No. 19-6524

United States Court of Appeals
FOR THE FOURTH CIRCUIT

GARY WALL,
Petitioner - Appellant,

v.

WARDEN JEFFREY KISER,
Respondent - Appellee.

Appeal from the United States District Court for the Western District of Virginia

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APPELLANT'S PETITITON FOR PANEL REHEARING OR REHEARING EN BANC

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INTRODUCTION AND RULE 35(b) and 40(b) STATEMENT

The panel majority's published opinion in this case vastly diminished the availability of federal habeas relief in this Circuit by taking the unprecedented step of extending the postconviction-specific retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989), to habeas cases challenging detention decisions that—unlike criminal convictions or sentences—are imposed outside the judicial process. The result of this precedent is to categorically prevent this Court from applying even modest extensions of due process protections in any habeas case, even where federal habeas is a petitioner's first and only opportunity to receive judicial review of his detention, thus insulating a wide array of unlawful extrajudicial detentions from judicial scrutiny.

Panel rehearing or en banc review is warranted for two reasons. First, the panel majority's opinion conflicts with *Teague* itself, as well as with precedent from this Court. *Teague*—by its own terms—bars retroactive application of new rules of *criminal* procedure after a criminal judgment becomes final through direct judicial review. This Court recognized as much in *Plyler v. Moore* when it observed that *Teague*'s non-retroactivity rule does not apply where "[i]nmate[s] do not challenge

the validity of their convictions or sentences." 129 F.3d 728, 735 n.9 (4th Cir. 1997). And the panel majority opinion overlooked the distinction this Court has repeatedly drawn between court-authorized detentions, which raise unique finality and comity concerns, and administrative decisions on detention, which do not. *See Tyler v. Hooks*, 945 F.3d 159, 167 (4th Cir. 2019); *Hamlin v. Warren*, 664 F.2d 29, 31 (4th Cir. 1981). Because the panel majority's opinion conflicts with these decisions, panel rehearing or en banc review is warranted under Federal Rules of Appellate Procedure 35(a)(1) and (b)(1)(A) and Local Rule 40(b)(iii).

Further review is warranted for the independent reason that, if left to stand, the panel majority opinion will have a catastrophic effect on habeas in this Circuit. As long as state courts determine—even if in error—that they lack jurisdiction to review a state habeas petitioner's claims, grievous constitutional violations will persist without review by any court. And the situation will be even worse for federal detainees. Because they have only one avenue for relief—the federal courts—the panel majority's holding that habeas is always a collateral remedy and that new procedural rules cannot apply retroactively on collateral review means that the opinion freezes in place the body of federal law that is

enforceable through habeas as of the date of the opinion: December 27, 2021. This proceeding therefore involves a question of exceptional importance under Federal Rules of Appellate Procedure 35(a)(2) and 35(b)(1)(B) and Local Rule 40(b)(iv).

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Virginia Department of Corrections initiated administrative disciplinary proceedings against Petitioner-Appellant Gary Wall after he was involved in a physical altercation at Red Onion State Prison with two corrections officers. J.A. 38, 60, 181. Mr. Wall repeatedly asked the two hearing officers tasked with adjudicating the charges to review video of the underlying events—video he attested "clearly" demonstrates that, contrary to the correctional officers' accounts, he "never threw any punches" at either of them. J.A. 41, 48, 62, 71, 93. The hearing officers refused to view the video and stripped Mr. Wall of 270 days of accrued good time credits. J.A. 42, 67.

Mr. Wall timely appealed both hearing officers' decisions to the Warden, arguing that the hearing officers' refusal to view the video violated due process. J.A. 43–45, 68–69. The Warden denied both appeals, reasoning that the decision to review security footage was solely

in the hearing officers' discretion. J.A. 49, 71. Mr. Wall appealed to the Virginia Department of Corrections Regional Administrator, who affirmed the denial of relief. J.A. 59, 80–81.

Mr. Wall then sought judicial review of his due process claim by timely filing a pro se habeas petition in the Virginia Supreme Court. J.A. 27. That court dismissed Mr. Wall's petition for lack of jurisdiction on the basis that challenges to "institutional proceeding[s] resulting in loss of good conduct . . . credit" are not cognizable in habeas under state law because they do not "as a matter of law . . . directly impact the duration of a petitioner's confinement." J.A. 26.

