



NON-CAPITAL HABEAS CONFERENCE

**ADMINISTRATIVE OFFICE OF THE U.S. COURTS
DEFENDER SERVICES OFFICE TRAINING DIVISION**

**Portland, Oregon
The Benson Hotel Curio Collection by Hilton,
309 SW Broadway, Portland, OR 97205
March 2-3, 2023**

(Draft Agenda 1/18/2023)

| <u>Day 1</u> | <u>Thursday, March 2, 2022</u> |
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| 8:00–9:00 | Registration/Continental Breakfast |
| 9:00–9:15 | Welcome from Federal Public Defender Lisa Hay |
| 9:15–10:30 | Plenary 1: Circuit and Supreme Court review. Easha Anand, Roderick & Solange MacArthur Justice Center and visiting professor, Stanford Supreme Court Clinic This session will provide an update on Supreme Court and major circuit decisions in § 2254 and § 2255 cases from the past year. |
| 10:30–10:45 | Break |
| 10:45–12:00 | Breakouts Beginner Getting started: going from state court to federal court. Amelia Bizzaro, Assistant NCHU Chief (D. Nev.) Claudia Flores, Assistant Federal Public Defender (E.D. Penn.) This session will provide an overview of a § 2254 case and walk you through the stages of the case. This session will focus on the concrete steps you should take once you've been appointed, identify issues to look out for and how to find them, discuss ideas for investigation and |

experts, and how to discuss the complexity of these type of cases with your client.

2255

Section 2255: The Basics.

Shelley Fite, National Sentencing Resource Counsel

This session will provide a brief history of § 2255, and cover some of the preliminary matters you need to consider before filing a § 2255 motion: Is your client in custody? Is a direct appeal still pending? Are the claims you wish to assert cognizable in § 2255, or must you pursue another remedy such as a habeas petition under 28 U.S.C. § 2241, or a motion for reduction of sentence under 18 U.S.C. § 3582? Are the claims you wish to raise barred by the nonretroactivity doctrine of *Teague v. Lane*?

Advanced

Section 2254 appellate practice in the circuit courts.

Tony Bornstein, Assistant Federal Public Defender (D. Ore.)
Stu Lev, Assistant Federal Public Defender ((E.D. Penn.)

This session will cover the nuts and bolts of appellate practice in habeas corpus cases. We will cover strategies and the methods for obtaining a Certificate of Appealability and the respective legal standards in cases decided either on the merits or in procedural default contexts. The faculty will also share tips on appellate advocacy.

12:00–1:15

Lunch

1:15–2:30

Breakouts

Beginner

Putting together the petition in 28 U.S.C. 2254 cases and what to expect afterwards.

Michael Weinstein, NCHU Chief (C.D. Cal.)
Mark Drozdowski, Senior Habeas Litigator (C.D. Cal.)

This session will cover the mechanics of putting together a federal habeas petition in a 28 U.S.C. § 2254 case and provide an overview of what happens after the petition is filed. What can you expect to see in the State's Answer? What should you include in your Traverse? And when should you file certain motions, like a motion to amend, a motion to stay, a motion for discovery, and a motion for an evidentiary hearing?

- 2255 **Section 2255: Obstacles to Relief.**
Paresh Patel, Appellate Chief (D. Md.)
Jennifer Coffin, Assistant Federal Public Defender (E.D. Tenn.)

This session will help you overcome the primary procedural hurdles found in § 2255 litigation: the statute of limitations, procedural default and waiver, the issue was raised and rejected on direct appeal, the burden of proof, and harmless error.

- Advanced **SOS bars and how to get around them: using *Magwood* (or not) across the circuits.**
Sam Saylor, Assistant Federal Public Defender (W.D. Penn.)
Michael Drake, Assistant Federal Public Defender (C.D. Cal.)

This session will discuss different strategies habeas lawyers can use to get around AEDPA's second-or-successive bars, including using *Magwood v. Patterson* to reset AEDPA's statute of limitations.

2:30–2:45 **Break**

2:45–4:00 **Breakouts**

- Beginner **Overcoming procedural defenses: an introduction.**
Amelia Bizzaro, Assistant NCHU Chief (D. Nev.)
Ron Sung, Assistant Federal Public Defender (D. Nev)

This session will introduce the government's most used procedural arguments for getting your case dismissed: timeliness, exhaustion, and procedural default. This session will explain what each of these procedural roadblocks are and ways to overcome them so your case survives to merits review.

- 2255 **Section 2255: What to do when the district court grants or denies your motion.**
Andrew Adler, Assistant Federal Public Defender (S.D. Fla.)
Benji McMurray, Assistant Federal Public Defender (D. Utah)

This session will cover forms of relief, post-judgment motions, notices of appeal, certificates of appealability, and second or successive § 2255 motions.

Advanced **The court ordered an evidentiary hearing. Now what?**
CB Kirschner, Assistant Federal Public Defender (D. Nev)
Kimberly Sandberg, Assistant Federal Public Defender (D. Nev)

Evidentiary hearings are rare and so much work it can feel overwhelming. This session breaks down the steps to take to prepare for your hearing. CB and Kim will discuss how to use the rules of civil procedure to your advantage, including the rules on discovery and experts, as well as tips for preparing your exhibits, your witnesses, and dealing with opposing counsel.

