obtain timely review of a constitutional claim. For example, a state court may, without justification, refuse to rule on a constitutional claim that has been properly presented to it. Alternatively, after the time for direct or collateral review has expired, a defendant may obtain compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely matter.[10]

In the plurality's view, state-court unfairness and newly discovered evidence could render ''a habeas petition directed at the enhanced sentence . . . the first and only forum available for review of the prior convictions.''[11] The entire majority, however, agreed that the aggravating prior conviction could not be shown to affect the current sentence.

Section III-B of the opinion was too restrictive for the dissenters. In addition to disagreeing with the majority's conclusion that the prior aggravating conviction was harmless, Justices David Souter, John Paul Stevens and Ruth Bader Ginsburg relied on their reasoning in the companion case *Daniels v. United States*[12] (addressing the same issue in the context of post-conviction review of a federal sentence) to explain why they would have allowed challenges to aggravating prior convictions under *any* circumstances, not just in certain exceptional circumstances.[13] Thus, six justices agreed that, at the least, the exceptions in Section III-B warrant federal habeas review of prior aggravating convictions.

Lackawanna Exceptions in the Lower Courts

As far as the author can determine, no habeas petitioner had succeeded in using *Lackawanna* to obtain review until June 20. On that date, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded in *Dubrin v. California* for the district court to further review a habeas challenge to a sentence enhanced by an aggravating prior conviction. It explained that ''when a defendant cannot be faulted for failing to obtain timely review of a constitutional challenge to an expired prior conviction, and that conviction is used to enhance his sentence for a later offense, he may challenge the enhanced sentence under § 2254 on the ground that the prior conviction was unconstitutionally obtained.''[14]

The petitioner in *Dubrin* is an example of a defendant whose diligent attempts to protect his rights were thwarted by mistakes attributable to the state court system. Brian Dubrin was affirmatively misled by the prosecutor and the sentencing court, both of whom assured him that his prior convictions would not count as a ''strike'' under California law. Dubrin discovered that

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[3] *Gideon v. Wainwright*, 373 U.S. 335 (1963).

[4] 532 U.S. 394, 69 CrL 113 (2001).

[5] Section 2254(a); see also Section 2255(a) (granting authority to challenge ''sentence of a court established by Act of Congress'').

[6] *Lackawanna*, 532 U.S. at 401-02; *Maleng v. Cook*, 490 U.S. 488, 491 (1989).

[7] *Lackawanna*, 532 U.S. at 401.

[8] Id. at 404.

[9] See also *Custis v. United States*, 532 U.S. 382 (1994) (discussing exception for attacks on prior convictions used as Armed Career Criminal Act predicates where the defendant was denied the right to counsel).

[10] *Lackawanna*, 532 U.S. at 405

[11] Id. at 406.

[12] 532 U.S. 374, 69 CrL 113 (2001).

[13] Id. at 387-91. Justice Stephen G. Breyer would have allowed defendants to challenge aggravating prior convictions earlier, at federal sentencing proceedings, overturning *Custis*. Id. at 392-93.

[14] 720 F.3d 1095, 1099, 93 CrL 448 (9th Cir. 2013).

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his conviction constituted a strike and, before his subsequent conviction, challenged his convictions through a pro se state habeas petition. The state court of appeals refused to consider his petition because he had been released. Thus, according to the state court, Dubrin was not ''in custody.''

The problem with the state court decision was that the court did not recognize that Dubrin was ''in custody'' pursuant to his sentence of probation. Mere release from incarceration did not remove Dubrin's custodial status. The Ninth Circuit reasoned that the state courts had deprived Dubrin of a meaningful opportunity to challenge the aggravating prior conviction.

As a pro se litigant who was no longer incarcerated, Dubrin understandably assumed the state appellate courts were right when they told him he was not ''in custody.'' And having been advised by the state courts that he was no longer eligible for habeas relief, Dubrin did not pursue habeas relief in federal court.