Having been denied a forum for judicial review in the state courts, Mr. Wall sought relief in the federal courts. J.A. 5, 9, 18, 20. The Commonwealth filed a motion to dismiss his petition, arguing that "the Virginia Supreme Court addressed the merits of Wall's claim," and 28 U.S.C. § 2254(d) barred him from attaining habeas relief in federal court. J.A. 119. The district court denied that motion because the Virginia Supreme Court made a jurisdictional determination and "did not adjudicate the merits of [Mr. Wall's] claims." J.A. 336–38.

At the district court's direction, the Commonwealth then filed an amended motion to dismiss, arguing that the disciplinary proceedings satisfied due process. J.A. 338, 339, 341–44. The district court granted the Commonwealth's motion. J.A. 356–59. It reasoned that while inmates have a qualified due process right to present documentary evidence at disciplinary proceedings where loss of good time credits is at issue, surveillance footage was "clearly outside the definition of 'documentary evidence.'" J.A. 356 (quoting *Wallace v. Watford-Brown*, No. 1:13-cv-319, 2015 WL 5827622, at *4 (E.D. Va. Oct. 5, 2015)).

Mr. Wall filed a timely notice of appeal. J.A. 361. While his appeal was pending, this Court held that prisoners have a qualified due process right to obtain and present surveillance video evidence in disciplinary proceedings. *Lennear v. Wilson*, 937 F.3d 257 (4th Cir. 2019). This Court then appointed undersigned counsel to represent Mr. Wall and granted a certificate of appealability with instructions to "address this Court's decision in *Lennear* . . . and whether the retroactivity analysis announced in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, applies in this case." Dkt. Nos. 14-1, 16. Oral argument was held on September 21, 2021.

On December 27, 2021, this Court issued its opinion affirming the district court. Dkt. No. 69. (Op.). The panel majority held that, though the Virginia Supreme Court "apparently mis[read] the decision on which it relied" in concluding that it lacked jurisdiction to hear Mr. Wall's state habeas petition, the Commonwealth nevertheless "*made judicial relief available*[,]" so his petition "invoked a collateral procedure" to the state court's final determination. Op. at 10–12. And even independent of the theoretical availability of state-court review, the opinion held, habeas corpus is "a writ providing relief independent of all other process" and so is inherently "a form of collateral review." Op. at 11. It went on to observe that *Teague* stands for the proposition that "new procedural rule[s]" do not apply "retroactively on federal collateral review," Op. at 14, and concluded that Mr. Wall was not entitled to the due process protections this Court announced in *Lennear*. Op. at 15.

The dissent concluded otherwise, determining that *Lennear* governs Mr. Wall's claim. Op. at 28. It observed first that "Fourth Circuit precedent casts doubt on whether *Teague* is a natural fit in the prison disciplinary context since prison administrators' unreviewed decisions are not those of courts and do not implicate comity concerns." Op. at 23–

24. The panel majority "fail[ed] to establish that *Teague* applies outside the conviction context; it cites no cases holding that *Teague* applies beyond habeas cases challenging final criminal convictions and judicially-imposed sentences." Op. at 25. And, in the dissent's view, the majority "created its own standard without supporting authority" when it concluded that the Commonwealth had "made judicial relief available." Op. at 26. To the contrary, when the state Supreme Court made its jurisdictional determination, it foreclosed judicial review of good-time credit revocations. Op. at 26. And thus, because "federal habeas corpus provides the only judicial means to challenge an administrative decision," the federal courts act as though they are "reviewing the issue on direct appeal." Op. at 27 (quoting *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1172 (9th Cir. 2001)).

REASONS FOR GRANTING THE PETITION

I. The panel majority opinion is in conflict with the Supreme Court's opinion in *Teague v. Lane*, as well as habeas cases from this Court.

The panel majority opinion extends *Teague*'s holding that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," 489

U.S. at 310, to habeas cases that challenge executive or administrative detentions. *See* Op. at 14. This holding—which no other Circuit court has adopted—requires additional review because it conflicts with *Teague* itself and its progeny.

