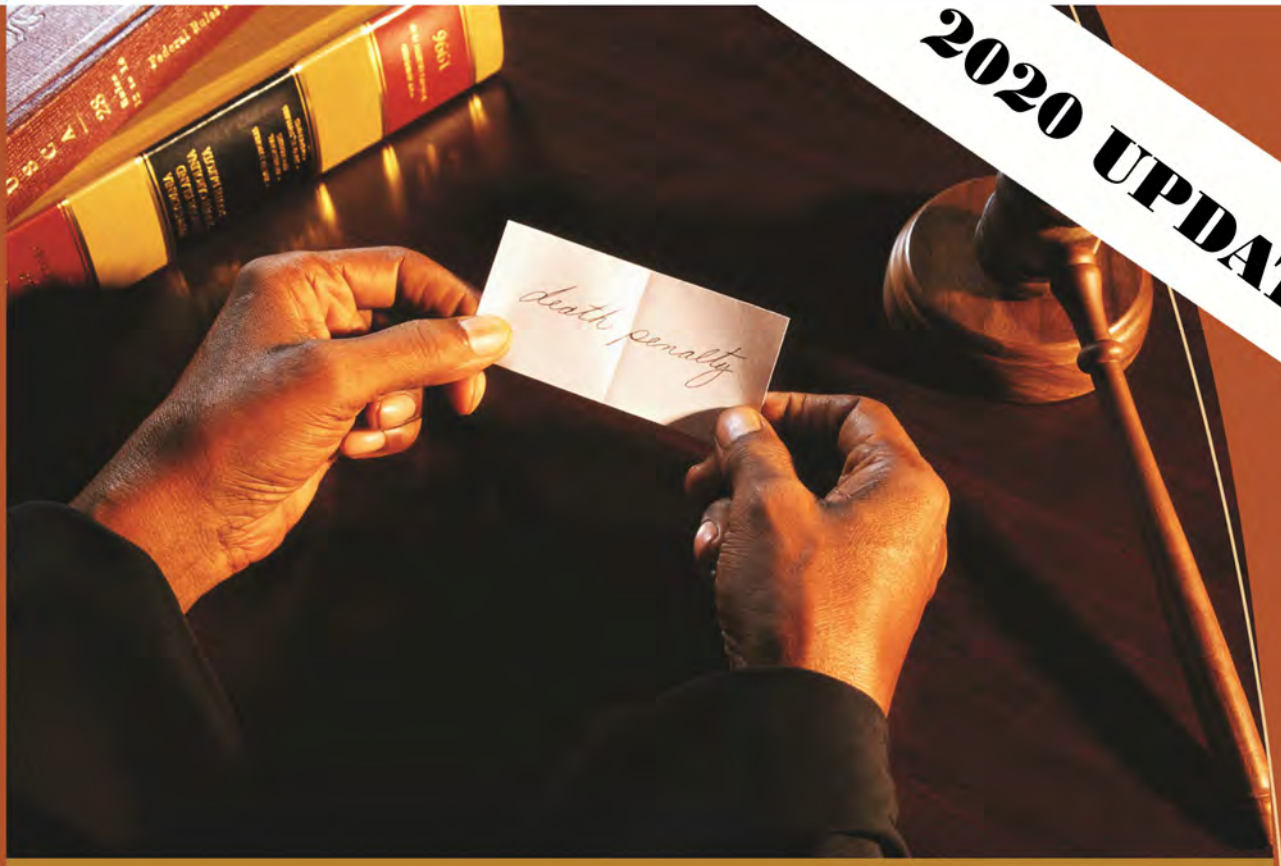
PRESIDING OVER A CAPITAL CASE – A Bench Book for Judges



2020 UPDATE

PRESIDING OVER A CAPITAL CASE

A BENCHBOOK FOR JUDGES

EDITORS
Hon. V. Lee Sinclair
Katheryn L. Yetter, Esq.
Brooke W. Sempel, Esq.

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THE NATIONAL JUDICIAL COLLEGE
SJI State Justice Institute

Presiding over a Capital Case: A Benchbook for Judges

2020 Update

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Hon. V. Lee Sinclair
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FOREWORD

In 1992, The National Judicial College (NJC), in collaboration with the American Bar Association/Judicial Division (ABA/JD) and the National Conference of State Trial Judges (NCSTJ), published a capital cases benchbook supported by a grant from the Bureau of Justice Assistance (BJA). The 1992 benchbook was our first effort to create a national resource addressing topics deemed important to judges on this subject.

Then, in 2009, the NJC published the updated *Presiding over a Capital Case*, which addressed topics ranging from case management, pre-trial discovery/motions, trial, and penalty phase, to post-conviction relief with much more in between. Once again, this publication was supported by a grant from BJA, a one-of-a-kind innovative federal entity that truly makes a difference in improving justice for all.

We are pleased to be able to offer this 2020 updated version of one of our most requested publications – this time in a purely digital format.

The NJC could not advance justice without the men and women who volunteer and give of their time to the mission of the NJC. We acknowledge and thank the many judges, attorneys, and subject-matter experts who have contributed to the three iterations of *Presiding over a Capital Case*, without whom this venerable publication would not be possible.

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CAPITAL CASES & FEDERAL CONSTITUTIONAL ISSUES

Prof. Penny J. White

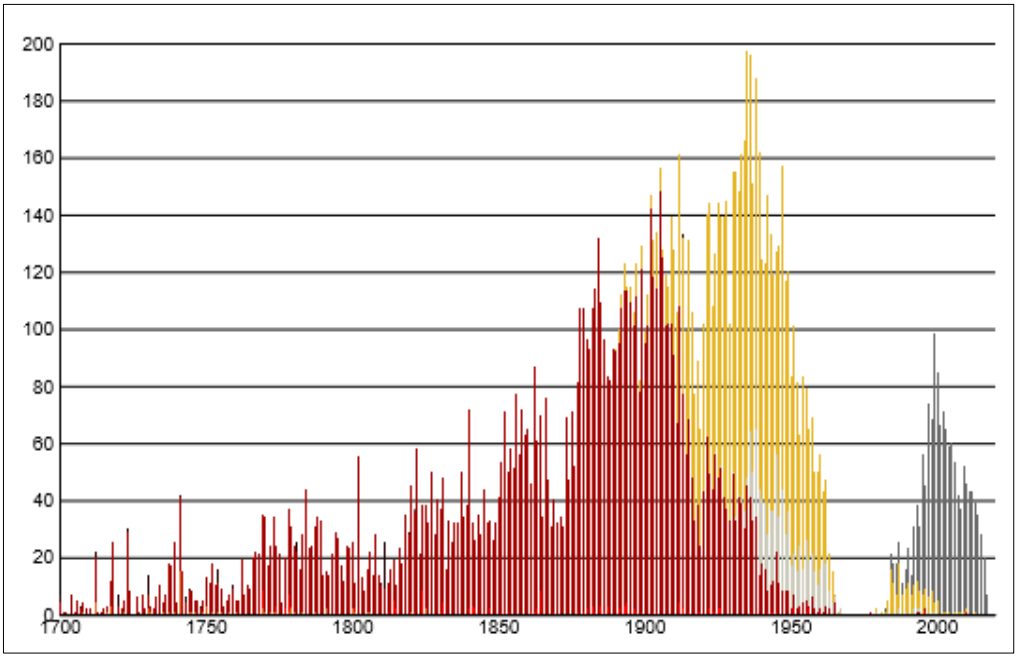
[1.1] History, Numbers, and Demographics

[T]he imposition of capital punishment in the United States dates back to its colonial beginnings when the laws of each colony were strongly influenced by the Puritan religious beliefs of the day. The earliest confirmed death sentence, in fact, was carried out in colonial Virginia in 1608, and there would be a total of 162 executions before the 17th century came to a close. The 18th century saw a sharp increase in the use of capital punishment, and, while the abolition movement began in earnest in the nineteenth century, the number of executions in America continued to rise. In the nineteenth century, for example, there were 5374 executions carried out under state and local authority, compared with only 1553 in the previous two centuries combined. The twentieth century, however, saw the trend reverse. While the number of executions reached its peak during the 1930s with 1567 executions, capital punishment rates began a rather rapid decline thereafter. In the 1950s, 717 people were executed and the number fell to 191 in the 1960s.[1]

By 1966, the public's support for capital punishment was waning. In a Gallup Poll conducted that year, support for capital punishment was measured at 42 percent.[2] At the same time challenges to the constitutionality of capital punishment were being raised. Those challenges ultimately made their way to the United States Supreme Court. In a series of decisions, the Court

[1] J. Caleb Rackley, *Comment: Legal Ethics in Capital Cases*, 36 St. Mary's L. J. 1119, 1128-29 (2005). The chart is from Time and is available at https://time.com/82375/ every-execution-in-u-s-history-in-a-single-chart/.
[2] *History of the Death Penalty* (2020), http://www.deathpenaltyinfo.org/ facts-and-research/history-of-the-death-penalty/the-abolitionist-movement.

Executions in the U.S. 1608-2017



refined capital punishment law and procedure[3] and, ultimately, in *Furman v. Georgia*, in 1972, the Court overturned capital sentencing schemes based on a violation of the Eighth Amendment's protection against cruel and unusual punishment.[4] The Court's decision impacted the capital sentencing laws in 40 states, required commutation of 629 capital sentences, and resulted in a moratorium on capital punishment.

Although states reinstituted capital punishment following the decision in *Furman v. Georgia*[5] and the cases that followed *Furman*, only 120 executions were carried out between 1976 and 1989.[6] The number of executions increased significantly during the last decade of the twentieth century, with 478 executions in the 1990s, almost one hundred of those occurring in 1998.[7] During that decade, the number of states conducting executions also increased from 13 in the 1980s to 29 in the 1990s.[8]

---

[3] *U.S. v. Jackson*, 390 U.S. 570 (1968); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Crampton v. Ohio*, 402 U.S. 183 (1971); *McGautha v. California*, 402 U.S. 183 (1971).

[4] In addition to the Georgia sentencing scheme, the Court also considered the capital sentencing scheme in Texas, in the case of *Branch v. Texas*, consolidated with *Furman* for decision. *Furman v. Georgia*, 408 U.S. 238 (1972).

[5] 408 U.S. 238 (1972).

[6] *Executions by Year* (2020), http://www.deathpenaltyinfo.org/executions-year.

[7] *Id.*

[8] *Id.*

All toll, since 1976, 1514 persons have been executed nationwide, 16 of whom were women.[9] The South is responsible for 1215 executions, with Texas, Virginia, and Louisiana accounting for 793 of that number.[10] Below is a graph indicating the number of executions per year between 1976, the year that executions resumed following *Furman v. Georgia*,[11] and 2020.

As the graph indicates, the number of executions declined from 1999 to 2008, with 42 executions in 2007 and 37 executions in 2008, but the number increased in 2009 to 52.[12] From 2010 until 2016, the number of annual executions steadily declined to a low of 20 in 2016, but in 2017-2019, the numbers exceeded 20 per year. As of January 31, 2020, 18 death warrants were pending in four states with 18 executions.

As of January 1, 2020, 29 states, the federal government, and the United States military continue to provide for capital punishment by statute but four of the states with death penalty statutes, California, Colorado, Oregon, and Pennsylvania, currently have governor-imposed moratoria.[13] The remaining 21 states, and the District of Columbia, have abolished capital punishment, at least prospectively.

Approximately 2500 prisoners are currently on death row in the United States; 53 of those on death row are women.[14] As a result

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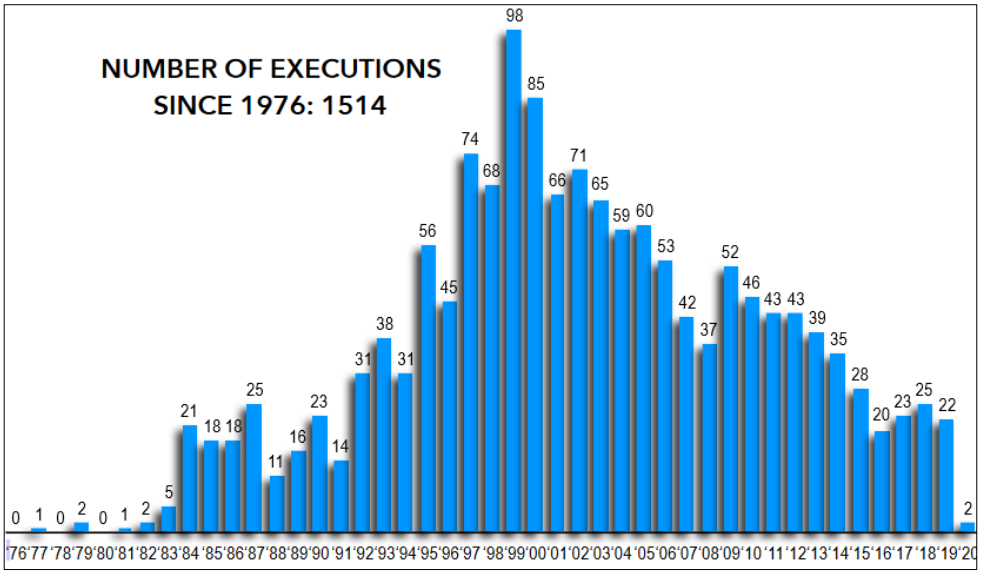
[9] *Id.*
[10] *Id.*
[11] U.S. 238 (1972).
[12] *Executions by Year* (2020), http://www.deathpenaltyinfo.org/upcoming-executions.
[13] *States with the Death Penalty* (2020), http://www.deathpenaltyinfo.org/state-and-federal-info/state-by-state.
[14] The number was reported at 2639, as of October 1, 2019, with 727 of those death-sentenced inmates being in California. *Prisoner on Death Row on October 1, 2019* (2020), http://www.deathpenaltyinfo.org/death-row/overview. The NAACP Legal Defense and Education Fund's spring 2019 study reflected an 18.6% decline in the number of individuals on death row over the past decade. *Spring 2019 "Death Row USA" Documents Further Shrinking of U.S. Death-Row Population* (2009), https://deathpenaltyinfo.org/news/spring-2019-death-row-usa-documents-further-shrinking-of-u-s-death-row-population.

of executions, sentence reversals, and natural death, the death-row population has declined for 19 consecutive years.

U.S. Executions 1976 to February 2020



[1.2] Trends

Many states have begun to reexamine their capital procedure out of growing concerns about the fallibility of death penalty proceedings. In more than half of the states with capital punishment, defendants sentenced to death have been exonerated of capital crimes.[15] Concerns over executing the innocent have led to moratoria in some states and to the abolition of the death penalty in others. These concerns have also prompted legislative action aimed at protecting the innocent.[16]

Some suggest that these concerns have also led to a decline in public support for capital punishment, particularly when the public is informed about the availability and guarantee of sentences to life without parole.[17] These shifts in public opinion are important because the Supreme Court considers society's "evolving standards of decency" in assessing the propriety of

[15] *Innocence* (2020), https://deathpenaltyinfo.org/policy-issues/innocence.
[16] *See* Section 1.4 *infra*.
[17] *Public Opinion* (2020), https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls.

punishment[18] and because state legislatures presumably look to the attitudes of the public in adopting and amending state laws. Finally, the number of death sentences imposed in the United States has fallen dramatically in the last 30 years, dropping 89 percent from its peak in the 1990s until the present day. In the decade of the 2010s, 825 fewer death sentences were imposed than in the previous decade of the 2000s. Additionally, the second half of the 2010 decade produced 635 fewer death sentences than the first half.[19]

[1.3] ABA Standards and State Assessments

In 1997, the American Bar Association called for a moratorium on executions, urging jurisdictions to suspend executions pending the implementation of policies and procedures that endured the fair and impartial implemental of capital punishment.[20] In 2001, the ABA published the ABA Protocols on the Administration of Capital Punishment, which were revised in 2010.[21] Additionally, the ABA Death Penalty Moratorium Implementation Project urged the federal and state governments to stop executions "in order to take a hard look at the growing body of evidence showing that race, geography, wealth, and even personal politics

---

[18] *See Hall v. Florida*, 572 U.S. 701,708 (2014). The *Hall* Court reviewed the evolving standard of decency doctrine, summarizing:

> The Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378, (1910). To enforce the Constitution's protection of human dignity, this Court looks to the "evolving standards of decency that mark the progress of a maturing society." *Trop, supra*, at 101, 78 S.Ct. 590. The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force.

[19] *Death Sentence Decline by More than Half in Decade of the 2010s* (2020), https://deathpenaltyinfo.org/news/death-sentences-decline-by-more-than-half-in-decade-of-the-2010s.

