

# Escape from the Underworld (Or, Primer on 2255 Proceedings)

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## The Story of Sisyphus

# 28 USC 2255

- Motion to Vacate, Set Aside, or Correct

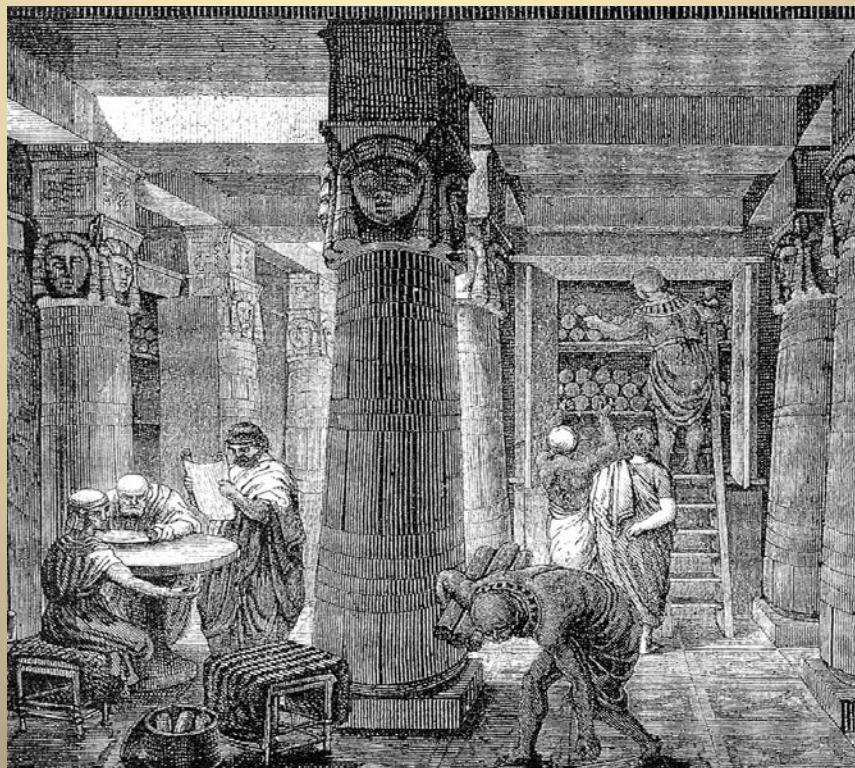


## Sisyphus rolling boulder up hill

Federal Inmate Seeking 2255 Relief

# Sources of Law

- 28 USC 2255
- Rules Governing Section 2255 Proceedings
- Caselaw



# 28 USC 2255

The “custody” requirement



# Custody

- Includes supervised release, parole, probation
- Includes mandatory participation in rehabilitation program
- Does not include registration as a sex offender

# Types of claims

- Violation of the Constitution
- Violation of Federal Law
- Lack of Jurisdiction
- Sentence in excess of maximum authorized by law
- Miscarriage of Justice

# What a 2255 Motion is NOT

- A substitution for an appeal.
- *King v. United States*, 199 F. App'x 524, 526 (6<sup>th</sup> Cir. 2006)

# Constitution is Supreme

- If your claim is not based on a constitutional violation, you must establish a miscarriage of justice.
- Very few miscarriages of justice.



# Mistakes that MIGHT NOT be Miscarriages of Justices

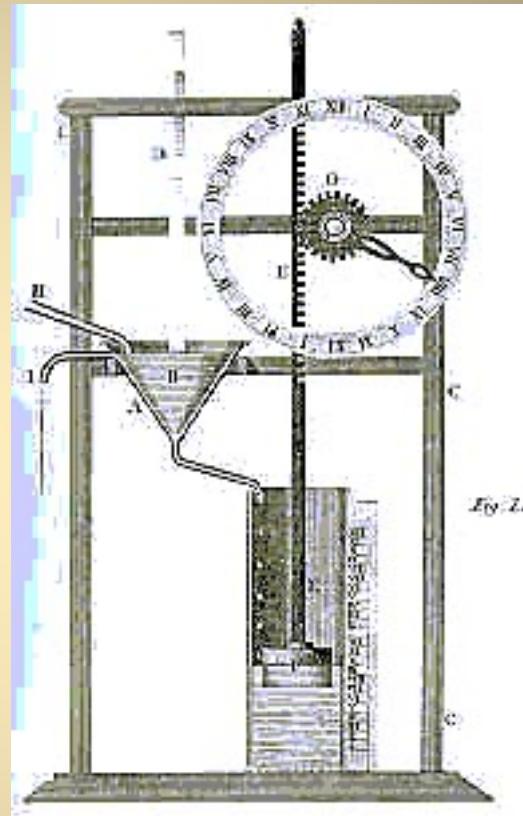
- Erroneous classification as a Career Offender
- *Johnson v. United States*, 544 U.S. 295 (2005)(holding a challenge to classification as a Career Offender states a valid 2255 claim); *contra Auman v. United States*, 67 F.3d 157, 161 (8<sup>th</sup> Cir. 2005)
- Erroneous bump in sentence under the Guidelines
- Erroneous imposition of consecutive sentences