Dubrin was later convicted of offenses constituting a third strike. After attempting to challenge the aggravating prior conviction in state post-conviction proceedings, he filed a Section 2254 petition. The *Dubrin* court reversed, finding that the state court ''unjustifiably refused to rule on petitioner's properly presented challenge,'' contrary to the lower court's conclusion.[15]

The Ninth Circuit followed the lead of the Tenth Circuit in taking the III-B exceptions seriously. In *Broomes v. Ashcroft,*[16] the Tenth Circuit recognized its authority to apply *Lackawanna* exceptions to claims for relief not based on *Gideon*. The issue has been recognized but left unresolved by panels in the Fourth[17] and Fifth[18] circuits. In an unpublished decision, the Sixth Circuit characterized the III-B exceptions as one of ''two possible exceptions to the general rule espoused in *Lackawanna*,'' the other being a *Gideon* violation.[19]

In one unusual case, the Eleventh Circuit held that *Lackawanna* meant that a habeas petitioner could bring a *Gideon* challenge to his misdemeanor conviction for sexual abuse that led the state court to revoke his probation and sentence him to serve the 10-year suspended sentence imposed for a prior conviction for felony sexual abuse.[20] The court reasoned that the petitioner's ''probation was revoked, and his ten-year sentence reinstated, in large part because of this new conviction,'' rendering it similar enough to an enhancement to come within the *Lackawanna* exception.[21]

No other court appears to have reached the conclusion that a petitioner met the *Lackawanna* III-B criteria and ruled on the issue of whether the exception was available. Thus, to find insight as to how those courts would treat meritorious III-B arguments, we can only look to whether and how the III-B exceptions are mentioned. Some courts have characterized the III-B exceptions as available even when not necessary to resolve the case.[22] Others have referred to *Gideon* as the sole exception to the rule against challenging aggravating prior convictions.[23] It seems fair to conclude that no consensus has emerged.

Prerequisites to *Lackawanna* Claims: Timeliness, Exhaustion and Successiveness of Challenges

The three most common procedural bars to post-conviction review in federal courts are timeliness, exhaustion and the rule against second or successive petitions. In *Lackawanna*, the Supreme Court explained:

> As with any § 2254 petition, the petitioner must satisfy the procedural prerequisites for relief including, for example, exhaustion of remedies. When an otherwise qualified § 2254 petitioner can demonstrate that his current sentence was enhanced on the basis of a prior conviction that was obtained [in violation

[15] *Dubrin v. California,* No. 10-1032, 2010 U.S. Dist. LEXIS 71793 (C.D. Cal. June 2, 2010).

[16] 358 F.3d 1251, 1254 (10th Cir. 2004) (explaining exception exists when ''no channel of review is available through no fault of the petitioner''); see also *McCormick v. Kline*, 572 F.3d 841 (10th Cir. 2009) (dismissing because petitioner failed to first bring his ''as enhanced'' challenge to his sentence in state court).

[17] *Lyons v. Lee,* 316 F.3d 528, 535 (4th Cir. 2003) (writing separately, where majority abstained from question of whether III-B *Lackawanna* exceptions exist, to emphasize ''*Coss* applies . . . to situations where there is a Sixth Amendment violation so substantial that it is as if a defendant never had the benefit of legal representation'') (Gregory, J., concurring); see also *Wilson v. Flaherty,* 689 F.3d 332 (4th Cir. 2012) (Wynn, J., dissenting).

[18] *United States v. Clark,* 284 F.3d 563, 567 (5th Cir. 2002) (noting defendant would not be eligible for exception to rule in *Daniels* because he had failed to take advantage of channels of review actually available to him and declining to conclude ''he may not properly be faulted for failing to obtain timely review'') (quotation omitted).

[19] *Ferqueron v. Straub,* 54 F. App'x 188, 190 (6th Cir. 2002) (explaining that Ferqueron did not fall within ''two possible exceptions'' to *Lackawanna* because counsel had been appointed in connection with aggravating prior conviction and ''Ferqueron had an available forum for review of the prior convictions, of which he availed himself, in that he sought post-conviction relief.''); but see *Abdus-Samad v. Bell,* 420 F.3d 614, 630 (6th Cir. 2005) (''Even if these plurality exceptions were controlling . . . .'').

[20] *Green v. Price*, 439 F. App'x 777 (11th Cir. 2011).

[21] Id. at 782, citing *McCoy v. Wainwright,* 804 F.2d 1196, 1197 n. 1 (11th Cir. 1986) (finding a ''positive and demonstrable relationship between the prior convictions and McCoy's present incarceration'' where, although McCoy had been incarcerated for longer than the sentence being challenged, he was ''still incarcerated on a separate charge and that his sentence on that charge is consecutive to the sentence rendered in this case'').