[20] *Death Penalty Moratorium Resolution* (2020), https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/moratorium-1997/.

[21] *See generally ABA Policies* (2020), https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/resources/policy/ (suggesting that the former protocol has been replaced with a series of policies, reports, and resolutions concerning the implementation and use of capital punishment).

can influence every stage of a capital case – from arrest through sentencing and execution."[22] To further explore concerns, the Project, ultimately renamed the ABA Death Penalty Due Process Review Project, from 2003 until 2013, conducted comprehensive assessments in twelve states, comparing the states' capital punishment practices with the standards set out in the protocol. The resulting reports were published and utilized to implore states to study and revise their state capital punishment laws. Some states were encouraged to impose moratoria until recommendations could be implemented.[23]

[1.4] Exonerations and Increasing Accuracy

The present decrease in death row population is attributable not only to executions but to exonerations as well. According to the Innocence Database, from the Death Penalty Information Center, 1677 individuals have been exonerated for capital crimes in 28 states.[24] The number of exonerations per year between 1973 and the present day has averaged around four per year.[25]

In 2004, Congress passed the Justice For All Act of 2004, Title IV of which is known as the Innocence Protection Act, largely in reaction to the increase in the number of exonerations.[26] The Act contains three subtitles: "Exonerating the Innocence through DNA Testing," "Improving the Quality of Representation in State Capital Cases," and "Compensation for the Wrongfully Convicted."[27] The first subtitle sets out the procedure for federal prisoners wishing to secure DNA testing to assert their innocence, but many states have passed similar legislation. The second subtitle describes and defines an "effective [capital punishment] system."[28] Among other things, an effective system

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[22] *Death Penalty Moratorium Implementation Project,* http://www.abanet.org/moratorium/why.html.
[23] Coyne & Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 49 (1996).
[24] *Innocence and the Death Penalty* (2020), https://deathpenaltyinfo.org/policy-issues/innocence.
[25] *Id.*
[26] Justice for All Act of 2004 (Pub. L. 108-405, Oct. 30, 2004, 118 Stat. 2260).
[27] *Id.*
[28] *Id.*

is defined to include an established list of qualifications for defense attorneys, the maintenance of a roster of qualified defense attorneys, the appointment of two attorneys in capital cases, the training and monitoring of capital defense attorneys, and funding for competent legal representation and experts.[29] The subtitle also provides funds to states upon grant application to design and implement training programs for prosecutors.[30] The third subtitle provides a mechanism to compensate the wrongfully convicted upon proof that the conviction has been reversed or set aside on the ground that the defendant "is not guilty of the offense of which he was convicted."[31] In 2009, the U.S. House of Representatives considered but did not pass a bill that would establish a fund to pay for services such as housing, medical care, and vocational counseling for the exonerated.[32]

[1.5] Abolition and Executive Action

In the last several years, some states have abandoned the death penalty. For example, in 2007, New Jersey became the first state in over 40 years to legislatively abolish the death penalty.[33] On March 18, 2009, New Mexico followed New Jersey's lead when its governor signed a bill repealing the death penalty in New Mexico. Governor Bill Richardson based his decision on a lack of "confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. If the state is going to undertake this awesome responsibility, the system to impose this ultimate penalty must be perfect and can never be wrong."[34] Activists who favor abolition continue to press the issue, with New Hampshire becoming the twenty-first state to abolish the death penalty in 2019.[35] The majority of the abolitionist states are in New

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[29] *Id.*
[30] *Id.*
[31] 28 U.S.C. § 2513 (2004).
[32] *Restitution for the Exonerated Act of 2009,* http://www.exonerated.org/j/index.php?option=com_content&task=view&id=80&Itemid=77.
[33] *Legislative Activity,* http://www.deathpenaltyinfo.org/legislative-activity-new-jersey.
[34] *Governor Bill Richardson Signs Repeal of the Death Penalty,* http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf.
[35] *The Death Penalty in 2019: Year End Report* (2020), https://files.deathpenaltyinfo.org/reports/year-end/YearEndReport2019.pdf.

England, with Pennsylvania being the lone northeastern state that continues to have a capital punishment statute. In Pennsylvania, however, the governor has imposed a moratorium on executions.

Trending in the opposition direction, perhaps, is the federal government. The United States Department of Justice announced on July 25, 2019, its intention to resume federal executions. This announcement came after a sixteen-year hiatus in federal executions. The government moved promptly to schedule executions, setting three executions for December, 2019. A number of opponents, including former judges, former and current prosecutors, and corrections officials urged the Department of Justice and the President to halt the action. Litigation challenging the Department's action, and the adoption of a single-drug lethal-injection protocol is pending.[36]

[1.6] International Law and Opinion

The application of international law and the relevance of international opinion is an issue of emerging interest in death penalty litigation. International tribunals have become more frequent venues for foreign national defendants sentenced to death in the United States. In some cases, international tribunals have issued orders affecting foreign nationals who are capital defendants. In other cases, international tribunals have issued orders that are in conflict with capital procedures in pending capital cases.[37]

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[36] The U.S. District Court for the District of Columbia issued a preliminary injunction that would temporarily halt federal executions in November 2019. *In re Fed. Bureau of Prisons' Execution Protocol Cases v. Barr*, Case No. 19-mc-145 (TSC) (D.D.C. Nov. 20, 2019). The Department of Justice filed an emergency appeal, but the U.S. Court of Appeals for the District of Columbia left the injunction intact. *Id*, No. 19-5322 (D.C. Cir. Dec. 2, 2019). The Department then requested that the Supreme Court vacate the injunction, which the Court declined to do because the merits of the case were still pending before the appellate court. Another appeal related to a federal death sentence was filed in Indiana and is pending before the United States Court of Appeals for the Seventh Circuit.

[37] *See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12; *Medellin v. Texas*, 552 U.S. 491 (2008). In *Medellin*, for example, 50 Mexican nationals filed suit in the International Court of Justice challenging the failure to afford them their rights under the Vienna Convention on Consular Relations. The International Court ruled in their favor and ordered the United States courts to review the cases. The involved Texas courts refused, but the

[1.7] Eighth Amendment Jurisprudence

> U.S. Const. Amend. VIII
> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Many historians tell the story of the U.S. Supreme Court and capital punishment by beginning in June 1972, with the case of *Furman v. Georgia*.[38] Perhaps that is because, until then, most opposition to capital punishment was case-specific, attacking the procedures used in individual cases, rather than alleging that capital punishment itself violated the Constitution. In the mid-1960s, opponents to capital punishment began to challenge the constitutionality of the death penalty in an organized fashion. Eventually, the attack resulted in a suspension of executions, and after *Furman*, "the entire nation experienced for the first time virtually complete abolition of the death penalty."[39]

[1.8] Arbitrariness in Imposition

The nine separate opinions that make up the *Furman* decision were prompted, among other things, by a recognition that

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U.S. Supreme Court granted certiorari. Before the case was decided, however, President George W. Bush ordered the lower courts to provide review. Ultimately, the U.S. Supreme Court dismissed the writ of certiorari and the Texas courts continued to refuse to review the cases. Certiorari was again requested and granted to decide whether the President acted within his authority when he ordered the lower courts to comply with the treaty obligations of the United States. Specifically, the U.S. Supreme Court undertook to decide whether a "state is bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the . . . judgment in the cases?" Ultimately, the U.S. Supreme Court held that neither the international court's decision nor the President's memorandum "constitutes directly enforceable federal law" sufficient to preempt state procedural limitations on successive habeas petitions. The President is not authorized to order states to bypass state procedural rules to comply with a ruling of the International Court of Justice.

[38] 408 U.S. 238 (1972).

[39] The Death Penalty in America, Current Controversies (Hugo Adam Bedau, ed. 1997).

capital punishment was being applied arbitrarily, thus violating the Eighth Amendment of the United States Constitution. A year prior to *Furman,* the U.S. Supreme Court decided *McGautha v. California*.[40] *McGautha* involved a systemic challenge to the death penalty based on the absence of standards to guide a jury's life and death decision. The U.S. Supreme Court found that the absence of standards did not violate due process. The following year, in *Furman*, a majority of the U.S. Supreme Court found an Eighth Amendment violation, based primarily on the arbitrariness and unfairness in the administration of capital punishment.[41]

The effect of *Furman* was to eliminate state death penalty statutes that did not discourage arbitrariness. In response to *Furman*, and in an effort to redraft statutes that would not run afoul of the Constitution, death penalty states devised various methods to address the issue of arbitrariness. Most states proposed a bifurcated trial system, separating the guilt-innocence and penalty phases. Many states defined aggravating and mitigating circumstances as a means to guide sentencing discretion, while every state provided for mandatory appellate review of death sentences. As part of that review, the appellate courts were sometimes charged with the obligation of determining whether a death sentence was the product of bias, passion, or prejudice or whether the sentence was disproportionate.

By 1976, cases challenging the new statutes were pending in the U.S. Supreme Court. In five consolidated cases, the U.S.

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[40] 402 U.S. 183 (1971).

[41] The decision prompted nine separate opinions. In a *per curiam* opinion expressing the view of five members of the court, it was held that the imposition and carrying out of the death sentence in the present cases constituted cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments. Justice Douglas stated that selective application of the death penalty to minorities and discriminatory application of the penalty constituted cruel and unusual punishment. Justice Brennan stated that the death penalty was cruel and unusual because it did not comport with human dignity and could not be shown to be a more effective means of punishment than less drastic means. Justice Stewart found the punishment unconstitutional because it was "wantonly" and "freakishly imposed." Justice White found that the infrequency of the punishment made it "unusual," and thus, unconstitutional. Justice Marshall, stated that the death penalty was morally unacceptable and a violation of the Eighth Amendment. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented.

Supreme Court evaluated new state death penalty schemes.[42] In three of those cases, the U.S. Supreme Court upheld the new death penalty statutes.[43] The statutes of Florida, Texas, and Georgia, were primarily modeled after the Model Penal Code and featured "guided discretion" by use of statutorily-defined aggravating and mitigating circumstances.[44] By contrast, the statutory schemes in North Carolina and Louisiana eliminated sentencing discretion in favor of mandatory death sentences for certain crimes.[45] These schemes failed in the U.S. Supreme Court's view because they eliminated the "individualized consideration" essential to fairness.[46]

The decision in *Furman* and the five consolidated cases that followed focused on eliminating arbitrariness and promoting individualized consideration by the use of guided discretion. Subsequent cases challenged the justness of death sentences, notwithstanding the use of approved schemes.[47] In these later cases, the U.S. Supreme Court granted relief, if at all, based on some specific finding of error in the case, but not based on any systemic fault with the capital punishment system.
In addition to its effect on state statutes, the *Furman* decision also had the effect of displacing the federal death penalty statute in effect at the time of the decision. In 1988, a new federal death penalty statute, modeled after the revised state laws, was enacted for murder in the course of a drug-kingpin conspiracy.[48] In 1994, the federal death penalty statute was expanded to numerous offenses, more than 60 in all, three of which do not involve murder.[49] Federal legislation of even

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[42] *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida,* 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).
[43] *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).
[44] *Id.*
[45] *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).
[46] *Id.*
[47] *Lockett v. Ohio*, 438 U.S. 586 (1978); *Coker v. Georgia*, 433 U.S. 584 (1977); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Enmund v. Florida*, 458 U.S. 782 (1982).
[48] Continuing Criminal Enterprise, Pub. L. No. 100-690, § 7001(a), 102 Stat. 4181, 4387 (codified at 21 U.S.C. § 848(e)-(r) (1988)).
[49] Federal Death Penalty Act of 1994 ("FDPA"), Pub. L. No. 103-322, § 60002(a), 108 Stat. 1796, 1959-82 (1994) (codified at 18 U.S.C. § 3591-99 (1994)).

greater significance to state-sentenced inmates passed two years later. The Anti-Terrorism and Effective Death Penalty Act of 1996 "affects both state and federal prisoners, restricts review in federal courts by establishing tighter filing deadlines, limit[s] the opportunity for evidentiary hearings, and ordinarily allow[s] only a single habeas corpus filing in federal court."[50]

[1.9] Insanity, Race, Age, Mental Retardation, Offense, and Culpability

Opponents of capital punishment have made other systemic challenges of note. In *Ford v. Wainwright*, the U.S. Supreme Court held that the Eighth Amendment barred the execution of the insane.[51] This categorical exclusion included both those who are insane at the time of the offense and those who are insane at the time of the execution. The following year, in *McClesky v. Kemp*, the U.S. Supreme Court upheld the Georgia death penalty system in the face of a systemic challenge based on racial discrimination.[52] Opponents also challenged the execution of juveniles, and ultimately, in *Roper v. Simmons*, succeeded in having the U.S. Supreme Court declare that executing juveniles violated the Constitution.[53] The decision in *Roper* ultimately led the Court to also conclude that a mandatory sentence of life without parole would be unconstitutional for juvenile offenders.[54] Further, in *Atkins v. Virginia*, the U.S. Supreme Court concluded that the Constitution does not allow the state to take the life of a mentally retarded offender.[55]

The U.S. Supreme Court's decisions have resulted in only two other categorical exclusions from execution. The first is based on the nature of the offense. In *Coker v. Georgia*, the U.S. Supreme Court held that the death penalty was disproportionate when applied to rapists who did not murder their adult female

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[50] Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 Tex. L. Rev. 1771 (1999-2000).
[51] 477 U.S. 399 (1986).
[52] 481 U.S. 279 (1987).
[53] 543 U.S. 551 (2005).
[54] *Miller v. Alabama*, 567 U.S. 460 (2012).
[55] 536 U.S. 304 (2002).

victims.[56] The U.S. Supreme Court extended this rationale to cases involving the rape of a child.[57] In a 2008 decision, the U.S. Supreme Court struck down as unconstitutional a Louisiana statute that allowed the death penalty for the rape of a child when the victim did not die. The U.S. Supreme Court held that laws providing for execution of defendants for crimes in which the victim did not die were not in keeping with the national consensus restricting the death penalty to the worst offenders. The second categorical exclusion from capital punishment is based on the culpability of the offender. In *Enmund v. Florida*[58] and *Tison v. Arizona*,[59] the U.S. Supreme Court limited the use of capital punishment for those convicted of felony murder who did not kill or have some other heightened culpability that justified the death sentence.

[1.10] Age of the Defendant

Even before the U.S. Supreme Court's ruling in *Roper v. Simmons*,[60] statutes in some states prohibited a death sentence for a defendant who was under a certain age, usually 18, at the time of the murder.[61] In *Roper*, the U.S. Supreme Court found a constitutional bar to such executions, holding that the execution of an offender who was under the age of 18 at the time the murder was committed violated the Eighth Amendment.[62] The decision, which was 5-4, was authored by Justice Kennedy, with Justice Scalia writing a strongly-worded dissent.

Before *Roper,* a plurality of the U.S. Supreme Court had vacated a death sentence imposed upon an offender who was 15 years

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[56] 433 U.S. 584 (1977).
[57] *Kennedy v. Louisiana*, 554 U.S. 407 (2008).
[58] 458 U.S. 782 (1982).
[59] 481 U.S. 137 (1987).
[60] *Roper v. Simmons*, 543 U.S. 551 (2005).
[61] Examples of states that prohibited the death penalty if the defendant committed murder while under age 18 included: California (Cal. Penal Code § 190.5); Colorado (Colo. Rev. Stat. Ann. § 18-1.3-1201); Connecticut (Conn. Gen. Stat. Ann. § 53a-46a); Illinois (720 Ill. Comp. Stat. 5/9-1and); and Ohio (Ohio Rev. Code. § 2929.02). New Hampshire prohibits execution of persons who commit murder while under age 17 (N.H. Rev. Stat. § 630:1). The FDPA prohibits execution of persons who were under the age of 18 at the time of the crime. 18 U.S.C. § 3591 (2004).
[62] *Roper v. Simmons*, 543 U.S. at 551.

old when his crime was committed,[63] but only four of the justices were willing to exclude all defendants under 16 from a sentence of death. The fifth justice, Justice O'Connor, agreed to reverse the juvenile's sentence of death, but on more limited grounds.[64] Less than a year later, the U.S. Supreme Court upheld the constitutionality of the death penalty in cases involving defendants who were 16 and 17 years old when the murders were committed.[65]

The U.S. Supreme Court would not revisit the issue until 2004 when it was again presented with the argument that execution of those who committed murder while juveniles constituted cruel and unusual punishment and violated the Eighth Amendment to the United States Constitution. Justice Kennedy, writing for the majority, reasoned that juvenile offenders, because of their age, had diminished levels of culpability.