# Constitutional Umbrella



# When To File

Within one year of when  
the judgment of conviction  
becomes final



# Conviction becomes final when...

- Supreme Court either denies certiorari or affirms on the merits
- If certiorari is not sought, the judgment becomes final when the 90 day period for filing a certiorari petition expires. *Clay v. United States*, 537 U.S. 522 (2003).
- If appeal is not sought, when the judgment is entered by the district court. (10 days after entry of judgment. Fed. R. App. P. 4(b)) *Sanchez-Castellano v. United States*, 358 F.3d 424, 427 (6<sup>th</sup> Cir. 2004).



**What if Sisyphus doesn't escape the Underworld  
in that one year?**

# Other Escape Opportunities File In One Year Of...

- Newly recognized right
  - *Johnson v. United States* currently pending (constitutionality of residual clause)
  - *Chambers v. United States*, 555 U.S. 122 (2009) (failure to report not a crime of violence)
  - *Dorsey v. United States*, 132 S.Ct. 2321 (applying Fair Sentencing Act retroactively to pre-FSA offenders sentenced after the FSA effective date)
- Newly discovered facts to support a claim
  - *Johnson v. United States*, 544 U.S. 295 (2005) (order vacating enhancing conviction is a new fact)

# Newly Recognized Right

- Newly recognized
  - Must be a change in the law
  - Supreme Court must recognize the right
  - The right must apply to collateral review
- “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. 2255(4)

- *Dodd v. United States*, 545 U.S. 353 (2005)
- Limitations period runs from the date the Supreme Court initially recognizes the new right
- Rare for the Supreme Court to recognize a new right and to decide retroactivity in the same opinion.

- *Wiegand v. United States*, 380 F.3d 890 (6<sup>th</sup> Cir. 2004)
- The district court should be the first court to decide retroactivity. “A court other than the Supreme Court can make the retroactivity decision for purposes of 2255.”

- Lower courts can hold new rights are retroactive. Otherwise, you can have rights that accrue after the statute of limitations has expired.



# *Jones v. United States*

- 689 F.3d 621 (6<sup>th</sup> Cir. 2012)
- *Begay v. United States*, 553 U.S. 137 (2008) applies retroactively, but noting
- Retroactivity concerns less pressing in federal case because comity and federalism concerns are lacking

# Form Petition

- Filed in the district court which imposed judgment
- Must contain a claim that satisfies 2255
- Must state facts supporting claim
- May be accompanied by legal memorandum
- May be accompanied by exhibits
- Rules governing 2255 motions rules 2 and 3

# What happens after a 2255 is filed?

- The government is “not required to answer the motion unless a judge so orders.” Rule 5(a)  
Rules governing section 2255 proceedings

# After Government Answers

- The Court may dismiss without further action from the parties.



# Take Affirmative Action

- Prisoner Options
  - Filing responsive legal pleading
  - Submitting documentation or exhibits
  - Moving for an evidentiary hearing
  - Move for discovery

File Notice of intent to -----

File Motion to -----

# Motion to Expand the Record

- Rule 7 of the Rules Governing Section 2255 allows the district court to “expand” the record.
- Place documentary evidence in the record.
- The test is whether the proposed evidence is relevant to a claim or rebutting a defense.
- Even if the court denies your motion, the evidence is part of the record on appeal.  
*Schlup v. Delo*, 513 U.S. 298, 308 n. 18 (1995)

# Types of Evidence

- Expert opinion, letters, documents, exhibits, affidavits

# Motion for Discovery

- Rule 6 of the Rules Governing 2255 Proceedings permits the prisoner to file a motion for discovery.
- The standard is whether the prisoner shows good cause.
- Good cause means the prisoner has a factual basis for alleging disclosure of additional information will show his entitlement to relief.