[22] *Frazier v. Padula*, No. 12-112, 2012 U.S. Dist. LEXIS 73535, *6 (D.S.C. May 29, 2012); *Honeycutt v. Young*, 2010 U.S. Dist. LEXIS 140463 *2-6 (W.D. Okla. Dec. 9, 2010); *Lowder v. Grayer*, No. 5:10-2, 2010 U.S. Dist. LEXIS 4781, *2-3 (M.D. Ga. Jan. 21, 2010); *Tatum v. Wolfenbarger*, No. 08-10988, 2009 U.S. Dist. LEXIS 5928, *6-7 (E.D. Mich. Jan. 28, 2009).

[23] *Jones v. Lafler*, No. 1:08-916, 2013 U.S. Dist. LEXIS 6393, *7 (W.D. Mich. Jan. 16, 2013); *Roberts v. Cunningham*, No. 10-1252, 2011 U.S. Dist. LEXIS 71568, *10 (W.D. Wash. June 24, 2011); *Byrnes v. Union Correctional Institution*, No. 11-20409, 2011 U.S. Dist. LEXIS 43817 (S.D. Fla. April 6, 2011); *Wilson v. Douglas*, 2011 U.S. Dist. LEXIS 36493 (M.D. Fla. April 4, 2011); *Corder v. Espinda*, No. 10-00284, 2010 U.S. Dist. LEXIS 124394, *13-15 (D. Haw. Oct. 21, 2010); *Rangel v. Stansberry*, No. 08-782, 2010 U.S. Dist. LEXIS 2338, *10 n.7 (E.D. Va. Jan. 12, 2010); *United States v. Griffee*, 2009 U.S. Dist. LEXIS 37009, *9 (D. Ore. April 30, 2009) (''A limited exception. . .'' and ''the narrow exception outlined in *Lackawanna*''); *Baker v. Douglas County Correctional Center*, No. 07-3002, 2007 U.S. Dist. LEXIS 28192, *5 (D. Neb. April 16, 2007); *Veasey v. Connor*, No. 01-523, 2002 U.S. Dist. LEXIS 19968, *6 (D. Del. Oct. 17, 2002).

of *Gideon*], the current sentence cannot stand and habeas relief is appropriate.[24]

As a lower court has said, ''*Lackawanna* simply does not create a new, indefinite and unlimited statute of limitations for habeas corpus attacks on uncounseled state convictions.''[25] In the rare case where a petitioner challenges a subsequent conviction used to impose a suspended sentence, the statute of limitations begins to run with reference to proceedings on the suspended sentence, not on the (presumably earlier) date that conviction becomes final.[26] The limitations period is not jurisdictional, however, and can be waived or forfeited by the state.[27]

In *McCormick v. Kline*, the Tenth Circuit held that proper exhaustion is a ''threshold prerequisite[ ]'' of a *Lackawanna* claim. Because the petitioner had not challenged his sentence enhancement in state courts, he could not demonstrate entitlement to the *Lackawanna* exception in federal habeas proceedings.[28] Petitioners thus should bring their ''as enhanced'' challenges to the subsequent conviction in state court first. Where a state-court challenge to the enhanced conviction is currently pending, any federal habeas petition should be dismissed without prejudice to refile.[29]

As with any other petitioners, *Lackawanna* claimants are subject to the limitation on successive filings. Petitioners must raise their claims in the first filing or lose them.[30]

Elements Arguendo: Raising The Hypothetical III-B Exception To *Lackawanna*

Successful *Lackawanna* challenges based on the III-B exceptions described by the Supreme Court are rare and will likely remain so. The touchstone of most *Lackawanna* claims is a diligent attempt to bring the claims in state court that fails due to some procedural unfairness. In deciding whether these elements are met, federal courts are likely to draw on case law regarding diligence and procedural unfairness in the context of the Antiterrorism and Effective Death Penalty Act's statute of limitations and of procedural default, respectively.

The III-B plurality, however, wrote in a time when any mistakes made during the course of post-conviction review were the sole responsibility of the petitioner, whether proceeding pro se or through counsel. Any failure to raise a claim properly would likely result in a permanent procedural bar to habeas review. After *Martinez v. Ryan*,[31] federal habeas courts should entertain unexhausted claims if a petitioner was not effectively represented at the first stage at which the claim could be brought (most commonly, with respect to claims of ineffective assistance not cognizable until post-conviction review). It would seem inconsistent not to apply *Lackawanna* to these unexhausted ''first-tier collateral claims'' as well.