Moreover, neither retribution nor deterrence could justify taking the life of a juvenile offender. Justice Kennedy relied upon the juvenile's lack of maturity and underdeveloped sense of responsibility; their susceptibility to negative influences and outside pressures; and their "transitory, less fixed" characters.[66] Five years after *Roper*, the Court considered whether life without parole was an appropriate punishment for juveniles who were not convicted of homicide. In *Graham v. Florida*,[67] the Court recognized that non-homicide offenses do not warrant the most serious punishment available noting that "[t]he concept of proportionality is central to the Eighth Amendment." The Court stopped short of requiring that juveniles sentenced to life without parole for non-homicide offenses were entitled to release, holding instead that they were entitled only to a "meaningful opportunity" to be released. But two years later, in *Miller v. Alabama* and *Jackson v. Hobbs*, decided jointly, the Court held unequivocally that for juveniles mandatory sentences of life without parole violated the Eighth Amendment.[68] Rather than requiring a mandatory sentence for a juvenile, the Court

[63] *Thompson v. Oklahoma*, 497 U.S. 805, 815-16 (1988).
[64] *Id.* at 853-54 (O'Connor, J., concurring).
[65] *Stanford v. Kentucky*, 492 U.S. 361 (1989) (including consolidated case of *Wilkins v. Missouri)*.
[66] *Roper v. Simmons*, 543 U.S. at 569-70.
[67] *Graham v. Florida*, 560 U.S. 48 (2010).
[68] *Miller v. Alabama*, 567 U.S. 460 (2012).

recognized that judges should be able to consider "transient rashness, proclivity for risk, and inability to assess consequences," all of which occur during adolescence. It is the juvenile's "chronological age" and not "mental age" that determines eligibility for the death penalty. Nonetheless, an offender's mental age may be an appropriate consideration relevant to the prohibition against executing a mentally retarded defendant.[69]

[1.11] Mental Retardation

In *Atkins v. Virginia*,[70] the U.S. Supreme Court barred the execution of mentally retarded individuals, but declined to adopt a uniform standard defining mental retardation or uniform procedures for determining its existence. As a result, state statutes, rules, and judicial opinions established the applicable state definitions and procedures.

While the U.S. Supreme Court declined to set forth a mandatory definition, it did refer to definitions adopted by the American Association of Mental Retardation (AAMR), now the American Association of Developmental and Intellectual Disability (AADID) and the American Psychiatric Association (APA). While not identical the two definitions are similar and contain three components: (1) intellectual functioning; (2) adaptive behavior skills; and (3) age of onset. When *Atkins* was decided, for example, the AAMR defined mental retardation as:

> substantial limitations in present functioning . . . characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.[71]

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[69] *Alston v. State*, 723 So.2d 162 (Fla. 1998).
[70] 536 U.S. 304 (2002).
[71] American Association on Mental Retardation, Mental Retardation Definitions, Classification, and Systems of Supports (Luckasson et al. eds., 10th ed., 2002) (1921).

The APA's similar definition provided that "[t]he essential feature of mental retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system."[72]

As can be seen, each definition, and most, but not all state definitions, has three elements, all of which must be present in order for a defendant to be classified as mentally retarded. The first two elements – intellectual functioning and adaptive behavioral skills – are often established by standardized tests, while the third element – age of onset, which is not uniformly required – is often established by school or medical records or by individuals familiar with the conditions of the defendant's birth or childhood. Expert testimony is often required on each of the elements.

Courts post-*Atkins* also grapple with difficult procedural issues: who bears the burden of proof, what level of proof is required, when should the issue of mental retardation be decided, and should the decision be for the judge or jury? As is true of the substantive component, courts differ significantly on their approach to these procedural issues. Some of the issues are statutorily prescribed, while others are determined by the courts. Even in light of legislative directives, some courts adopt procedures that make the capital procedure more efficient. For example, the Supreme Court of Florida recently rejected a statutory procedure requiring that the issue of mental retardation be decided *after* the jury recommended the death penalty.[73]

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[72] American Psychiatric Association, Diagnostic and Statistical Manual 4th Edition, Text Revision (American Psychiatric Press Inc. 2000) (1952).
[73] Amendments to Florida Rules of Criminal Procedure, 875 So.2d 563 (Fla. 2004).

Deciding the mental retardation issue before trial has obvious advantages related to the efficiency of the capital proceeding. A pre-trial determination may remove the need to assure that the presiding judge and trial counsel meets state-imposed standards for death penalty cases. In addition, a pre-trial determination may eliminate the need to death-qualify the jury and to prepare for and resolve issues related to the penalty phase. For example, the court may not need to grant resources to hire investigators or expert witnesses for the penalty phase. Witnesses whose testimony is only relevant to sentencing need not be transported or subpoenaed. Legal issues that pertain only to sentencing issues will not need to be resolved. Moreover, determining the issue pre-trial may enhance the possibility of a plea agreement. Perhaps most importantly, a pre-trial determination of mental retardation removes the potential that an innocent mentally retarded defendant will enter a plea agreement to avoid the death penalty.

[1.12] Offense

In *Gregg v. Georgia,*[74] the U.S. Supreme Court held that the Eighth Amendment did not create a *per se* bar to the imposition of the death penalty for the crime of murder. One year later the U.S. Supreme Court reversed a death penalty in a rape case holding that the death penalty was disproportionate for the crime of rape of an adult woman, but did not hold that the death penalty only applied when a life was taken.[75] As a result, some states, including Louisiana, passed statutes authorizing the death penalty for the rape of a child. But only two people were on death row for the crime of rape of a child.

In 2008, in *Kennedy v. Louisiana*,[76] the U.S. Supreme Court struck down the Louisiana statute that authorized the death penalty for the rape of a child. The 5-4 Court reasoned that 44 out of 50 states did not permit the death penalty for similar crimes. "Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist

[74] 428 U.S. 153 n. 35 (1976).
[75] *Coker v. Georgia*, 433 U.S. 584 (1977).
[76] *Kennedy v. Louisiana,* 554 U.S 407 (2008) (modified on rehearing).

another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments."[77]

[1.13] Culpability: *Enmund/Tison* Exclusion

In *Enmund v. Florida*,[78] the U.S. Supreme Court held that the Eighth Amendment does not permit the imposition of the death penalty for a defendant who aids and abets a felony (in *Enmund*, a robbery) in the course of which a murder is committed by others and the defendant does not kill, attempt to kill, intend that a killing take place, or intend that lethal force be employed. In *Tison v. Arizona*,[79] the U.S. Supreme Court held that a defendant's major participation in a felony resulting in murder, combined with defendant's reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement even if the defendant is not the killer.

In a 1986 decision, the U.S. Supreme Court held that the *Enmund/Tison* decision could be made by a jury, the trial judge, an appellate court, or even a federal habeas court,[80] but that decision predated the U.S. Supreme Court's decisions in *Apprendi v. New Jersey*[81] and *Ring v. Arizona*.[82] Under *Apprendi* and *Ring* the defendant has a Sixth Amendment right to have a jury determine any fact necessary to elevate a defendant's ultimate sentence. The *Ring* decision specifically held that capital defendants have a constitutional right to have a jury find any statutory aggravating circumstances that make the defendant death eligible. Thus, the issue of whether an *Enmund/Tison* finding is a similar finding that must be made by a jury is apparently an open question.

[1.14] Alternative State Schemes

Naturally, different states have different procedures for the application of capital punishment. Most have a system by

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[77] *Id.* at 421 (2008).
[78] 458 U.S. 782 (1982).
[79] 481 U.S. 137 (1987).
[80] *Cabana v. Bullock*, 474 U.S. 376 (1986).
[81] 530 U.S. 466 (2000).
[82] 536 U.S. 584 (2002).

which the jury weighs aggravating circumstances and mitigating circumstances in a bifurcated penalty proceeding. The major differences in these states are the specific circumstances and the weighing and proof provisions. Some states historically allowed judicial override, relegating the jury decision to the status of a recommendation.

Instead of, or in addition to, requiring juries to evaluate specific aggravating and mitigating circumstances, some states require the jury to answer specific questions following a guilt finding, pertaining most often to the future dangerousness of the defendant. For example, in Texas a jury must answer the following questions after finding a defendant guilty of a capital offense:[83]

1. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
2. in [certain] cases, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.[84]

[1.15] Federal Constitutional Requirements in Capital Litigation

The numerous U.S. Supreme Court decisions evaluating constitutional challenges to state death penalties have resulted in a constitutional capital punishment jurisprudence. The extent to which these principles are relied upon by the U.S. Supreme Court in subsequent decisions depends upon the composition and division of the U.S. Supreme Court. Yet, familiarity with the principles, some of which overlap, is essential to a complete introduction to capital litigation.

[83] Texas Code Crim. Proc. Ann. art. 37.071 (2005).
[84] *Id.*

[1.16] Death is Different

Concurring in *Furman*, Justice Stewart wrote that:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.[85]

After a decade of evolution, the U.S. Supreme Court summarized, in *Spaziano v. Florida*, its post-*Furman* jurisprudence as continuing to recognize that "death is different."[86]

> In the 12 years since *Furman* . . . every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.[87]

The constitutional reason that "death is different" is the application of the Eighth Amendment's prohibition on "cruelty" to a degree that varies from its application in most other criminal cases. The U.S. Supreme Court has, on occasion, relied on this difference as the basis for upholding procedures in death cases that are not required in other cases. For example, in *Murray v. Turner*, the U.S. Supreme Court reversed a case in which the trial judge had failed to allow prospective jurors to be questioned on the issue of racial bias.[88] The U.S. Supreme Court held that the failure resulted in a violation of the capital defendant's rights.

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[85] *Furman*, 408 U.S. at 306.
[86] 468 U.S. 447 (1984).
[87] *Id.* at 468.
[88] 476 U.S. 28 (1986).

[1.17] Heightened Fairness and Heightened Reliability

The upshot of the recognition that death is different is a requirement that the procedures used in capital cases produce reliable results including a fair sentence. Thus, the U.S. Supreme Court has said that the constitutionality of imposing death depends upon a fair decision-making process, which assures that a death sentence is imposed in a manner that is not discriminatory, arbitrary, or capricious. Building on these requirements, the majority of the U.S. Supreme Court has explained in various cases that:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[89]

The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed.[90] The U.S. Supreme Court has explained that the Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case."[91] Thus, it requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die,"[92] and invalidates "procedural rules that tend to diminish the reliability of the sentencing determination."[93]

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[89] *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976).
[90] *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994).
[91] *Id.* (citing *Woodson*, 428 U.S. at 305).
[92] *Simmons*, 512 U.S. at 172 (citing *Gregg v. Georgia*, 428 U.S. 153, 190 (1976)).
[93] *Id.* (citing *Beck v. Alabama*, 447 U.S. 625, 638 (1980)).

[1.18] "Super" Due Process[94] – Fairness in Factfinding

For decades, the U.S. Supreme Court has recognized that, in capital cases, a higher standard of due process is required for purposes of acquiring a higher standard of reliability. In *Reid v. Convert*, the U.S. Supreme Court said that "in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights."[95] Similarly, in *Eddings v. Oklahoma*, Justice O'Connor, in concurrence, noted that it would be cruel and unusual punishment to execute a defendant without providing "extraordinary measures to ensure that the prisoner . . . is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake."[96] In a different context, the U.S. Supreme Court in *Gardner v. Florida*, held that due process was violated when the death penalty was imposed, at least in part, on the basis of confidential information which was not disclosed to the defendant or his counsel.[97] This due process rule has not been applied uniformly to noncapital sentencings.

In one of its most recent capital punishment decision, *Panetti v. Quarterman*, the U.S. Supreme Court reversed and remanded, on federal review, a Texas case because of the state court's failure to provide adequate procedures for determining an inmate's incompetency to be executed.[98] The U.S. Supreme Court reiterated many of its fundamental holdings relevant to fact finding in capital cases, stating that "if the Constitution renders the fact or timing of [an inmate's] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being."[99] Procedures that invite arbitrariness or error violate the requirements of due

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[94] The phrase "super due process," used to refer to a heightened level of substantive and procedural fairness anticipated in death penalty cases was coined by Margaret Jane Radin in her article *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1168-69 (1980).
[95] 354 U.S. 1, 46-47 (1957).
[96] 455 U.S. 104, 118 (1982).
[97] 430 U.S. 349 (1977).
[98] 551 U.S. 930 (2007).
[99] *Id.* at 2855 (quoting *Ford v. Wainwright,* 477 U.S. 399, 411-12 (1986)).

process. The U.S. Supreme Court specifically concluded that "due to the state court's unreasonable application of *Ford*, the factfinding procedures upon which the court relied 'were not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'"[100]

[1.19] Guided Discretion

A statutory scheme that does not properly guide the jury's discretion violates the Eighth Amendment and the Due Process Clause. This principle led the U.S. Supreme Court to its decisions in *Furman* and *Gregg v. Georgia*.[101] In *Gregg*, the U.S. Supreme Court upheld statutes that allowed the jury to exercise discretion in determining the sentence, but provided standards for the exercise of discretion through, for example, the use of use of weighing mechanisms and aggravating and mitigating circumstances.[102]

Mandatory death sentences violate the Constitution, but statutory schemes that require a death sentence do not. Therefore, a statutory scheme in which the jury "unanimously finds at least one aggravating circumstance to have been proven beyond a reasonable doubt and no mitigating circumstances" is constitutionally permissible.[103]

[1.20] Individualized Consideration

In *Gregg*, the U.S. Supreme Court noted "that in capital cases, it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence."[104]

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[100] *Id.* at 2859 (quoting *Ford*, 477 U.S. at 423-24).
[101] *Gregg v. Georgia*, 428 U.S. 153 (1976).
[102] *Id.*
[103] *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).
[104] *Gregg*, 428 U.S. at 189-90 n. 38.

One of the most important aspects of individualized consideration is the consideration of evidence that mitigates against a sentence of death. The U.S. Supreme Court has repetitively emphasized the myriad of factors that must be considered. In *Woodson*, the U.S. Supreme Court said that "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassion or mitigating factors stemming from the diverse frailties of humankind."[105]

The U.S. Supreme Court elaborated on the constitutional requirement of "individualized consideration" in *Lockett v. Ohio*, when it stated that the jury must consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[106]

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." . . . . The mandatory death penalty statute in *Woodson* was held invalid because it permitted *no* consideration of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense." . . . [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance

[105] *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).
[106] 438 U.S. 586, 587 (1978).

> of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques – probation, parole, work furloughs, to name a few – and various post-conviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The non-availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.[107]

The requirement of individualized consideration is satisfied if the jury is allowed to consider all relevant mitigating evidence, even if the jury is required to impose a sentence of death upon a finding that the aggravating circumstances outweigh the mitigating circumstances. In other words, there is no requirement that the jury retain unfettered discretion to impose a life sentence even if aggravation outweighs mitigation.[108]

The jury must be instructed that each juror is to evaluate mitigation and weigh it in the balance even if the other jurors do not agree that the mitigation is present.[109] Neither state law nor jury instructions may preclude consideration of facts and circumstances proffered in mitigation.[110]
Recently the U.S. Supreme Court decided a case in which the defendant challenged the restrictions on his introducing evidence of residual doubt of guilt in the penalty phase as mitigation.[111] The U.S. Supreme Court held that the Constitution does not prohibit a state from limiting "innocence-related" evidence that has already been introduced at trial.[112] The U.S.

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[107] *Id.* at 604-05.
[108] *Boyde v. California*, 494 U.S. 370 (1990).
[109] *Mills v. Maryland,* 486 U.S. 367 (1988).
[110] *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Bell v. Ohio*, 438 U.S. 637 (1978).
[111] *Oregon v. Guzek*, 546 U.S. 517 (2006).
[112] *Id.*

Supreme Court reasoned that sentencing generally focuses on how, not whether, a defendant has committed a crime; further the evidence was previously introduced and the matter previously litigated at the guilt phase.[113]

[1.21] Evolving Standards of Decency, Proportionality, & Heightened Culpability: Substantive Bars to Capital Punishment

The Eight Amendment prohibits excessive punishment. As early as 1910, the U.S. Supreme Court held that punishment "should be graduated and proportioned to the [crime.]"[114] In earlier decisions, when confronted with challenges that execution methods were cruel, for example, the U.S. Supreme Court evaluated the challenge based on a historical perspective, comparing the method of execution to historical methods.[115] Beginning with *Weems v. U.S*, the U.S. Supreme Court began, instead, to analyze excessiveness in terms of "evolving social mores," noting that the Eighth Amendment acquires "meaning as public opinion becomes enlightened by a humane justice."[116] In determining excessiveness, the U.S. Supreme Court looks to the "evolving standards of decency that mark the progress of a maturing society."[117] In reviewing evolving standards, the U.S. Supreme Court recognizes historical evidence, but also relies on legislative judgments, sentencing decisions of juries, and their own judgment.