# Types of Claims Which May Require Discovery

- Prosecutorial misconduct
- Brady violation
- Juror misconduct
- Ineffective assistance

# Judge's Options

- Dismiss
- Direct one or both parties to submit additional evidence or offer additional legal argument
- Set the matter for an evidentiary hearing

# Appointment of Counsel

- 18 USC 3006A(a)(2)(B) provides appointment of counsel for a non-capital 2255 if the interests of justice so require.
- If the court grants a hearing, the court must appoint counsel. Rule 8, Rules Governing 2255 Proceedings

# Appeal

- Two components
  - Notice of appeal
    - 2255 Motion is civil in nature and is governed by FRAP 4(a)
  - Certificate of appealability 28 U.S.C. 2253(c)
    - May seek a certificate from the district court and/or the appeals court

# Perfecting an Appeal

## Notice of Appeal

- Bright line rule on contents and timing
- Mandatory
- Jurisdictional
- Filed pursuant to FRAP 4(a)
- Electronic filing
- Normally places jurisdiction of the case in the appeals court

## Certificate of Appealability

- No bright line rule on contents or timing
- Mandatory
- Jurisdictional
- Filed pursuant to 28 U.S.C. 2253(c) and FRAP 22(b)(3)
- Case hovering between district court and appeals court

# Case Manager

- Discuss the case with the case manager.
  - certificate of appealability with district court  
certificate of appealability with the appeal court



# Take Affirmative Action

- If nothing else happens to the case, beyond filing a notice of appeal, the appeals court will treat that appeal notice as an application for certificate of appealability and probably dispose of the case in a single unpublished order.
- *Castro v. United States*, 310 F.3d 900 (6<sup>th</sup> Cir. 2002).

# Substantive Standard for Certificate of Appealability

- Substantial showing of the denial of a constitutional right. 28 USC 2253(c)(2)
- Jurists of reason could debate the issue. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)
- Show this by citing cases similar to yours where the prisoner won relief.

# What if the prisoner has already filed (and lost) a 2255 motion?

- There is a strong presumption that each prisoner gets one bite at the apple.
- Before filing 2255 motion, review dockets in the district and appeals court to see if other 2255 motions have been filed or are pending.
- If the prisoner has already filed a 2255 motion, offer the district court reasons why the prisoner should be permitted a second bite--to file a second 2255 motion.

# Reasons to File a Second 2255 Motion

- The previous filing was not in fact a 2255 motion and movant has credible claims. *Stantini v. United States*, 140 F.3d 424, 426 (2d Cir. 1998)
- Diligent prisoner/attorney was not aware of relevant facts. *Dobbs v. Zant*, 506 U.S. 357 (1993)
- Prior 2255 motion did not reach merits of critical factual or legal issues. *Sanders v. United States*, 373 U.S. 1 (1963); *Clark v. United States*, 764 F.3d 653 (6<sup>th</sup> Cir. 2014)
- New factual development makes a claim ripe. *Panetti v. Quarterman*, 551 U.S. 930 (2007) (applying abuse of the writ standard)

# Reasons to file a second 2255 Motion, continued

- 28 USC 2244 is not applied in a way that “close[s] our doors to a class of habeas petitioners seeking review ....” *Panetti v. Quarterman*, 551 U.S. at 946.
- If prisoner is not abusing the process, there is an argument he should be permitted to file a second 2255 motion.

# Successive Motions Permitted Under 28 USC 2255(h)

- If new evidence of innocence
- If new retroactive constitutional right
- If the appeals court approves your motion.

Very difficult to meet this standard.

Successive motion originates in the appeals court.

# Transfer

- If you file a second 2255 motion in the district court, and if the district court does not believe you have a good reason for not previously raising the claim, the district court will transfer the case to the appeals court.
- The appeals court will treat your motion as a 2255(h) successive motion.

# Wins

- Simmons claims.
- Begay claims.
- Dorsey claims.