Because *Martinez* means that lack of access to appointed counsel is generally good cause for failing to timely bring ineffectiveness claims in state court, and because most defendants do not have counsel for state post-conviction proceedings, *Lackawanna* relief could be available to an enormous segment of federal habeas petitioners. And because ineffectiveness can encompass almost any substantive claim, the author is cautiously optimistic that the *Lackawanna*/*Martinez* combination could allow challenges to prior aggravating convictions based on practically anything.

The Generic III-B Claim: Unjustifiable Refusal to Hear a Claim

Defendants show diligence by attempting to discover and assert any meaningful grounds for release as soon as possible. Diligence is a key component in the equitable tolling inquiry, and I expect that federal courts will draw on this body of law in deciding *Lackawanna* cases.[32] Courts will equitably toll the AEDPA statute of limitations only when ''extraordinary circumstances'' external to the petitioner defeat a diligent attempt to timely file. While equitable tolling is by definition driven by the facts of each case, it is possible to identify factors that generally will not excuse a failure to timely bring a challenge to a conviction:

- lack of legal education;
- occasional denial of access to legal materials;
- transfer of the petitioner or unavailability of an inmate providing legal services (even if the petitioner cannot speak English); and
- other inconveniences normally part of prison life.[33]

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[24] 532 U.S. at 404.

[25] *Steward v. Moore,* 555 F. Supp. 2d 858, 867 (N.D. Ohio 2008).

[26] *Green,* 439 F. App'x at 782-83.

[27] *Grigsby v. Cotton,* 456 F.3d 727 (7th Cir. 2006) (declining to ''enforce the alleged untimeliness of Grigsby's petition'' because the state had failed to raise those defenses, waiving them on appeal).

[28] *McCormick v. Kline,* 572 F.3d 841 (10th Cir. 2009). See also *Nelson v. Jones,* No. 12-644, 2013 U.S. Dist. LEXIS 70964, *8-10 (N.D. Okla. May 20, 2013) (recognizing that the petitioner had arguably pleaded the innocence exception in Section III-B of *Lackawanna* but could not satisfy the exhaustion requirement because he had not challenged his enhanced sentence in state proceedings).

[29] *Alexander v. Attorney General of Colorado*, 515 F. App'x 746, 750 (10th Cir. 2013) (dismissing as unexhausted where petitioner's direct appeal of current conviction was pending; dismissal without prejudice is appropriate to protect the petitioner's right to ''mount[ ] a future federal habeas challenge to his current convictions and sentence'').

[30] *Darden v. Keller,* No. 12-2268, 2013 U.S. Dist. LEXIS 44843 (N.D. Ga. Feb. 12, 2013); *Skinner v. Duncan,* No. 02-0219, 2005 U.S. Dist. LEXIS 2206 (S.D.N.Y. Feb. 17, 2005) (successive); *Thompson v. Warden,* No. 13-4544, 2013 U.S. Dist. LEXIS 94937, *5-6 (C.D. Cal. July 6, 2013).

[31] 132 S. Ct. 1309, 90 CrL 805 (2012).

[32] *Holland v. Florida,* 130 S. Ct. U.S. 2549, 87 CrL 399 (2010) (holding that a petitioner is entitled to equitable tolling only if he shows that he has been pursuing his rights diligently but some extraordinary circumstance stood in his way).

[33] E.g., *Bolarinwa v. Williams,* 593 F. 3d 226, 232, 86 CrL 537 (2d Cir. 2010) (requiring specific showing of link between mental illness and untimeliness); *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009) (denying tolling with respect to nearly three-month period of limited access to law library); *Maxwell v. Hedgpeth*, No. 10-cv-8749, 2011 U.S. Dist. LEXIS 109221 (C.D. Cal. July 7, 2011) (lockdowns); *Coker v. Warden,* No. 1:11-cv-01842, 2012 U.S. Dist. LEXIS 109567 (D.S.C. July 30, 2012) (lockdowns); *Harper v. United States*, No. 07-cr-00339,

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The common thread appears to be that these obstacles are either to be expected or not external to the defendant; thus, failure to account for them shows a lack of diligence.