The U.S. Supreme Court explains the evolving standards of decency analysis as follows:

> A punishment is "excessive," and therefore prohibited by the Amendment, if it is not graduated and proportioned to the offense. An excessiveness claim is judged by currently prevailing standards of decency. Proportionality review under such evolving standards should be informed by objective factors to the maximum possible extent, the

[113] *Id.*
[114] *Weems v. U.S.*, 217 U.S. 349, 367 (1910).
[115] *Id.*
[116] *Id.* at 358.
[117] *Trop v. Dulles*, 356 U.S. 86 (1958).

> clearest and most reliable of which is the legislation enacted by the country's legislatures. In addition to objective evidence, the Constitution contemplates that this Court will bring its own judgment to bear by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators.[118]

Based on this type of review, the U.S. Supreme Court has concluded that death is an impermissible punishment for certain categories of offenses and offenders.[119] For example, the U.S. Supreme Court has concluded that death is an impermissible punishment for rape of an adult woman.[120] Similarly, the U.S. Supreme Court held in *Enmund v. Florida* that the death penalty was inappropriate for one "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intends that a killing take place or lethal force be employed."[121] The U.S. Supreme Court later clarified that *Enmund* "does not impose any particular form of procedure upon the states. The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* for such punishment. . . . At what precise point in its criminal process a state chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution."[122]

Five years after *Enmund*, the U.S. Supreme Court arguably altered the culpability exclusion in *Tison v. Arizona*.[123] In that case the U.S. Supreme Court held that a "major participation in the felony committed, combined with reckless indifference to human life is sufficient to satisfy the *Enmund* culpability requirement."[124] Another aspect of the U.S. Supreme Court's proportionality jurisprudence focuses on the penological purposes served by the

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[118] *Atkins v. Virginia*, 536 U.S. 304 (2002) (citations omitted).
[119] This measure of proportionality employed as part of the evolving standard of decency analysis must be differentiated from comparative proportionality, a feature of the post-*Furman* statutes that was applauded by the U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Proffitt v. Florida*, 428 U.S. 242 (1976), but subsequently overruled as a constitutional prerequisite in *Pulley v. Harris*, 465 U.S. 37 (1984).
[120] *Coker v. Georgia*, 433 U.S. 584 (1977).
[121] *Enmund v. Florida,* 458 U.S. 782, 797 (1982).
[122] *Cabana v. Bullock*, 474 U.S. 376 (1986).
[123] 481 U.S. 137 (1987).
[124] *Id.* at 158.

death penalty. "Unless the imposition of the death penalty . . . measurably contributes to one or both of [the goals of capital punishment] it 'is nothing more than the purposeless and needless imposition of pain and suffering' and hence an unconstitutional punishment."[125]

Generally, the penological purposes served by the death penalty are said to be deterrence and retribution. The issue of deterrence is two-fold. General deterrence theory focuses on whether the death penalty is necessary to deter other murderers. It is argued that if a lesser punishment can achieve the same or a greater level of deterrence, that the death penalty cannot be justified on deterrent grounds.[126] Conversely, specific deterrence theory focuses on the particular defendant who is charged with the capital crime. Proponents argue that specific deterrence guarantees that the defendant will not kill again. In capital cases, retribution, as a penological goal, seeks to punish defendants in accordance with what they deserve. "Retributivists believe that punishment is justified when it is deserved. It is deserved when the wrongdoer freely chooses to violate society's rules."[127]

In recent decisions, the U.S. Supreme Court has focused on whether the death penalty, in a given context, contributed to its penological purposes. Thus, in *Atkins v. Virginia*, the U.S. Supreme Court reasoned that mental impairments diminished a mentally retarded defendant's degree of culpability. The "severity of the appropriate punishment necessarily depends on the culpability of the offender. . . . If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[128] Similarly, in *Roper v. Simmons*, the U.S. Supreme Court reasoned that neither retribution nor deterrence justified the execution of juveniles who, because of a lack of maturity and heightened vulnerability, have diminished culpability.[129]

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[125] *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (quoting *Enmund*, 458 U.S. at 798).
[126] Randall Coyne & Lynn Entzeroth, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 25 (3d ed. 2006).
[127] Joshua Dressler, UNDERSTANDING CRIMINAL PROCEDURE 16 (4th ed. 2006).
[128] *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).
[129] 543 U.S. 551, 569-70 (2005).

[1.22] State Judicial Finality via Federalism

Since the administration of the death penalty is a matter for state government, federal court intervention is affected by federalism. The application of federalism, by the U.S. Supreme Court, gave rise to one of the more controversial cases in recent capital punishment jurisprudence, *Herrera v. Collins*.[130] There, the U.S. Supreme Court noted that "[f]ew rulings would be more disruptive of our federal system than to provide for federal *habeas* review of free-standing claims of actual innocence."[131] Therefore, the final resolution of factual issues in capital cases will almost always be by state courts. This healthy respect for federalism is the basis of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which limits federal *habeas* review and relief to state prisoners.[132] The Act provides for separate and more restrictive treatment for capital cases when states have implemented "opt-in" provisions under the federal law. Because federalism and AEDPA limit federal court review of state death sentences, state courts have an even greater responsibility to assure fairness and thoroughness of death penalty proceedings. In only rare cases will the federal courts have jurisdiction to provide alternative substantive review, thus placing the burden on state courts to assure that their processes are fair and reliable.

[1.23] "Truly Awesome Responsibility"[133] of the Jury

The responsibility placed upon juries in capital cases has been described as the "truly awesome responsibility of decreeing death for a fellow human."[134] The U.S. Supreme Court has explained the ramifications of procedures that undermine the sense of responsibility:

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[130] 506 U.S. 390 (1992).
[131] *Id.* at 401.
[132] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub.L. 104-132, Apr. 24, 1996, 110 Stat. 1214)
[133] McGautha v. California, 402 U.S. 183, 208 (1971).
[134] *Id.*

> [C]apital sentencers [should] view their task as the serious one of determining whether a specific human being should die at the hands of the State. . . . Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed th[e] Court to view sentencer discretion as consistent with – and indeed as indispensable to – the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case."[135]

Anything that diminishes the jury's sense of responsibility for the imposition of a death sentence violates the Eighth Amendment. In *Caldwell v. Mississippi*, the U.S. Supreme Court held that an argument to a capital sentencing jury that the jury's decision was not final would minimize the jury's role, tend to diminish their overall sense of responsibility and violate the Eight Amendment.[136] "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[137]

[1.24] Narrowing the Class of Eligible Defendants

The Eighth Amendment requires that the class of defendants eligible for capital punishment be sufficiently narrowed.[138] Narrowing serves to provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[139]

The narrowing requirement mandates that a state narrow the sentencer's consideration to a smaller and more culpable class of homicide defendants than were death eligible before *Furman*.[140]

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[135] *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985).
[136] *Id.*
[137] *Id.* at 328-29.
[138] *Furman v. Georgia*, 408 U.S. 238 (1972).
[139] *Id.* at 313.
[140] *Id.*

A proper narrowing device "insures that, even though some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers – those whose crimes are particularly serious, or for whom the death penalty is peculiarly appropriate."[141]

Some state statutes perform the narrowing requirement in the definition of capital murder. Others, more broadly define capital murder, and then use aggravating circumstances to narrow those for whom death may be sought. These systems provide a means by which a jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. The Supreme Court has approved either method of narrowing, holding that the narrowing function for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.[142]

Even when a state attempts to narrow, by one of the two schemes, it may violate the narrowing principle if it fails to create "any inherent restraint on the arbitrary and capricious infliction of the death sentence."[143] Thus in *Zant v. Stephens*, the U.S. Supreme Court struck down an aggravating circumstance deemed to be "too vague and nonspecific to be applied evenhandedly by a jury."[144] The aggravating circumstance failed to narrow because a "person of ordinary sensibility could find that almost every murder fit the stated criteria . . . [and] the facts of the case itself did not distinguish the murder from any other murder."[145]

The narrowing requirement may be violated when, for example, a single set of facts is the basis for the finding of both an element of capital murder and an aggravating circumstance. In *Zant v. Stephens*, the U.S. Supreme Court explained that

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[141] *Id.*
[142] *Lowenfeld v. Phelps*, 484 U.S. 231 (1988).
[143] *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).
[144] 462 U.S. 862 (1983).
[145] *Id.* at 878.

> [a]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify imposition of a more severe sentence on the defendant compared to others found guilty of murder.[146]

Recently the U.S. Supreme Court addressed the issue of the effect of an invalid aggravating factor on the narrowing requirement. The U.S. Supreme Court had previously set forth different rules for weighing and non-weighing states. In a weighing state, if the jury relied upon an aggravating or eligibility factor that was later determined to be invalid, the U.S. Supreme Court had found the process to be skewed in favor of death, requiring reversal.[147] The result was different in a non-weighing state since automatic skewing would not necessarily occur. In 2006, the U.S. Supreme Court decided *Brown v. Sanders*.[148] Noting that the prior law had been "needlessly complex," the U.S. Supreme Court set forth a new rule for all future cases, regardless of whether the state was classified as "weighing" or "non-weighing."[149]

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.[150]

Under the facts in *Brown*, a new sentencing was not required because although two of the four special circumstances were invalidated, the remaining two were sufficient to satisfy the narrowing requirement.[151]

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[146] *Id.* at 877.
[147] *Stringer v. Black*, 503 U.S. 222 (1992).
[148] 546 U.S. 212 (2006).
[149] *Id.*
[150] *Id.* at 213.
[151] *Id.*

[1.25] Jury Determination of Facts Essential to Death

The U.S. Supreme Court has recently explained the role that the Sixth Amendment plays in factual determinations. Any increase in a defendant's authorized punishment that is contingent upon a finding of fact must be found by a jury beyond a reasonable doubt.[152] The Sixth Amendment does not depend on the "empty formalism" of how a state characterizes the elements of the offense or its sentencing procedures. Instead, it demands that facts "essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt."[153]

In *Ring v. Arizona*, the U.S. Supreme Court applied *Apprendi's* rule to the "factfinding necessary to put [a defendant] to death."[154] In *Ring*, the U.S. Supreme Court applied *Apprendi's* nomenclature of an "element of a crime" to aggravating factors in a death penalty case.[155] The aggravating factors were equivalent to elements of a crime because absent the finding of an aggravating factor (under Arizona law), no death sentence could be imposed.[156] Thus, a capital defendant has a constitutional right to a jury finding of the statutory aggravating circumstances necessary to make the defendant eligible for a sentence of death.

[1.26] Emerging Jury Selection Issues

Jury selection in the death penalty case is complicated by the death-qualification process. Because the same jurors decide the issue of guilt or innocence and punishment, the jurors' attitudes about the imposition of a death sentence must be inquired into on *voir dire*. Recent U.S. Supreme Court decisions have addressed not only the death-qualification process, but also the

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[152] *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona,* 536 U.S. 584 (2002).
[153] *Ring*, 536 U.S. at 610 (Scalia, J., concurring).
[154] *Id.* at 609.
[155] *Id.* at 586.
[156] *Id.*

discriminatory use of peremptory challenges in violation of *Batson v. Kentucky.*[157]

[1.27] Death Qualification: Review of Juror Removal; Factors for Consideration

The process of determining a juror's views about the death penalty in order to determine whether the juror is qualified to serve is known as death qualification. If a juror holds views either in favor of or in opposition to the death penalty that are so strong as to prevent or substantially impair the juror from considering sentences of both death and life in prison, the juror must be removed for cause.[158] In Uttecht v. Brown, the U.S. Supreme Court revisited the standards for death qualification that had been outlined twenty years earlier.[159]

In Uttecht, the U.S. Supreme Court reviewed four "established" principles pertaining to the right to a fair and impartial jury.[160] First, the right to an impartial jury entitles the defendant to a jury drawn from a venire that has not been "tilted in favor of capital punishment by selective prosecutorial challenges for cause."[161] Second, the state has a strong interest in having jurors who will apply capital punishment law as is proscribed by the state framework.[162] Third, to balance these interests, a juror who is "substantially impaired in the ability to impose the death penalty under the state law framework can be excused for cause."[163] Fourth, a trial court must base its judgment in making the determination in part on the juror's demeanor. In addition, the U.S. Supreme Court noted that trial court determinations are owed deference by the reviewing courts.[164]

In applying the Witherspoon-Witt standard, the court must consider the entire voir dire process,[165] including the number of jurors challenged and excused by each side and the court's jury

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[157] 476 U.S. 79 (1986).
[158] *Wainwright v. Witt*, 469 U.S. 412 (1985).
[159] 551 U.S. 1 (2007).
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*

selection procedure. In Uttecht, for example, the U.S. Supreme Court noted that before trial, each juror filled out an individual questionnaire;[166] that during voir dire and before each ruling, the trial judge allowed each side to explain its position; and that the trial judge gave careful and measured explanations for each decision.[167] In addition, the U.S. Supreme Court noted that the trial judge clearly explained the possible punishments to the jurors. Finally, although federal law does not require objections to preserve jury challenge issues, the U.S. Supreme Court considered the failure to object as indicating the defendant's "voluntary acquiescence to, or confirmation of, a juror's removal."[168] "By failing to object, the defense did not just deny the conscientious trial judge an opportunity to explain his judgment or correct any error; it also deprived reviewing courts of further factual findings that would have helped to explain the trial court's decision."[169]

[1.28] Batson Issues

By court rule or statutes, states authorize each side to excuse a limited number of jurors by the exercise of peremptory challenges. Although counsel does not have to state a reason for the exercise of a peremptory challenge, the U.S. Supreme Court, in a series of cases, beginning with Batson v. Kentucky,[170] has restricted their use. In Batson, the U.S. Supreme Court endorsed a three-part test by which the discriminatory use of a peremptory challenge could be contested. First, the objecting party must establish a prima facie claim of discrimination; second, the party exercising must state a neutral reason for the exercise of the challenge; and third, the court must evaluate the persuasiveness or plausibility of the stated reason and determine whether the objecting party has shown purposeful discrimination.[171]

In 2008, the U.S. Supreme Court revisited the *Batson* issue in a case in which the Louisiana Supreme Court had interpreted *Rice*

[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] 476 U.S. 79 (1986).
[171] *Id.*

v. Collins,[172] to require a reversal on *Batson* grounds only when a "reasonable fact finder would necessarily conclude that the prosecutor lied" about the reasons for the challenges.[173] The U.S. Supreme Court disagreed with this interpretation, and held 7-2, in *Snyder v. Louisiana* [174] that "[f]or present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution."[175] Although the prosecution claimed a non-racial reason for striking the juror – that the juror was a college senior with student-teaching obligations – the U.S. Supreme Court reasoned that the "implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as [the challenged juror.]"[176]

[1.29] Emerging Evidence Issues

Some evidence issues that have arisen in non-capital cases have application in the capital context as well. These include the issues of the right to confrontation, the right to present a defense, and the introduction of evidence of residual doubt.

[1.30] *Crawford* in Capital Sentencing

In *Crawford v. Washington,*[177] the U.S. Supreme Court held that the Sixth Amendment right to confrontation barred the use of testimonial statements made by unavailable declarants who did not appear at trial unless the defendant had a prior opportunity for cross-examination. Although a few courts have held otherwise, most courts rely upon pre-*Crawford* case law to support the proposition that the confrontation right applies only at trial and not at a capital sentencing hearing.[178] Some state statutes provide for cross-examination at sentencing as a matter

[172] 546 U.S. 333 (2006).
[173] *Snyder v. Louisiana*, 552 U.S. 472 (2008).
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] 541 U.S. 36 (2004).
[178] *Williams v. New York*, 337 U.S. 241 (1949).

of statutory right, but most hold that the Sixth Amendment applies only to trial.[179]

Two U.S. Supreme Court decisions may provide a basis for a more critical analysis. In *Gardner v. Florida*,[180] the U.S. Supreme Court reversed a capital sentence that was based in part upon a pre-sentencing report that the judge had considered but that had not been provided to defense counsel. The U.S. Supreme Court held that sentencing was a "critical stage" of the trial and that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause . . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process."[181] Despite the broad language, most courts read *Gardner* narrowly as only prohibiting sentences that are based on secretive, non-disclosed information.