The balance *Teague* struck between vindicating constitutional rights and state courts' interest in finality applies only where a petitioner challenges a final criminal judgment. *Teague* speaks in the language of the finality of criminal "conviction[s]" and the comity federal courts afford to those final state court judgments. *See, e.g.*, 489 U.S. at 309 ("These underlying considerations of finality find significant and compelling parallels in the *criminal* context.") (emphasis added); *see also Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (describing the "substance of the '*Teague* rule'" as follows: "new rules of *criminal* procedure. . . may not provide the basis for a federal collateral attack on a state-court *conviction*" (emphasis added)). It has nothing to say about administrative decisions that no court has ever reviewed. Indeed, the Supreme Court has explicitly recognized that there is a difference between "criminal conviction[s]," which occur "after a judicial hearing before a tribunal disinterested in the outcome and committed to

procedures designed to ensure its own independence," and detention by the executive, in which such dynamics are "not inherent" and the "need for habeas corpus" is therefore "more urgent." *Boumediene v. Bush*, 553 U.S. 723, 783 (2008). It is thus no surprise that neither the Commonwealth nor the panel majority opinion cite to any cases in which any other court has held that *Teague* precludes application of new due process protections in habeas cases outside the postconviction context.

And the panel majority opinion's novel and erroneous interpretation of *Teague* is, as the dissent recognizes, in conflict with a number of cases from this Court. *See* Op. at 23–25. In *Plyler*, this Court noted that "*Teague* has no application" at all to habeas petitions "that do not challenge the validity of . . . convictions or sentences." *Plyler v. Moore*, 129 F.3d 728, 735 n.9 (4th Cir. 1997). The panel majority opinion's attempt to explain how *Plyer* is actually consistent with its holding is irreconcilable with *Plyler* itself: it suggests that *Plyer* "implied" that *Teague* precludes retroactive application of new procedural rules to habeas proceedings that challenge "the duration of detention," Op. at 14, without recognizing that the *Plyler* petitioners *were* challenging the duration of their detentions. *See id.* at 735 (explaining that the

application of the challenged provision to the plaintiffs "unquestionably has the effect of increasing the length of their incarceration"). So too is the panel majority opinion inconsistent with reasoning in *Tyler v. Hooks*, 945 F.3d 159, 167 (4th Cir. 2019) (observing that prison disciplinary decisions do not carry the same presumptive finality as judicial decisions), and *Hamlin v. Warren*, 664 F.2d 29, 31 (4th Cir. 1981) (suggesting comity interests are absent, "or at least not highly visible, in controversies over good time credits")—reasoning the panel majority opinion does not address at all. Panel rehearing or rehearing en banc is therefore required to ensure that this Circuit remains consistent with its own opinions and with those of the Supreme Court.

II. This is a case of exceptional importance because the panel majority's misapplication of *Teague* dramatically constricts federal courts' power to grant habeas relief.

Panel rehearing or rehearing en banc is also warranted for the independent reason that the panel majority opinion's misapplication of *Teague* will result in the substantial curtailment of federal courts' habeas powers, thereby raising issues of exceptional importance. At one point, the panel majority opinion concludes that *Teague* bars application of newly-announced protections whenever a state administrative

proceeding becomes final—even if no judicial review is ever available. *See* Op. at 15 ("[T]he decision . . . became final when Wall exhausted his administrative appeals."). At another point, it concludes that *Teague*'s retroactivity framework applies whenever a state habeas case challenging a prison's administrative decision becomes final—even when the state court decided it lacked jurisdiction. *See* Op. at 10–13 (reasoning that because "Virginia *made judicial relief available*," his subsequent federal petition "invoked a collateral procedure"). Either of these conclusions has dramatic implications for federal courts' power to grant habeas relief.

The first holding means that federal courts "lack the power" to extend new due process protections to *all* habeas petitioners—even those who challenge administrative or executive detention decisions imposed outside the judicial process. Op. at 16–17. This understanding of *Teague* as a limitation on habeas itself—rather than a postconviction-specific doctrine that is justified by the fact that a court already had the opportunity to hear the petitioner's constitutional claims—is an extreme result that no other federal circuit court has adopted.