4:00–5:15 **Plenary 2: Channeling Mr. Rogers.**
Jay McEntire, Senior Litigator (E.D. Wash. & Idaho)

On May 1, 1969, Fred Rogers testified before a senate subcommittee to save PBS from budget cuts. In just 6 minutes, Mr. Rogers turned the subcommittee from deep skeptics into passionate supporters. It was remarkable. In this talk, we'll discuss how to blend the moral psychology that Mr. Rogers relied on with classy writing to craft persuasive motions and briefs—no matter the audience.

5:15–5:30 **Announcements/Adjourn**

5:30 **Happy Hour!**

Day 2 **Friday, March 3, 2023**

8:30–9:00 Continental Breakfast
Plenary 3: What the *Shinn*?! Introducing *Shinn v. Rameriz* and what it means for your § 2254 practice.
9:00–10:15 Jonathan Kirshbaum, NCHU Chief (D. Nev.)
Jeremy Baron, Assistant Federal Public Defender (D. Nev.)

Shinn dropped a bomb into many of our cases. This session will talk about what *Shinn* says and how to deal with it in your current and future cases.

Optional **2255 Tough questions**

Optional **2255 Case consults (as needed)**

10:15–10:30 **Break**

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| 10:30–11:45 | Plenary 4: Does that new Supreme Court decision provide a basis for § 2255 relief? Josh Carpenter, Assistant Federal Public Defender (W.D.N.C.) Janice Bergmann, Assistant Federal Public Defender (S.D. Fla.) Shelley Fite, National Sentencing Resource Counsel |
| | Every time the Supreme Court issues an opinion touching on federal criminal law, clients will contact you and ask you to file a § 2255 motion for them. How do you know if that new decision provides a basis for § 2255 relief? And if it does, how do you determine which clients might benefit? This session will describe the analysis you should use to help you answer those questions. |
| Optional | 2254 Tough questions |
| Optional | 2254 Case consults (as needed) |
| 11:45–1:00 | Lunch |
| 1:00–2:15 | Breakouts |
| Beginner | Grappling with § 2254(d): ways around and through the AEDPA standard Nell Brown, Assistant Federal Public Defender (D. Ore.) |
| | AEDPA creates a difficult road to habeas relief. Under AEDPA, habeas relief is permissible only when the petitioner demonstrates the state court's decision was contrary to or an unreasonable application of controlling Supreme Court precedent or that it was based on an unreasonable determination of facts. But is there a road less traveled that could make all the difference? This session will explain the AEDPA standard for obtaining relief and offer ways to avoid and overcome this standard. |
| 2255 | Section 2255: What about extra-record claims? Janice Bergmann, Assistant Federal Public Defender (S.D. Fla.) Brianna Mircheff, Appellate Chief (C.D. Cal) |
| | This session covers how to develop and present facts supporting claims – such as claims of ineffective assistance of counsel – that arise outside the trial record, and will discuss fact-based |

pleading, discovery, expansion the record, and evidentiary hearings.

Advanced ***Shinn* and how courts across the country how judges are sorting dealing with it.**

Moderator: Michael Weinstein, NCHU Chief (C.D. Cal.).

Panelists:

Ryan Norwood, Assistant Federal Public Defender (W.D. Penn.)

Keith Hilzendeger, Assistant Federal Public Defender (D. Ariz.)

Stu Lev, Assistant Federal Public Defender (E.D. Penn.)

Alison Rose, Assistant Federal Public Defender (D. Ariz.)

A panel of distinguished habeas litigators from across the country will talk about how *Shinn* has impacted habeas work in their district or circuit, if at all. They will cover topics such as whether *Shinn* has limited the availability of evidentiary hearings in their jurisdictions, how their office is developing facts post-*Shinn*, and whether *Shinn* has led to a pivot to state-court practice.

2:15–2:30 **Break**

2:30–3:45 **Breakouts**

Beginner **Prejudice standards in federal habeas.**

Elizabeth Dahlstrom, CHU Chief (C.D. Cal.)

This session will cover the differences between structural and harmless error claims in federal habeas and will also include a discussion about how different harmlessness standards operate in relation to each other.

2255 **Section 2255: What to do when § 2255 doesn't provide a remedy.**

Brianna Mircheff, Appellate Chief (C.D. Cal.)

This session will throw out some creative ideas for how to get your client relief when § 2255 relief is unavailable.

Advanced **Actual innocence: a panel discussion on how to tell your innocent client's story.**

Moderator, Amelia Bizzaro, Assistant NCHU Chief (D. Nev.)

Panelists:

Jonathan Kirshbaum, NCHU Chief (D. Nev.)

CB Kirschner, Assistant Federal Public Defender (D. Nev.)
Jeremy Baron, Assistant Federal Public Defender (D. Nev.)
Kim Sandberg, Assistant Federal Public Defender (D. Nev.)
Ron Sun, Assistant Federal Public Defender (D. Nev)
Tony Borstein, Assistant Federal Public Defender (D. Ore.)

Actual innocence is a way around every procedural barrier to a case. This session will discuss the different ways of uncovering innocence and how to persuade the courts and prosecutors to listen.

3:45–4:00

Closing remarks