Similarly, in *Specht v. Patterson*[182] the U.S. Supreme Court overturned a Colorado procedure that allowed a defendant found guilty of a specified offense to receive a significantly increased sentence, based upon the judge's finding of an additional fact. The Colorado procedure violated due process because it did not preserve the defendant's right to be present with counsel and to "have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own."[183] While *Specht's* rationale relevant to jury factfinding has been expanded in *Apprendi v. New Jersey*[184] and *Ring v. Arizona*,[185] the U.S. Supreme Court has not discussed their application to capital sentencing proceedings in light of those cases or *Crawford.*

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[179] *See generally*, Penny J. White, *He Said, She Said, and Issues of Life or Death*, 19 REGENT U. L. REV. 387 (2006-07).
[180] *Gardner v. Florida*, 430 U.S. 349 (1977).
[181] *Id.* at 358.
[182] 386 U.S. 605 (1967).
[183] *Id.* at 610.
[184] 530 U.S. 466 (2000).
[185] 536 U.S. 584 (2002).

[1.31] Right to Present a Defense and *Holmes*

The U.S. Supreme Court has recognized a criminal defendant's right to a "meaningful opportunity to present a complete defense."[186] In *Holmes v. South Carolina,* the defendant, who was charged with murder and related offenses, was prevented from offering evidence of third-party guilt in his trial based upon a rule set forth in a state court decision. The South Carolina rule required the trial judge to assess the strength of the state's case in determining whether to allow the defendant to offer evidence of third-party guilt.[187] The U.S. Supreme Court held that this rule violated the criminal defendant's federal constitutional rights "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or the Compulsory Process Clause or Confrontation Clause of the Sixth Amendment . . . ."[188]

[1.32] Residual Doubt Evidence and *Guzek*

Conversely, federal constitutional law does not require the state to admit innocence-related evidence at a capital penalty hearing that was not introduced at trial. In *Oregon v. Guzek,*[189] defendant Guzek offered evidence of alibi during the penalty phase of his capital hearing. Notwithstanding the rulings of the state and federal courts holding that Guzek had a federal constitutional right to present live alibi testimony during the penalty phase, the U.S. Supreme Court disagreed, holding that states may put reasonable limits on the evidence a defendant may present, particularly at sentencing, when the question is not *whether* the defendant committed the crime but *how*. Because the issue of innocence had already been resolved against defendant, and since state law allowed defendant to present evidence of his innocence in the form of transcripts from his original trial to the jury, the Oregon court did not have to hear Guzek's additional evidence of innocence.[190] The U.S. Supreme Court left it to the Oregon courts to determine whether the alibi evidence was

[186] *Holmes v. South Carolina*, 547 U.S. 319 (2006).
[187] *Id.* at 319.
[188] *Id.*
[189] 546 U.S. 517 (2006).
[190] *Id.*

admissible at the penalty hearing to impeach other witnesses whose earlier testimony the state intended to introduce at sentencing.[191]

[1.33] Conclusion

While the decision to authorize capital punishment is left to the judgment of the individual states, the administration of state capital punishment proceedings is influenced not only by state law, but also by federal constitutional law and, to a lesser extent, international treaties and conventions. Thus, state court judges must master not only the relevant constitutional provisions, statutes, rules, and decisions in the state, but they must also understand the principles of federal death penalty jurisprudence, which have developed as the U.S. Supreme Court has interpreted the Eighth Amendment. These interpretations, though complex and ever changing, impose restrictions on the states' imposition of the death penalty.

[191] *Id.*

CASE MANAGEMENT

Hon. Forrest D. Bridges
Hon. C. Darnell Jones, II
Hon. Don R. Ash

[2.1] Practical Aspects of Presiding over a Capital Case

Presiding over a capital case presents the trial judge with unique challenges and opportunities. No case is more difficult, yet none offers more opportunity for the judge to exercise the skills of the trade or carry out the sworn obligations of a judge's oath. The capital case, perhaps more than any other case, magnifies the significance of decisions made by the judge during the pre-trial, trial, and post-trial periods. Judges extend due process in every criminal case; in a capital case, the judge must extend *super* due process. More than most judges realize, the judicial decisions they make every day matter greatly to the litigants and others. In a capital case, those decisions really matter. Welcome to the Major Leagues!

[2.2] The Context of a Capital Trial

In preparation for a capital trial, the judge first must understand and appreciate the context in which the trial will take place. Trial courts can assume:

- ✓ Everyone will be nervous. Because so much is at stake, each of the lawyers will be on edge, worried about making mistakes. Usually with at least four lawyers, two on each side, at least one may be trying a capital case for the first time. Many states have capital case attorneys prequalified to handle these types of proceedings. Some of them only handle death penalty cases. Everyone expects the judge not only to know the rules but also to set the tone for the proceedings. This can be difficult if the judge has limited experience with these matters. Most states have judges who have handled these cases in the

past. Less-experienced judges should reach out to these more seasoned jurists and learn from their experiences. You must remain calm, confident, and keep everyone else on track. It is a difficult job.

- ✓ Preparation, preparation, and preparation are the key words for any judge facing the daunting task of presiding over a death penalty case. When the notice is filed, the state is seeking the ultimate punishment. You should do three things:

    - First, as previously mentioned, sit down with one of your colleagues and discuss practices and procedures.
    - Next, review books and other materials that focus on the challenges of these types of cases.
    - Finally, develop a case-specific capital case notebook, which includes a checklist (like the one in the appendix of this publication) and other important information. The capital case notebook and the capital case checklist will be tremendous assets as you go through the difficult days of handling these types of cases. These two items are essential.

- ✓ At the beginning of the case, it is critical to hold a status conference to discuss procedures and plans for future hearings. This conference should be in the courtroom, on the record, and with the defendant present. Your tone at this initial hearing is critical. Civility is critical. Hopefully, you are familiar with the prior experience of the defense counsel and the state's representatives. Discuss motion dates and trial dates. You can anticipate motions to continue at each of these initial settings and when examining such requests. Special emphasis to protecting the due process rights of the accused must be given priority. Trial courts can anticipate that potentially dozens of appellate courts will review these proceedings so every ruling is critical. Being on the record is the rule. Always keep in mind "the record, the record, the record." Also, the defendant should be present at all stages. Any waiver

of the defendant's presence should be done by the defendant in person.

- ✓ Scheduling orders set the framework for the court, counsel, and all parties involved, including the accused and the victim's family. A detailed scheduling order, which sets out time requirements for discovery, disclosure of experts, raising defenses like insanity or an alibi, disclosure of witnesses, as well as other requirements established by your state's rules of criminal procedure puts everyone on notice of what the court expects and when it is expected. It is also necessary to schedule your pre-trial motion dates (and there will be several). A good practice is to schedule at least one every other month in the early stages of the proceedings. As the trial date gets closer, scheduling motion days bi-monthly and weekly will help make the process smoother and identify potential problem areas.

- ✓ You should anticipate requests from defense counsel for *ex parte* proceedings, especially if the defendant is indigent. Many defense lawyers initially request approval for an investigator to help develop the facts of the case, plus locate and take statements of potential witnesses. These requests will also focus on hiring various experts, who specialize in mental health, forensics, and mitigation. The mitigation expert is critical since he or she will research the family, education, and employment history of the defendant. If the defendant is convicted, the mitigation expert will try to counteract the aggravating factors presented by the state. Normally, these requests will be presented to the court in chambers. The court will review the qualifications of the experts, the necessity of the expert, the hourly rate to be charged, plus the total amount requested. It is your discretion to approve the hiring but also the reasonableness of the fees. Modification of the monies occurs frequently but denial of a reasonable request to hire an expert or investigator should be rare. Then, these requests are reviewed by either your state's administrative office of the court or supreme court. These requests and orders are normally

filed under seal. This is important since the defense does not want to disclose its theory to the prosecutors.

- ✓ As the motions and hearings proceed, you should consider the use of a detailed jury questionnaire. In many death penalty trials, individual *voir dire* is also a must to determine the qualifications of potential jurors. Normally all potential jurors are brought in early to fill out the questionnaire and to advise the Court of any potential scheduling conflicts. It is a good practice, after the potential jurors are excused, to randomly draw the first sixty or seventy jurors to be selected. This will assist in their preparation. Many of these questionnaires include a question which asks the jurors to rank his or her feelings about the death penalty, i.e. Rank 1 – everyone convicted of murder should get the death penalty and Rank 5 – no one should ever get the death penalty. More experienced lawyers will sometimes agree 1s and 5s will automatically be excused. This can speed up the selection process. Another important area to be examined is possible knowledge the potential juror may have obtained through pre-trial publicity. Individual *voir dire* can be a long process. Sometimes it can take more than thirty minutes per juror. Judicial preparation and participation, if permitted by your state, can speed up this process dramatically.

- ✓ You should also anticipate motions for a change of venue, especially if this is a high-profile case – most death penalty cases are. Exhibits to these motions usually include copies of newspaper articles, videos of news coverage, and sometimes social media postings. While often insufficient for a change of venue, it is a consideration to prevent an appealable issue. In some instances, jurors will be brought from another venue to hear the matter. Before deciding on using out-of-area jurors, you should speak to the jury coordinator or someone in a similar position to determine the logistics of doing so. If you decide to move forward, consider having an initial meeting with the venire to determine availability, hand out the questionnaires, and schedule times for individual *voir dire*.

- ✓ Some jurisdictions will require jury sequestration. This can be a huge expense for either your state or county. You will be required to meet with the deputies who will be charged with keeping the jurors sequestered. Individual hotel rooms without televisions and telephones are suggested and should be examined prior to using. It is also important to review all meal arrangements and schedule lunch and dinner for the jurors. If the trial extends for more than a couple of weeks, how the jurors will spend their free time over any weekend and whether family visitation will be permitted must be considered. Preventing any improper contact or conversations with non-jurors or between the jurors themselves is very important.

- ✓ Appeals and post-trial motions are inevitable. If there is a conviction, there will very likely be an appeal. If the sentence is death, there will be interminable appeals. The trial judge's every word is subject to review. As such, be extremely conscious of the importance of making a record. You should keep bench conferences to a minimum; if used, reconstruct them on the record with the assent of counsel to each reconstruction. Remember: the record, the record, the record.

- ✓ The trial will be long and tiring. One of your challenges will be to keep the trial on schedule and progressing at a steady pace without sacrificing the quality of work produced by the lawyers, parties, and jurors. During a lengthy trial, anticipate scheduling problems, family concerns, and various conflicts to arise. While it is important to be prompt and to maintain a consistent schedule, recognize the importance of being sensitive to the personal needs of the jurors, the parties, and their attorneys. You may have to choose between canceling a half or full day of court and losing a juror due to such a conflict. It may also become necessary to recess early, or to take extended breaks occasionally, to simply avoid undue fatigue. Recognize that stress will take its toll on everyone during the course of a long, hard trial. Issues involving jurors should always be on the record.

- ✓ Super due process must be woven into the very fabric of the trial. You must ensure procedural due process; that is, the right to notice and a fair hearing. Further, due process involves another aspect called "procedural justice." Unlike distributive justice, which is concerned with the outcome of a case, procedural justice refers to a process in which the litigants perceive they had a chance to tell their stories and that people listened to them. Studies on this issue have led to a conclusion that "citizens who view legal authority as legitimate are generally more likely to comply with the law."[192] Under this theory, a case will be easier to manage if a defendant believes he or she is getting a fair trial.

- ✓ As noted above, the lawyers, parties and witnesses are looking to the judge to set the tone of the trial. Part of the judge's job is to put everyone at ease to an appropriate degree. The task is difficult, to be sure, but does not need to be an overwhelming one. It is important to the state and to the defendant that the judgments in these cases are made by fair-minded and conscientious people. Once the jurors are selected, the parties have accepted them and expressed confidence that the jurors are fair minded and conscientious. The judge's words and actions in the presence of the jury need to reflect that the jurors meet that standard.

[2.3] Setting the Tone

One of the best ways to set the tone for a capital trial is for the judge to set parameters for the lawyers in advance of the trial. Lawyers know that each judge has particular nuances and certain "hot buttons." They want to know the judge's expectations and generally welcome any information that makes the trial more predictable. Judges can save themselves (and the lawyers) much anguish by communicating in advance any special rules they expect to be followed or any pet peeves the lawyers should avoid.

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[192] TYLER, TOM R., WHY PEOPLE OBEY THE LAW 62 (Princeton University Press, 2006).

For example, the judge's "toolbox" for a capital case might include handouts for the lawyers on any stage of the trial that the judge anticipates will likely present problems, such as jury selection or closing arguments. Even if the lawyers disagree with the judge's rulings, it would be a foolish lawyer indeed who would continue to violate policies the judge has furnished in writing before the trial.

[2.4]The Judge's Capital Trial Toolbox

As the judge prepares for a capital case, it is useful to create management checklists for recurring issues likely to arise during the trial. A capital case will likely involve some unique, yet some fairly predictable, issues. For example, it is far more likely a capital trial will pose particular problems during jury selection, especially with the death qualification of jurors and potential *Batson* challenges, as well as potential abuses during closing arguments.

The judge's preparation for a capital case should include creation and compilation of checklists, notes, and form orders for dealing with these and other areas. By taking time to create these checklists, judges will force themselves to become familiar with the principles necessary to rule on many of the contentious issues that will arise during the capital trial. Anticipating likely problems will enable the judge to minimize the potential for error and to articulate early in the process the conduct expected of the lawyers. As an example, a capital case may have as many as one hundred pretrial motions. The judge needs to maintain a log of prosecution motions and a second log of defense motions. This permits a double-check system to ensure that every motion is decided.

A word of caution, however, with respect to the use of checklists and form orders: Judges should not fall into any set pattern in ruling on objections or motions during the trial or pre-trial proceedings. Rather, judges should make decisions on a case-by-case basis. The checklists aid the judge in ensuring that all matters are completed prior to trial. They are super-helpful to-do lists.

You should include the following items in a capital case toolbox for effective trial management:

- ✓ Individual state's capital case bench book;
- ✓ Attorneys' guidelines for jury selection questions;
- ✓ Form of questions for death qualification of jurors;
- ✓ Procedure for determining *Batson* issues;
- ✓ Attorney's notice of intent to exercise peremptory challenge, opportunity for *Batson* objection;
- ✓ Sample *Batson* Order;
- ✓ Juror responsibilities' handout with contact information;
- ✓ Preliminary jury instructions;
- ✓ Sample Order on Motion to Suppress;
- ✓ Checklist for entering any orders restricting public comment;
- ✓ Sample Order on Media Coverage;
- ✓ Checklist for ordering physical restraints on defendant;
- ✓ Checklist for removing disruptive defendant from courtroom;
- ✓ Sample Order for placing restraints on defendant;
- ✓ Sample Order for removal of disruptive defendant;
- ✓ Handout for attorneys' guidelines for closing arguments;
- ✓ State's rules of practice or criminal procedure; and
- ✓ Selections from the state's rules of professional responsibility.

Many of these items are contained in the appendices of this publication, but judges should not underestimate the importance of creating their own forms. By doing so, they will gain a much better appreciation for particular nuances involved in each stage of the capital trial. They can also factor their particular management styles into the creation of their forms.

[2.5] Dealing with Disruptive Defendants

In *Deck v. Missouri*,[193] the U.S. Supreme Court held due process forbids the use of visible shackles during a capital murder trial unless the use is justified by an "essential state interest."[194] Justice Breyer noted the law has long forbidden the routine use

[193] 544 U.S. 622 (2005).
[194] *Id.* at 628.

of visible shackles during a capital trial, permitting shackling only in the presence of a particular reason to do so. The U.S. Supreme Court found the basic rule embodies notions of fundamental fairness found in the Due Process Clause, forming a part of the Fifth and Fourteenth Amendments' due process guarantees. "The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, the court authorities consider the offender a danger to the community . . . ."[195]

Nevertheless, the right to remain free of physical restraints visible to the jury may be "overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum."[196] The majority stated:

> We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms. But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.[197]

In any event, no person shall be tried using restraints "except as a last resort."[198] Unfortunately, the U.S. Supreme Court does not provide a thorough definition of the elements which are sufficient to justify the use of restraints. Rather, it provides the trial court's determination "must be case specific"[199] and be supported by findings.

The bottom line is: make a detailed record. Hold a hearing with both the prosecution and defense participating. Give the record eyes by describing disruptive conduct. Make detailed findings and conclude that there is a manifest and essential need for the action of the court. Also, find that the court has weighed all potential solutions and the least obtrusive and least restrictive solution is being utilized. Finally, find that the actions of the court are case specific to this trial and this defendant and being used

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[195] *Id.* at 633.
[196] *Id.* at 628.
[197] *Id.* at 632.
[198] *Id.* at 628.
[199] *Id.* at 633.

as a last resort and are essential for courtroom security, escape prevention, or courtroom decorum as the facts dictate. The judge must make it clear that the determination is that of the judge based on facts presented and placed on the record. The final decision need be the decision of the judge based on objective facts and not the decision of law enforcement.