Procedural unfairness in the state court is the second element of a generic III-B claim. Here, the inquiry is similar to that undertaken by courts determining whether a state procedural rule is sufficiently clear and fair to result in procedural default if the rule is violated. Although federal courts generally respect the state courts' application of their own procedural rules to refuse to consider an improperly presented claim, state procedural rules are occasionally applied in a manner that is fundamentally unfair. Federal courts can consider even claims that are not technically exhausted.

Consider the issue of timeliness. Most state courts have a definite statute of limitations for seeking post-conviction review. Generally, these will be enforced, but federal courts need not respect a state court's failure to grant tolling if warranted.[34] Another example occurs when a state relies on a novel interpretation of its own law and applies a procedural bar without fair warning. Although federal courts are generally loath to supervise state procedure, they need focus only on the foreseeability of the decision in a particular defendant's case.[35] Courts have also excused minor technical violations where the petitioner substantially complied with the purpose of the rule.[36]

The *Martinez/Lackawanna* Extension: First-Tier Collateral Claims

The Supreme Court recently identified another exception to procedural default for ''first-tier collateral claims.'' When *Lackawanna* was decided, it was well-settled that counsel's deficient failure to bring a claim can excuse a failure to exhaust, at least as long as there exists a constitutional right to effective representation.[37] However, no constitutional right to counsel exists after direct appeal. Thus, ineffective assistance of counsel could not excuse errors on collateral review. Because certain claims usually cannot be brought on direct appeal (for example, ineffective assistance of counsel), most defendants never have the aid of a lawyer in bringing them.

The *Martinez* decision recognized that petitioners have a strong interest (but not a constitutional right) to the assistance of counsel in bringing all challenges to their convictions. The *Martinez* court did not require appointment of counsel for these first-tier collateral claims; however, the court held that federal courts should not find such a claim procedurally defaulted when a petitioner failed to raise the claim in state court before proceeding to federal habeas.[38] If lack of counsel excuses a failure to bring a claim in state court, the same reasoning would support excusing a failure to bring a claim on federal habeas—especially if federal habeas review would not have been available because *Martinez* had not yet been decided.

Conclusion

Meritorious federal habeas claims are rare; good legal excuses for failing to bring them at the first opportunity have been rarer. Since *Lackawanna*, there has existed authority for the proposition that federal courts can hear belated challenges to aggravating prior convictions if the state denied a meaningful opportunity to bring those claims while the petitioner was directly ''in custody on those convictions.''

After *Martinez*, there is support for the idea that lack of access to counsel renders state post-conviction proceedings unfair with respect to first-tier collateral claims and that federal review is the answer. The author hopes that the *Martinez/Lackawanna* case law develops more quickly than the *Lackawanna* case law has so far and that an appropriate test case will arrive soon.

2012 U.S. Dist. LEXIS 1712 (M.D. Pa. Jan. 6, 2012) (bipolar disorder/inexperience); *Shelby v. McNeil*, No. 09-cv-230, 2010 U.S. Dist. LEXIS 45036 (N.D. Fla. April 14, 2010) (Gulf War syndrome); *Williams v. United States*, No. 11-cv-8048, 2013 U.S. Dist. LEXIS 118559 (N.D. Ala. Aug. 21, 2013) (attorney negligence); *Green v. United States*, No. 09-aw-0230, 2011 U.S. Dist. LEXIS 11915 (D. Md. Feb. 8, 2011) (lockdowns); *Martinez v. Kuhlman,* No. 99-cv-1094, 1999 U.S. Dist. LEXIS 21318, *18-23 (S.D.N.Y. Dec. 3, 1999) (transfer and illiteracy in English).

[34] *Cotto v. Herbert,* 331 F. 3d 217, 240 (2d Cir. 2003) (quoting *Lee v. Kemna*, 534 U.S. 362, 387, 70 CrL 330 (2002)) (''the adequacy of a state procedural bar is determined with reference to the 'particular application' of the rule; it is not enough that the rule 'generally serves a legitimate state interest.' '').

[35] For example, procedural default need not follow the failure to observe rules that are ''not always clear or closely hewn to'' or where a petitioner ''could not fairly be deemed to have been apprised of the rule's existence.'' *Lee*, 534 U.S. at 389-90.

[36] *Osborne v. Ohio*, 495 U.S. 103, 125 (1990); see also *Garvey*, 485 F.3d at 714.

[37] *Coleman v. Thompson,* 501 U.S. 722, 750 (1991) (does not bar relief where ''the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice'').

[38] *Martinez*, 132 S. Ct. at 1320 (''Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.'').