To begin, the rationale of the panel majority opinion violates basic separation of powers principles with ramifications extending well beyond the prison disciplinary context. It mandates that where state courts' doors are closed to their claims, civilly-committed individuals, prisoners, and other state detainees may vindicate their due process rights only if federal courts have already considered the precise claim they seek to raise. *See Lambrix v. Singletary*, 520 U.S. 518, 538 (1997) (holding that federal courts cannot grant relief for a due process violation under *Teague* unless the result is "*dictated*" by precedent, i.e., unless "*no other* interpretation" of that precedent is "reasonable"). The constitutional structure does not tolerate this result: "If the Executive could bypass courts and detain individuals without judicial inquiry, government under law would exist only at the sufferance of the executive branch." Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2039 (2007).

The panel majority opinion has even more troubling implications for federal detainees, including prisoners, immigration detainees, and military detainees. Under its reasoning, no habeas petitioner may *ever*

receive the benefit of a newly-announced due process protection because habeas is a collateral remedy. *See United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998) (observing that if *Teague* bars application of a new rule to a state detainee, it must also bar application to a federal detainee). Thus, whatever process a federal detainee received when the executive revoked his liberty is the only process he will ever receive, unless a result to the contrary is "dictated" by precedent. *See Lambrix*, 520 U.S. at 538. The effect of this holding is not only to deprive habeas petitioners of constitutional protections, but also to freeze the development of federal law in habeas proceedings as of the date of the majority opinion.

By contrast, the position urged by the petitioner and embraced by the panel dissent—namely, that *Teague* does not apply where federal habeas is a prisoner's first and only opportunity to seek judicial review of an administrative or executive detention decision—simply preserves the status quo. Federal courts post-*Teague* have *always* understood that, when considering unconstitutional extrajudicial detentions, they simply apply the law as it exists when they consider the case. *See*, *e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 539 (2004) (announcing a new due process

protection in the executive detention context and remanding); *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021) (announcing new due process protections in the immigration detention context and remanding); *Howard v. U.S. Bureau of Prisons*, 487 F.3d 808, 815 (10th Cir. 2007) (announcing new due process protections in the prison disciplinary context and remanding). Indeed, prior to the panel majority opinion in this case, this Court has proceeded under exactly the same understanding. *See Lennear*, 937 F.3d at 279 (announcing and retroactively applying new due process protection on federal habeas on facts analogous to this case); *see also McWilliams v. Saad*, 794 F. App'x 288 (4th Cir. 2020) (retroactively applying *Lennear* on habeas); *Hawkins v. Coakley*, 779 F. App'x 183, 184 (4th Cir. 2019) (same). Neither the Commonwealth nor the panel majority cited any case holding, or even suggesting, a contrary view, and we have found none.

The panel majority opinion's alternative holding—that the Commonwealth "*made judicial relief available*" to Mr. Wall even though everyone agrees that the Virginia Supreme Court determined it lacked jurisdiction and that "no Virginia court addressed" or could have addressed his habeas claim, Op. at 11—is even less supportable. Judicial

relief is not "available" to a litigant where a court determines that it lacks authority to entertain his claim. *See Kontrick v. Ryan*, 540 U.S. 443 (2004) (explaining that jurisdiction relates to the "adjudicatory authority" of the court). As the dissent rightly recognizes: "'making judicial review available' is simply not the procedural equivalent of 'opportunity for judicial review,' particularly where that opportunity was improperly denied," and in concluding otherwise the panel majority opinion "created its own standard without supporting authority." Op. at 26. And in any event, this alternative holding would not limit the wide-ranging effects of the panel majority opinion because the existence of a state court with ostensible authority to review the petition—whether or not it has actual adjudicatory power—would divest federal courts of the ability to announce and apply a new procedural rule in habeas.

On either holding, the panel majority opinion's departure from established habeas principles is a fundamental diminution of federal courts' power to correct unlawful extrajudicial detentions. Further review is required in light of that exceptionally important issue.

CONCLUSION

The Court should grant panel rehearing or rehearing en banc.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) and Fed. R. App. P. 40(b)(1) because it contains 2,964 words and is 15 pages long, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Lauren Bateman, certify that on January 10, 2022, a copy of Appellant's Petition for Panel Rehearing or Rehearing En Banc was served on counsel for Appellee via the Court's ECF system.

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