Particular caution needs to be exercised in three related areas: (1) It is a violation of due process to have a general rule that all defendants charged with murder are shackled. This is frequently raised by law enforcement. Such general rules are constitutionally defective. (2) A second serious error is to place shackles on a compliant, otherwise unrestrained, defendant simply because the defendant in testifying as a witness. A further hearing and additional findings are essential. (3) Avoid the use of a stun belt or react band without first holding a hearing and making appropriate findings for restraints.

[2.6] Requisites for Use of Physical Restraints

Multiple courts have examined the underlying reasons justifying the use of restraints in capital cases. In *State v. Thomas*,[200] the trial court adequately described the reasons for shackling the defendant as: (1) he threatened to become violent and tip over the counsel table; (2) he refused to come to the courtroom from the holding cell; and (3) he threatened his attorneys and one bailiff with physical injury. Outside of the presence of the jury, the trial court expressed, on the record, its concerns that the defendant would endanger court personnel, possibly the jury, and that "a situation could arise that just couldn't be stopped in an amount of time [to prevent someone from getting] hurt, and probably the defendant."[201] Similarly, in *Russell v. State*,[202] the Mississippi Supreme Court upheld the trial court's use of shackles because the defendant on trial for the capital murder of a prison guard had already fatally stabbed an inmate, had a past conviction for armed robbery, and had attempted to escape from a medical center ending in a shootout.

[200] 514 S.E.2d 486 (N.C. 1999).
[201] *Id.* at 331.
[202] 849 So.2d 95 (Miss. 2003).

Conversely, in *Gammage v. State*,[203] the Texas Court of Appeals found the trial court committed prejudicial error when it required the defendant to wear handcuffs throughout trial. During a pre-trial hearing, the sheriff testified he preferred to have both co-defendants under physical restraints throughout the trial because they "were more dangerous than any other prisoners he has ever had.[,]" [204] which he seemed to base on the charges alone as he admitted he knew nothing about their criminal histories and unequivocally testified that neither had misbehaved while in police custody. Further, the sheriff stated informants told him the defendants planned to escape; however, the judge made no effort to seek direct testimony from the informants. The Appeals Court pointed out most of the testimony regarding why they should be restrained was "hearsay evidence several times removed."[205]

Despite the fact the trial court allowed the defendant to dress in civilian clothing, the Texas Court of Appeals held it was "an abuse of discretion for the court to employ restraints without specifically finding a manifest need, when less drastic security measures would have adequately and reasonably addressed the problem."[206] The Texas Court of Appeals found unpersuasive the fact the co-defendant was acquitted of the murder despite wearing handcuffs. The Appeals Court made clear that "[a]mong the most precious rights afforded an accused is the right to be tried before an impartial jury with the presumption of innocence fully intact and free of prejudice."[207]

Likewise, in two Washington cases, the Washington Supreme Court found the restraint of the defendant was improper. In *State v. Clark*,[208] the trial court ordered the defendant to appear in shackles on the first day of *voir dire*, during the reading of the verdict, and throughout sentencing, but not during the trial phase after *voir dire*. The defendant argued the restraint violated his rights to a fair trial and sentencing, and amounted to

[203] 630 S.W.2d 309 (Tex. Ct. App. 1982).
[204] *Id.* at 311.
[205] *Id.*
[206][206] *Id.* at 317.
[207] *Id.* at 313.
[208] 24 P.3d 1006 (Wash. 2001).

"impermissible judicial comment on the evidence."[209] While the trial court found the jury venire could not see the shackles, the Washington Supreme Court held the jury could infer shackling from the defendant's "stilted and restrained movement."[210] There was no evidence in the record that the defendant "posed a threat of violence, escape, or disruption."[211] Indeed, the Washington Supreme Court found from the record that the defendant was well-mannered during pre-trial proceedings. The Washington Supreme Court held the shackling was constitutional error, but it was harmless because (1) he was not shackled throughout the two-and-a-half-week trial and (2) the jury had already arrived at its verdict of guilt or innocence prior to the second time they saw the defendant shackled. The Washington Supreme Court did not address whether the shackling constituted impermissible judicial comment on the evidence.

In *State v. Finch*,[212] the defendant was shackled during the entire trial and during the special sentencing hearing. The trial court was trying the defendant for allegedly murdering his ex-wife's friend and a police officer during his arrest. The trial court ordered the defendant shackled because he was a large man and he had originally planned to kill his estranged wife who testified against him. The Washington Supreme Court found restraining a defendant during trial infringes upon his right to a fair trial, primarily violating the presumption of innocence. Further, the Court found shackling restricts the defendant's ability to assist counsel during trial, it interferes with the defendant's right to testify on his or her behalf, and it "offends the dignity of the judicial process."[213] Finally, restraining a defendant also infers dangerousness and prejudices the jury against the accused, especially in a trial alleging a violent crime.

Although the trial court may have been justified in shackling the defendant during his ex-wife's testimony, the Washington Supreme Court held restraints were not justified throughout the trial. The Washington Supreme Court found no indication from the record that the defendant "posed a threat to anyone else in

[209] *Id.* at 1021.
[210] *Id.* at 1027.
[211] *Id.* at 1028.
[212] 975 P.2d 967 (Wash. 1999).
[213] *Id.* at 999.

the courtroom,"[214] he posed an escape risk, or he disrupted the courtroom proceedings.

The state argued the trial court's decision was justified because the defendant was on trial for murder, he had prior convictions for violent offenses, he was a large man, and he attempted suicide while he was in prison. The Washington Supreme Court found being on trial for murder couldn't be used to justify restraint because all capital defendants would then be subject to restraint. It noted the defendant's prior convictions were more than 25 years old, and he never committed violence or attempted escape while incarcerated. The Washington Supreme Court also found the size of the defendant does not constitute a "manifest need" for restraints.[215] Even though the defendant attempted suicide while in custody, the suicide attempt was eight months prior to trial; the defendant was placed on antidepressant medication; and, there were no other cases allowing for the use of restraints on that basis.

Nevertheless, in *People v. Morgan*,[216] the Fulton County Court found a "heightened standard of due process" in a capital case pre-trial proceeding did not compel the sheriff's office to alter its standard procedure of restraining the defendant and allowing only prison garb during pre-trial proceedings. The defense unsuccessfully argued that due to media coverage, potential jurors may witness the defendant in restraints and prison garb which will "taint" the trial. The Fulton County Court held because all papers filed in the case containing potentially sensational material were sealed, the portrayal of defendant in the media had not "even approached the sensational" nature of it.[217] As such, the defense could address any "taint" during *voir dire*.

In addition to preventing violence, the trial court may also need to restrain the defendant to prevent possible escape and to avoid trial disruption. In *Stockton v. Commonwealth*,[218] the Virginia Supreme Court examined, in part, whether the trial court's use of shackles during a re-sentencing hearing before a jury denied the defendant a fair trial. During the re-sentencing

[214] *Id.* at 1002.
[215] *Id.* at 1002.
[216] 682 N.Y.S. 2d 516 (Fulton County Ct. 1998).
[217] *Id.* at 627.
[218] 314 S.E.2d 371 (Va. 1984).

hearing, the defendant was shackled at the ankles. He swore at the judge and refused to return to court unless he was unshackled. On the next day, he returned to the courtroom unshackled. The Virginia Supreme Court found he was not prejudiced by the shackling on the first day because: (1) The defendant was already convicted of the capital offense; (2) he had an enhanced motive to attempt an escape and to injure anyone who stood in his way; (3) he had a previous record of escape, and (4) he cursed the judge.

In *People v. Stankewitz*,[219] the California Supreme Court held the trial court did not err in ordering leg restraints to be placed on defendant during *voir dire* and trial. The trial court ensured the leg restraints were never in view of jurors, and it conducted an evidentiary hearing 14 days after *voir dire* began where the court found that during the defendant's first trial, he tried to escape from the courthouse holding cell, he struck his attorney, and he threatened the trial judge. The trial court also found there were recent reports the defendant expressed plans to escape. After *voir dire* concluded, the trial court conducted a second hearing in which the chief bailiff testified he believed the defendant posed a continuing security risk, citing defendant's prior violence and escape attempts, defendant's statements he would shoot officers if he had a gun, and several recent incidents involving threats and assaults by the defendant against other inmates in state prison.

Because of its potentially prejudicial impact on the jury, the California Supreme Court held trial courts should only allow shackling as a last resort, based on "a showing of manifest need for such restraints."[220] Where used, they "should be as unobtrusive as possible, although as effective as necessary under the circumstances."[221] However, the defendant must object to their use or the claim will be deemed waived on appeal. Finally, the court's "shackling decision cannot be successfully challenged on review except on a showing of a manifest abuse of discretion."[222]

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[219] 793 P.2d 23 (Cal. 1990).
[220] *Id. at 38.*
[221] *Id.*
[222] *Id.* (internal citations omitted).

In addition to potential violence and trial disruption, a state trial court held the potential for escape and violence are sufficient reasons to order the use of physical restraints. In *State v. Atkins*,[223] the state trial court permitted the use of leg irons on the defendant during the sentencing hearing because the defendant attempted escape from his jail cell and had a propensity towards violence evidenced by his guilty plea to the brutal beating of his infant son as well as expert testimony at his prior competency hearing suggested a violent disposition.

The North Carolina Supreme Court held a trial court may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons. In doing so, the court must, under the North Carolina statute: (1) state on the record, out of the presence of the jury, and in the presence of the person to be restrained and his or her counsel, if any, the reasons for the action; (2) give the restrained person an opportunity to object; and, (3) unless the defendant or defense counsel objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt. If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact. In *Atkins*, the trial court, pursuant to the statute, conducted a hearing, outside the presence of the jury, to allow argument by all parties concerning the need for restraint. The trial court ensured that a cloth was draped over defendant's counsel table to completely conceal the leg restraints from view by the jurors, thus limiting any potential prejudice to defendant. (However, the best practice would be to drape both the prosecution and the defense tables.) The defendant always entered the courtroom before the jurors and left the courtroom after the jurors so they could not view his leg irons. The North Carolina Supreme Court found the trial court "took every conceivable precaution to evaluate the need for restraints and to minimize any potential prejudice to defendant."[224]

[223] 505 S.E.2d 97 (N.C. 1998).
[224] *Id.* at 116.

[2.7] Types of Restraints

Many types of restraints are used to restrain capital defendants. Shackles, handcuffs, stun belts and other electronic devices, leg irons, leg braces, "security chairs," and combinations thereof can be concealed from jurors so they are less likely to adversely affect the trial process. Obviously, if visible signs of restraints (such as gagging or visible shackles) are necessary, the trial court should give curative instructions to the jury.

One area of particular concern is a verbally disruptive defendant. Gagging is a restraint that should be weighed against removal from the courtroom with the proceedings provided to the defendant by video feed.[225] Although binding and gagging a defendant may be constitutionally acceptable in certain circumstances, it is likely to have a significant prejudicial impact upon the jury and is generally is less preferable than removing the defendant from the courtroom.[226]

Whatever restraint used, it must be the least obtrusive and least restrictive as essential to the facts involving the particular defendant and the particular case. Remember: the record is the judge's best friend. Make the record and give it eyes. This is not the place to rush the proceedings resulting in reversible error.

[2.8] Use of Restraints for Transferring Defendants and during Videotaped Interviews

To safely transfer or transport a capital murder defendant from a secure facility to the trial court, law enforcement and prison and jail officials use restraints. However, problems may arise when jurors inadvertently witness the defendant in restraints. In *State*

[225] As of the 2020 update, there were numerous cases that discussed removal as preferable to gagging as it is the least prejudicial.
[226] *See Illinois v. Allen,* 90 S.Ct. 1057 (1970) (removal of accused from courtroom and proceeding with trial in his absence until he promised to conduct himself properly was not unconstitutional); *see also, Weldon v. State*, 247 Ga. App. 17, 543 S.E.2d 56 (2000) (trial judge abused his discretion by attempting to control defendant's disruptive behavior by binding and gagging versus less prejudicial alternatives, including removing him from the courtroom until he was willing to be present without disruption).

v. Hankins,[227] the Missouri Supreme Court held the inadvertent viewing of a capital murder defendant in handcuffs and chains on two occasions did not justify a mistrial. In the first incident, the sheriff was transporting the defendant from one courthouse to another prior to trial. As he ascended the steps to the courthouse, the defendant asserted that there were "jurors standing on the steps all the way around when I came through."[228] The appellate court noted the jury had not yet been selected when this occurred. The sheriff then escorted the defendant into the courtroom where there were other people, but the defendant was unsure whether they were (potential) jurors or not. The sheriff immediately removed the restraints.

On the second occasion during lunch on the first day of trial, the sheriff transported the defendant, who was wearing handcuffs, to the sheriff's office located near the entrance to the courthouse. Four or five jurors saw the defendant. The Missouri Supreme Court differentiated this case from one where the defendant was handcuffed during trial. It found that "officers charged with the custody of an accused may take reasonable precautions to maintain that custody."[229] It found that it is a desirable and necessary practice to handcuff prisoners, and "the jury is aware of this."[230] The Missouri Supreme Court found "nothing to indicate that the officers charged with the custody of [the defendant] exceeded their right to take the reasonable necessary precautions for the maintenance of order and the retention of custody during the progress of the trial."[231]

Despite this case, trial judges should take precautions to ensure jurors are not able to view the defendant in restraints. If there is an error and a juror inadvertently witnesses the defendant in restraints, the trial court should provide a curative instruction. Such precautions require preplanning with the judge and security and, when appropriate, consulting each other.

However, some cases present factual scenarios where showing the defendant in restraints is necessary. In *Barber v. State*,[232] the

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[227] 642 S.W.2d 606 (Mo. 1982).
[228] *Id.* at 610.
[229] *Id.*
[230] *Id.* at 609.
[231] *Id.* at 610.
[232] 952 So.2d 393 (Ala. 2005).

state introduced into evidence a videotape taken at the scene of the crime, not the police station. In the video, the defendant is wearing handcuffs, though the videotape is blurry in places, and the handcuffs are visible only part of the time. The Alabama Court of Criminal Appeals held that the handcuffing did not "tend to negate the presumption of innocence or portray the defendant as a dangerous or bad person" because: (1) defense counsel did not object to the handcuffs in the video during trial; (2) defense counsel did not request a cautionary instruction; (3) "jurors would likely infer that handcuffing was simply standard procedure"; (4) the jurors watched the defendant on television rather than in person which "further reduces the potential for prejudice"; (5) the defendant appeared in trial without handcuffs for several days; and (6) the defendant appeared in handcuffs for a relatively brief period.[233]

Conversely, in *Lucas v. State*,[234] the Texas Court of Criminal Appeals found that showing a crime-scene-videotaped confession of the capital defendant in handcuffs was error. While the appellate court agreed that it was "both necessary and practical to handcuff [the defendant] while on the side of a busy roadway," especially since he admitted to heinous and violent past activity, it was error because of the "visual impact of the improper picture of a restrained defendant upon the mind of the jury."[235] Nevertheless, the appellate court found the error to be harmless for a number of reasons. First, the defendant confessed to the actual killing over a month before the videotape was made. Second, the Texas Court of Criminal Appeals could not find any harm in allowing the jury to view the defendant with handcuffs where "the contact occurs simultaneously with the accused's voluntary, detailed descriptive confession of guilt at the scene of the crime."[236] Third, over the strenuous objections of defense counsel at the scene, the defendant "unequivocally made known his intention to disregard those warnings and to further implicate himself in the matter through the medium of videotape."[237] Fourth, the videotape shows a "minimally restrained individual" who was freely confessing to murder.[238]

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[233] *Id.* at 446.
[234] 791 S.W.2d 35 (Tex. Crim. App. 1989).
[235] *Id.* at 56.
[236] *Id.*
[237] *Id.*
[238] *Id.*

Fifth, the defendant appeared without handcuffs during the trial. Sixth, there was overwhelming evidence presented during the penalty phase of the trial.

[2.9] Trial Judge's Curative Instructions

Curative instructions may be needed when restraints are an issue. Such instructions are not a substitute for proper handling of restraints and security issues. The keys are preplanning and making a detailed record with findings. Curative instructions are a tool in giving a fair trial. They are not a substitute for poor planning or to attempt to rectify avoidable error.

In those cases where the jury witnesses the use of restraints, the trial court may correct the problem by giving a curative instruction. In *People v. Arias*,[239] the defendant's outburst during his trial revealed his waist chain and his handcuffs which had been concealed. The court admonished the jury "that you are to consider this case only on the evidence that comes from the witness stand here and make your decision based on that evidence, and not what you observed in the courtroom, the acts or antics of the defendant. You're to ignore these actions in making your decision and base it solely on the evidence that comes from the witness stand."[240]

Likewise, in *Szuchon v. Lehman*,[241] the federal trial court visibly shackled the capital murder defendant after he "grabbed and kicked a state trooper who was leaving the witness stand."[242] The jury witnessed this event and witnessed court security subdue the defendant in front of the jury box. The trial court ordered the defendant shackled to his chair and to the counsel table; however, the court allowed the defendant's left hand to remain unshackled, so he could take notes and assist his counsel. The trial court also did not gag the defendant. The trial court record plainly evidenced that the court considered a number of options besides shackling such as barring the defendant from the courtroom, issuing a contempt citation, and concealing the

[239] 913 P.2d 980 (Cal. 1996).
[240] *Id.* at 1014.
[241] 273 F.3d 299 (3rd Cir. 2001).
[242] *Id.* at 314.

shackles. In rejecting the latter course of action, the trial court stated:

> It's my opinion that a couple of jurors were so frightened last night that it would be more productive for them to know that he is in some fashion shackled to his chair, and it is my belief that the possibilities of the prejudicial effect of knowing that he is unable to leave his chair are far less than the productive, if you will, effect of them knowing that they can pay attention to the evidence without having to worry about the defendant.[243]

The Third Circuit Court of Appeals found no violation of due process stating the jurors' "declarations seem to verify the court's assessment that certain jurors were truly frightened and that shackling would help them to focus on the evidence rather than on [the defendant]."[244]

However, in *Lovell v. State*,[245] the trial court explained to the jury during the sentencing hearing that wrist and ankle shackling was the normal procedure for anyone already convicted of charges of murder and facing a serious sentence. The Maryland Court of Appeals held that instruction does not cure "the error by causing the balance to tip sufficiently away from prejudice and in favor of the state interest in courtroom security to sustain the decision to shackle."[246] The Court found the "instruction reflects the notion that all convicted murderers who face the possibility of a jury-imposed capital sentence are appropriately shackled."[247] It found an "individualized evaluation" is required. The individualized evaluation should consider whether there is a state interest that justifies the prejudice to the offender. Otherwise, trial courts could simply shackle and instruct in all capital sentencing hearings without the need for hearings.

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[243] *Id.* at 314-15.
[244] *Id.* at 315.
[245] 702 A.2d 261 (Md. Ct. App. 1997).
[246] *Id.* at 274.
[247] *Id.*

[2.10] Removal of Disruptive Defendants

The U.S. Supreme Court in *Illinois v. Allen* stated, "it is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country."[248] The trial court should not and cannot tolerate "flagrant disregard" of elementary standards of proper conduct.[249] Accordingly, if a "disruptive, contumacious, stubbornly defiant" defendant confronts the court, appellate courts must give them "sufficient discretion to meet the circumstances of each case."[250]

In *Allen*, the defendant represented himself; however, the court appointed counsel to protect the record as much as possible. During *voir dire*, and again during the prosecution's case in chief, the trial court had to remove the defendant from the proceedings because of his disruptions. Nevertheless, defense counsel remained to represent the defendant. The Seventh Circuit Court of Appeals felt the defendant's Sixth Amendment right to be present at his own trial was "absolute."[251] It held that no matter how unruly or disruptive the defendant's conduct might be, the trial court could never hold that he lost that right so long as he continued to insist upon it as Allen clearly did. Therefore, the Seventh Circuit Court of Appeals concluded a trial judge could never expel a defendant from his own trial. The court concluded the trial judge's ultimate remedy when faced with an obstreperous defendant like Allen who is determined to make his trial impossible is to bind and gag him.

The U.S. Supreme Court disagreed, stating:

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, . . . we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly,

[248] *Illinois v. Allen*, 397 U.S. 337, 343 (1970).
[249] *Id.*
[250] *Id.*
[251] *Id.* at 342.

> disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.[252]

The U.S. Supreme Court found at least "three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."[253]

[2.11] Practice Pointers for Dealing with Disruptive Defendants

- A trial court should use caution when ordering the restraining of a capital defendant during trial. The trial court should review its own statutory authority to assess whether there is a scheme for using restraints. If not, the following may be used as a checklist for doing so.

- A trial judge may order physical restraints upon a defendant or witness when the judge finds the restraint to be reasonably necessary to:
    - Maintain order or prevent disruption;
    - Prevent the defendant's escape; or
    - Provide for the safety of persons.

- Before ordering the restraint of a defendant or witness, the judge should:
    - Hold a hearing outside the presence of the jury and in the presence of the affected person and counsel;
    - Provide an opportunity for objections;
    - Ensure that the hearing is on the record; and
    - Make findings of fact.

[252] *Id.* at 343.
[253] *Id.* at 343-44.

- The judge should consider the following factors in assessing whether a restraint is necessary:
    - The seriousness of the charge(s) against the defendant;
    - The defendant's temperament, character, age, physical attributes, past record;
    - Past escapes or attempted escapes or evidence of a present plan to escape;
    - Threats to harm others or create a disturbance;
    - Self-destructive tendencies;
    - The risk of mob violence or attempted revenge by others;
    - The possibility of rescue by other offenders still at large;
    - The size and mood of the audience;
    - The nature and physical security of the courtroom; and
    - The adequacy and availability of other remedies.

- The judge should instruct the jurors the restraint is not to be considered in weighing the evidence or determining guilt unless there is an objection to the instruction.

[2.12] Disruptive Defendant Checklist

Prepared by: Judge Lee Sinclair
Court of Common Pleas
Stark County, Ohio 44702

The Basic Cases:

Deck v. Missouri, 126 S.Ct. 407 (2005)
Illinois v. Allen, 397 U.S. 337 (1970)
Harrell v. Israel, 672 F.2d 632 (7th Cir. 1982)
State v. Cassano, 96 Ohio St.3d 94 (2002)
People v. Duran, 127 Cal. Rptr. 616 (1976)
Long v. State, 823 S.W.2d 259 (Tex. Crim. App. 1991)
Simms v. State, 127 S.W.3d 924 (Tex. App.-Corpus Christi, 2004) [Stun belt]
State v. Wilson, 406 N.W.2d 442 (Iowa 1987)
State v. Bartnick, 436 N.W.2d 647 (App. Iowa 1988)
United States v. Honken, 541 F.3d 1146 (8th Cir. 2008) [Stun belt]

1. Issue warning on record. Find defendant in contempt.
2. Hold a restraint hearing on the record with defendant present.
3. Specify that decision is judge's decision; not that of security or the prosecutor.
4. Hold hearing on the record: find facts not innuendo. Make detailed findings.
5. Place witnesses under oath.
6. Obtain testimony explaining use and workings of specific restraint.
7. Provide opportunity for defense to object and opportunity to provide evidence.
8. Find “manifest need for restraint” (“extreme need”).
9. Indicate restraint is "least restrictive and least obtrusive" necessary. Discuss why other options are not utilized. Explain details to defendant.
10. Avoid using general policies: make case specific to facts of case and to specific defendant.
11. Give limiting instruction if restraint is visible or if requested.
12. Only use removal or restraints until defendant will comport.
13. Hold hearing outside presence of jury.

As this chapter demonstrates, presiding over a capital case presents case management issues that are unique. Decisions made by the judge hold a magnified significance that doesn’t usually occur in any other type of case. Further, it is the only type of case that requires direct appeal after the case has concluded and that will inevitably cycle through many appeals and reviews. Hopefully, this chapter will assist you in those trial management issues.

PRE-TRIAL MATTERS UNIQUE TO CAPITAL CASES

Hon. C. Darnell Jones
Hon. Daniel J. Crothers

[3.1] Introduction

Early and timely discovery and motions practice is extraordinarily important in capital cases. Jurisdictions vary in their approach in handling some or all pre-trial matters. Some jurisdictions, where the capital caseload is high, assign a special judge to hear initial motions so that the special judge decides many of the critical motions before the trial is set.

For example, motions for discovery and motions to strike or quash aggravating circumstances often require a disposition long before the court tries the case. Jurisdictions with large numbers of capital cases should consider creating a "Homicide Calendar Judge," a "Homicide Motions Judge," or a "General Motions Judge" to decide these motions exclusively or with priority. In jurisdictions where a case is assigned to the same judge from beginning to end, the responsibility can be extremely onerous and often requires significant preparation and advance rulings addressing critical issues.

In capital cases, many pre-trial motions are similar to those in other criminal cases. The usual motions for severance, discovery, continuance, and change of venue will be present. However, capital cases require attorneys to be even more creative and aggressive, and capital case trial judges must be prepared to handle unique motions. This chapter focuses on pre-trial matters which might be expected in capital cases.

The Complexity of a Capital Case. A capital case is extraordinarily complex. Motions may exceed one hundred filings. A huge potential jury venire will be summoned. Exhibits will be voluminous. All of this is fertile ground for committing error. Therefore, absolute attention to detail is imperative. Checklists such as those in this publication should be followed.

Motion logs and exhibit logs are essential. A detailed up-to-date trial notebook containing all the logs and checklists is a lifesaver. Redundancy is a virtue. The trial notebook must be maintained on a current basis with a diary as the case progresses. Detail, details, details are second only to the record, the record, the record.

[3.2] Motion to Strike or Quash Aggravating Circumstances

In *Furman v. Georgia,*[254] the United States Supreme Court held the Eighth Amendment required that the class of defendants eligible for capital punishment must be narrow. States have implemented this directive by either narrowing the definition of capital murder or requiring proof of aggravating circumstances. In the latter circumstance, the defendant will likely move for the disclosure of evidence that is probative of the alleged aggravating circumstances. After the defense receives discovery or is otherwise made aware of the alleged aggravating circumstances, counsel often files a motion challenging the prosecution's ability to prove their existence.

Pennsylvania also addressed pre-trial motions to quash aggravating circumstances. In *Commonwealth v. Buck*,[255] the defendant challenged the trial court's authority to determine the propriety of aggravating circumstances alleged by the Commonwealth in a homicide case. Two principal rulings arose from this case: (1) the Pennsylvania Sentencing Code establishes that a jury must weigh the evidence in support of aggravating and mitigating circumstances, whereas a trial court has no authority to do the same; and (2) a trial court may not interfere with the Commonwealth's pre-trial designation of a murder as a capital case.[256] However, the Pennsylvania Supreme Court explained the courts retain a role in this process:

> A defendant who claims that there is no evidence supporting the notice of aggravating circumstances bears the burden of proving that contention. If the defendant fails to meet this

[254] 408 U.S. 238 (1972).
[255] 709 A.2d 892 (Pa. 1998).
[256] *Id.* at 895.

> burden and evidence exists to create a factual dispute regarding whether the aggravating factors exist, the defendant's motion should be summarily denied as no abuse of discretion by the prosecutor is apparent. However, if the defendant makes a showing that no evidence exists to support the aggravating circumstance alleged, the trial court may require minimal disclosure by the Commonwealth. If no evidence is presented in support of *any* aggravating circumstance, the trial court may rule that the case shall proceed non-capital. This ruling shall be without prejudice to the Commonwealth to file an amended ["Notice of Aggravating Circumstances"] if it subsequently becomes aware of evidence in support of an aggravating factor.[257]

[3.3] Authority to Dismiss Aggravating Circumstances Prior to Trial

Courts have taken several approaches in describing their authority to impose judicial review on the prosecutor's allegations of aggravating circumstances. In *State v. Ogden*[258] the New Mexico Supreme Court held the courts have "the inherent authority" to establish a pre-trial procedure for evaluating aggravating circumstances.[259] The court explained:

> A defendant who has been notified that the State will seek the death penalty may move to dismiss an aggravating circumstance before trial. Pretrial rulings on the support of aggravating circumstances can present questions of fact, law, or mixed fact and law, and this will affect the standard of review. When the applicability of an aggravating circumstance presents a question of law capable of determination without trial (like the peace officer aggravating circumstances in this case), [the court's rule on pre-trial motions] applies and the district court should rule on the

[257] *Id.* at 896-97.
[258] 880 P.2d 845 (N.M. 1994).
[259] *Id.* at 850.

> motion consistent therewith. A motion to dismiss an aggravating circumstance that presents a purely legal question should be granted when the district court finds that the aggravating circumstance does not apply as a matter of law.[260]

Pennsylvania also addressed pre-trial motions to quash aggravating circumstances. In *Commonwealth v. Buck*[261] the defendant challenged trial court's authority to determine the propriety of aggravating circumstances alleged by the Commonwealth in a homicide case. Two principal rulings arose from this case: (1) the Pennsylvania Sentencing Code establishes that a jury must weigh the evidence in support of aggravating and mitigating circumstances, whereas a trial court has no authority to do the same; and (2) a trial court may not interfere with the Commonwealth's pre-trial designation of a murder as a capital case.[262] However, the Pennsylvania Supreme Court explained the courts retain a role in this process:

> A defendant who claims that there is no evidence supporting the notice of aggravating circumstances bears the burden of proving that contention. If the defendant fails to meet this burden and evidence exists to create a factual dispute regarding whether the aggravating factors exist, the defendant's motion should be summarily denied as no abuse of discretion by the prosecutor is apparent. However, if the defendant makes a showing that no evidence exists to support the aggravating circumstance alleged, the trial court may require minimal disclosure by the Commonwealth. If no evidence is presented in support of *any* aggravating circumstance, the trial court may rule that the case shall proceed non-capital. This ruling shall be without prejudice to the Commonwealth to file an amended ["Notice of Aggravating Circumstances"] if it subsequently becomes aware of evidence in support of an aggravating factor.[263]

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[260] *Id.* (footnote omitted).
[261] 709 A.2d 892 (Pa. 1998).
[262] *Id.* at 895.
[263] *Id.* at 896-97.

[3.4] Whether a Hearing is Mandatory for Consideration of a Defendant's Motion Challenging Aggravating Circumstances

In *State v. Wilds*,[264] a defendant filed a motion for a pre-trial hearing to determine whether sufficient evidence supported submitting the question of aggravating circumstances to the jury. The issue presented was "whether the trial court abused its discretion when it denied defendant's request for a pre-trial, [a] so-called *Watson* hearing to determine whether the evidence was sufficient for the case to proceed to trial as a capital case."[265] The defendant argued (1) the trial court's reason for denial of the hearing was "unsustainable;" and (2) the refusal to conduct a hearing resulted in the defendant's trial before a death-qualified jury in violation of his constitutional right to be tried by a fair and impartial jury.[266]

The North Carolina Court of Appeals, in affirming the defendant's conviction and life sentence, held a *Watson* hearing is within the broad discretion of the trial court, and North Carolina courts have uniformly rejected the argument that "death qualifying" a jury deprives a defendant of his constitutional right to a fair trial.[267]

In *State v. Coffin*,[268] the New Mexico Supreme Court held that an aggravating circumstance should be dismissed by the trial court if it presents a question of law capable of determination without trial if it doesn't apply as a matter of law. However, if the aggravating circumstance raises a question of fact or fact and law, the trial court should dismiss the aggravating circumstance only if it finds that there is no probable cause to support the aggravating circumstance.[269]

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[264] 515 S.E.2d 466 (N.C. Ct. App. 1999).
[265] *Id.* at 470; *see also State v. Watson*, 312 S.E.2d 448 (N.C. 1984).
[266] *Id.* at 470-471.
[267] *Id.* at 471.
[268] 991 P.2d 477 (N.M. 1999).
[269] *Id.* at 498 (citations omitted).

[3.5] Inflammatory Photographs

Photographs of a murder victim are not *per se* inadmissible. Rather, admissibility often turns on the manner in which the corpse is displayed. Like most evidentiary questions, the admission of such photographs is a matter "within the sound discretion of the trial judge, and is subject to an abuse of discretion standard of review."[270]

Determining the admissibility of dead body photographs usually requires a three-step analysis.

1. First, a court must determine whether the photograph is relevant.[271]
2. Second, a court must determine whether the photograph is inflammatory. If not, the court may admit it if it is relevant and assists the jury's understanding of the facts. If the photograph is inflammatory, the trial court must decide whether the photograph is of such essential evidentiary value that its need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.[272]
3. Third, the court must undergo a traditional Federal Rule of Evidence 403 analysis: assess whether the probative value outweighs the unfair prejudice. In making this decision, the Florida Supreme Court in *Philmore v. State*[273] "'caution[ed] trial judges to scrutinize such evidence carefully for prejudicial effect, particularly

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[270] *Philmore v. State*, 820 So.2d 919, 931 (Fla. 2002), *cert. denied sub nom. Philmore v. Florida*, 537 U.S. 895 (2002).
[271] *See Custis v. State*, 793 N.E.2d. 1220, 1224 (Ind. Ct. App. 2003), (citing *Kiefer v. State*, 153 N.E.2d. 899, 903 (Ind. 1958) (stating that the relevance of photographs depicting the body of a victim is determined by whether a witness would be permitted to describe the scene photographed)); *Scott v. State*, 297 S.E.2d. 18 (Ga. 1982) (ruling that a photograph accurately depicting the location of the victim's wound is relevant and may be admitted even if the defendant stipulates to the cause of death).
[272] *See Commonwealth v. Spotz*, 756 A.2d 1139 (Pa. 2000), *cert. denied sub nom. Spotz v. Pennsylvania,* 532 U.S. 932 (2001) (stating that prior to admitting photographs of a murder victim (in this case a video of the victim's legs protruding from under a car), the trial court must decide if the photographs are inflammatory and, if so, whether the probative value of the evidence outweighs its potential to impassion jurors).
[273] 820 So.2d 919 (Fla. 2002), *cert. denied sub nom. Philmore v. Florida*, 537 U.S. 895 (2002).

> when less graphic photographs are available to illustrate the same point.'"[274]

The court in *Philmore* addressed inflammatory photographs and stated that where the photographs are relevant, the trial court must determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence."[275]

If an inflammatory photograph is merely cumulative to other evidence, an appellate court will likely not deem it admissible.[276] However, in *State v. Lane*,[277] the Louisiana Supreme Court held that the cumulative nature of photographic evidence does not provide a ground for inadmissibility if it corroborates the testimony on essential matters.[278]

In *State v. M.M.*,[279] the defendant asserted the trial court erred by overruling his objection to color crime scene photographs depicting various parts of his father's and mother's bodies. Defendant claimed the photographs' gruesome nature inflamed the jury and prejudiced him in ways that outweighed their probative value.[280]

The court held that among the photographs, only one was particularly gruesome. It showed the gunshot wound to the face of the defendant's father. The court held that the photograph's probative value was outweighed by the danger of unfair prejudice.[281]

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[274] *Id.* at 931 (citations omitted).
[275] *Id.* at 930-931.
[276] *See Commonwealth v. LeGares*, 709 A.2d 922 (Pa. Super. Ct. 1998), *appeal denied*, 729 A.2d 1127 (Pa. 1998).
[277] 414 So.2d 1223 (La. 1982).
[278] *Id.* at 1227.
[279] 802 So.2d 43 (La. Ct. App. 2001), *writ denied sub nom. by State v. Morris*, 826 So.2d 1121 (La. 2002).
[280] *Id.* at 73.
[281] *Id.* at 74; *see also Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002) (holding that admissibility of photographs is within the sound discretion of the trial court, and an appellate court will not reverse the trial court's decision unless it falls outside the zone of reasonable disagreement); *Salazar v. State*, 38 S.W.3d 141, 151 (Tex. Crim. App. 2001) (appellant claimed that any injury caused by his actions to a two year old girl was the result of his pushing the victim down, once, in the bathtub. The pathologist testified that the victim's injuries were not consistent with appellant's version of the facts, but indicated repeated blows of

The key to photos as well as other gruesome items such as bloody clothing is to make orders well in advance of trial. Monitoring discovery and requiring advance disclosure will prevent error at trial.

[3.6] Other Photographs

Autopsy photographs generally are admissible unless they depict mutilation caused by the autopsy. Even then, photographs might be admissible if the alteration was necessary to fully depict the extent of the injuries in cases when the photographs are highly probative and there is no danger that the jury would attribute the autopsy alteration to the defendant.[282]

In *State v. Maxie*,[283] the Supreme Court of Louisiana considered the interest of the State in presenting the contested evidence and held that the State is entitled to the moral force of its evidence. Thus, "postmortem photographs of murder victims are admissible to prove *corpus delicti*, to corroborate other evidence establishing cause of death, location and placement of wounds, as well as to provide positive identification of the victim."[284]

Similarly, in *People v. Scheid*,[285] the California Supreme Court held that a defendant's offer to stipulate to the fact or manner of the shootings did not negate the photograph's admissibility. Moreover, "[t]he prosecutor 'was not obliged to prove these details solely from the testimony of live witnesses or to accept antiseptic stipulations in lieu of photographic evidence. [T]he jury was entitled to see how the physical details of the scene and the bod[ies] supported the prosecution theory . . .'"[286]

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severe force. At trial, the prosecution introduced photographs of the two-year-old victim's internal organs removed during an autopsy. The prosecution argued that they would show the victim was beaten repeatedly with extreme force and not pushed once as claimed by the defendant. The trial court found that the probative value was not substantially outweighed by danger of unfair prejudice because, while the pictures were graphic, their gruesome nature was lessened by fact that victim's body did not appear in any of the pictures. All of the organs had been removed and placed on a separate tray for the taking of the photograph).

[282] *See Ripkowski v. State*, 61 S.W.3d 378, 392-393 (Tex. Crim. App. 2001), *cert. denied sub nom. Ripkowski v. Texas*, 539 U.S. 916 (2003).

[283] 653 So.2d 526 (La.1995).

[284] *Id.* at 533.

[285] 939 P.2d 748 (Cal. 1997).

[286] *Id.* at 756 (quoting *People v. Pride*, 833 P.2d 643, 671 (Cal. 1992)).

[3.7] "In Life" Photographs

Many states have adopted legislation to bring victims and their rights fully and visibly back into the courtroom. Thus, questions arise in some jurisdictions whether it is permissible to allow a jury to become acquainted with the homicide victim through a display of "in life" photographs.

A split of authority exists on the admissibility of a victim's "in life" photographs. For example, courts in Arkansas, California, Mississippi, New York, Ohio, Oklahoma and Pennsylvania and have held admission of "in life" photographs is erroneous absent another evidentiary basis.[287]

In *Commonwealth v. Rivers*,[288] the Pennsylvania Supreme Court addressed "in life" photographs. The *Rivers* Court held counsel introduced these photographs to engender sympathy and thus were "clearly irrelevant to the central issue at trial, which is the guilt or innocence of the accused."[289] The Court went on to state, "Only where the victim's character or physical abilities are called into question will such evidence be relevant."[290] However, subsequent Pennsylvania decisions focus on the standard relevancy/probative value analysis.[291]

Georgia, North Carolina, North Dakota, Oregon and Washington have held that "in life" victim photographs are either always admissible or that their admissibility is within the discretion of the trial court.[292]

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[287] *See People v. Zapien*, 846 P.2d 704 (Cal. 1993); *People v. Stevens*, 559 N.E.2d 1278 (N.Y. 1990); *Commonwealth v. Rivers*, 644 A.2d 710 (Pa. 1994); *Walker v. State*, 671 So.2d 581 (Miss. 1995); *Parker v. State*, 731 S.W.2d 756 (Ark. 1987); *State v. Roe*, 535 N.E.2d 1351 (Ohio 1989); *Rawlings v. State*, 740 P.2d 153 (Okla. Crim. App. 1987).
[288] 644 A.2d 710 (Pa. 1994).
[289] *Id.* at 716.
[290] *Id.*
[291] *See Commonwealth v. Tharp*, 830 A.2d 519 (Pa. 2003), *cert. denied sub nom. Tharp v. Pennsylvania,* 541 U.S. 1045 (2004) (in prosecution of mother for starvation death of her child, the prosecution's introduction of "in life" photographs and video of child was relevant and admissible).
[292] *See State v. Pirtle*, 904 P.2d 245 (Wash. 1995); *Ledford v. State*, 439 S.E.2d 917 (Ga. 1994); *State v. Goode*, 461 S.E.2d 631 (N.C. 1995); *State v. Ash*, 526 N.W.2d 473 (N.D. 1995); *State v. Williams*, 828 P.2d 1006 (Or. 1992).

In *State v. Williams*,[293] the Oregon Supreme Court referenced a statute that required the trial court to admit a photograph of a homicide victim while alive when offered to show general appearance and condition. The statute declares the photograph relevant and not subject to a balance of prejudice against probative value.[294] The court held photographs of the murder victims while alive were relevant to placing the defendant with victims at scene of murders, and witnesses used the photographs to make out-of-court identifications of women seen with the defendant and co-perpetrator on the day of the murders.[295]

[3.8] Motions for Mental Evaluation and Other State-Funded Experts

Indigent defendants often request funds for a mental evaluation. Reasons for these requests include assessing the defendant's sanity or competence to stand trial, evaluating the defendant's capacities to make voluntary confessions, or assessing whether the defendant could grant permission to perform searches.

In *Atkins v. Virginia,*[296] the U.S. Supreme Court held executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by the Eighth Amendment. In light of this holding, defendants often move the court for appointment of experts and creation or recovery of relevant records in preparation for seeking a pre-trial ruling of the defendant's ineligibility for the death penalty. At a minimum, an evaluation may reveal mitigating factors such as whether the defendant was under the influence of extreme mental or emotional distress at the time of the alleged homicide.

In *Ake v. Oklahoma*,[297] the U.S. Supreme Court held that the U.S. Constitution requires that an indigent defendant receive a state-funded psychiatric evaluation once the defendant has shown that his or her mental state is at issue. In *Ake*, defendant was charged with two counts of capital murder. Prior to the trial, Ake's

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[293] 828 P.2d 1006 (Or. 1992).
[294] Fed. R. Evid. 401, 403; Or. Rev. Stat. § 41.415 (1987).
[295] *Williams,* 828 P.2d at 1013.
[296] 536 U.S. 304 (2002).
[297] 470 U.S. 68 (1985).

counsel indicated that his client wanted to raise an insanity defense and requested that the court appoint a psychiatrist or provide funds for one, since Ake was indigent.[298] The trial court denied the request and convicted Ake of capital murder.

The Oklahoma Court of Criminal Appeals affirmed. The U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment mandates that the State provide a psychiatrist's assistance to an indigent defendant who "has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial."[299] Ake, diagnosed as a paranoid schizophrenic, had been found incompetent to stand trial and returned to competence because of being prescribed an anti-psychotic drug. Therefore, the U.S. Supreme Court concluded Ake made the required preliminary showing. This *Ake* requirement will also be the anchor for any motions filed in the area of mental retardation to satisfy the *Atkins* requirements.

Indigent defendants often request other state-funded professional services, such as substance analysts, ballistics, or private investigators. While courts generally hold that no absolute constitutional right to such state-funded services exists, many jurisdictions recognize a limited or conditional right to such experts.[300]

This limited right is sometimes based on concerns about due process and equal protection under the Fourteenth Amendment, but most jurisdictions grant the request based upon the defendant's right to a fair trial.[301] Regardless of which constitutional right the court relies upon to support its decision, the vast majority of states have held that the decision whether to provide the defendant with such services rests within the sound

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[298] *Id.*
[299] *Id.* at 74.
[300] *See Ake v. Oklahoma*, 470 U.S. 68 (1985); *Ex parte Dobyne*, 672 So.2d 1354 (Ala. 1995); *Gretzler v. Stewart*, 112 F.3d 992 (9th Cir. 1997); *Walker v. State*, 327 S.E.2d 475 (1985); *Hough v. State*, 560 N.E.2d 511 (Ind. 1990); *Williams v. State*, 791 N.E.2d 193 (Ind. 2003); *State v. Hamilton*, 441 So.2d 1192 (La. 1983); *Lanier v. State*, 533 So.2d 473 (Miss. 1988); *Bannister v State*, 726 S.W.2d 821 (Mo. Ct. App. 1987); *Pertgen v. State*, 774 P.2d 429 (Nev. 1989); *State v Gambrell*, 347 S.E.2d 390 (N.C. 1986); *Liles v. State*, 702 P.2d 1025 (Okla. Crim. App. 1985); *Commonwealth. v. Appel*, 689 A.2d 891 (Pa. 1997); *Tuggle v. Commonwealth*, 334 S.E.2d 838 (Va. 1985).
[301] *Id.*

discretion of the trial court.[302] The decision of the trial court usually turns on whether the defendant has demonstrated a need for the service such that a denial of the request would deprive the defendant of a fair trial.[303]

Within the context of state-funded investigators, courts generally have held steadfast relative to the requisite "demonstration of need" element.

The case of *Franklin v. Anderson*[304] contains a thoughtful and thorough analysis of the issue of state-funded investigators. The petitioner argued his conviction and death sentence were void because the trial court refused to appoint an investigator in violation of the Due Process Clause of the Fourteenth Amendment. In that case, Franklin submitted a pre-trial motion stating that he is indigent and requesting that the court appoint "investigative services, experts and any other services as are reasonably necessary to assist . . . ."[305]

Prior to *Franklin*, the court reviewed the rule in *Ake* and *Mason* v. *Mitchell.*[306] In *Mason v. Mitchell*, the Sixth U.S. Circuit Court of Appeals noted that *Ake* was one of a number of cases that stands for the proposition "indigent prisoners are constitutionally entitled to the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners."[307]

The court also reviewed *Caldwell* v. *Mississippi,*[308] where the U.S. Supreme Court, four months after *Ake*, revisited when due process requires the State to pay for expert assistance for an indigent defendant. Mississippi provided expert psychiatric

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[302] *Id.*
[303] *See Davidson v. State*, 558 N.E.2d 1077 (Ind. 1990) (The court denied the defendant's pre-trial and pre-sentence motions for funds to hire experts to assist that defendant in preparing for her defense and to present evidence in mitigation in her capital murder case. The appellate court found no abuse of discretion because the defendant did not show how her case would have benefited from the use of the requested experts. Defendants are not constitutionally entitled at public expense to any and all types of experts they desire to support their cases. The trial court has the discretion to determine whether the experts are needed, and an appellate court will not overturn the decision unless defense counsel can show an abuse of discretion.)
[304] 267 F. Supp. 2d 768 (S.D. Ohio 2003).
[305] *Id.* at 782.
[306] 320 F.3d 604 (6th Cir. 2003).
[307] *Id.* at 615.
[308] 72 U.S. 320 (1985).

assistance to Caldwell at State expense. However, the trial court denied his requests for a criminal investigator, a fingerprint expert, and a ballistics expert. The petitioner challenged the conviction, arguing that there was constitutional infirmity in the trial court's refusal to appoint various experts and investigators to assist him. The U.S. Supreme Court held the motion did not establish the reasonableness for the request and offered a general claim of need.

The trial judge denied defendant's initial motion, and the petitioner renewed his request during a subsequent pre-trial proceeding. The court found that Franklin's oral and written statements were, as in *Caldwell*, "little more than undeveloped assertions that the requested assistance would be beneficial"[309] and did not constitute the preliminary showing required by *Ake*. It also noted that in any criminal prosecution, defense counsel might state that an investigator could be helpful and if such a statement constituted the preliminary showing required in *Ake,* then the Due Process Clause would require the appointment of an investigator to assist every indigent defendant charged with a crime.[310] Since the petitioner failed to make a preliminary showing that he needed the assistance of an investigator, the court declined to grant a certificate of appealability on the claim.[311]

In *Moore v. Kemp*,[312] the Eleventh Circuit U.S. Court of Appeals summarized the case law as follows:

> *Ake* and *Caldwell,* taken together, hold that a defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that

[309] *Id.* at 783.
[310] *Id.*
[311] *Id.*
[312] 809 F.2d 702 (11th Cir.1987) (en banc), *cert. denied,* 481 U.S. 1054 (1987).

> denial of expert assistance would result in a fundamentally unfair trial.[313]

In *Jackson v. State*,[314] the Indiana Court of Appeals held an indigent defendant's request for funds to hire a DNA expert to educate counsel was not specific enough to justify disbursement of public funds. Counsel must provide some indication counsel's education could not be reasonably accomplished by other means. Further, the court held the defendant's request for funds, five days prior to trial, was untimely in light of the defendant's substantial opportunity to make an earlier request. The court also found substantial and cumulative evidence of the defendant's guilt from other evidence. Further, the DNA evidence was not particularly favorable to the State or damaging to the defendant.[315]

However, in *State v. Frank*,[316] the Louisiana Supreme Court determined the trial court abused its discretion in not declaring a capital murder defendant indigent prior to trial. The failure to hold a hearing to determine the need for state-funded psychiatric or psychological expert assistance in order to present mitigating evidence during the penalty phase prejudiced the defendant and required a remand for an evidentiary hearing. The court held that

> [b]y not allowing a hearing on the matter, the trial court did not provide [the appellate court] with adequate information upon which to review the question of whether the defendant was entitled to the expert assistance she requested for the penalty phase of her trial and what prejudice she may have suffered as a result of not obtaining state-funded assistance.[317]

On remand, the trial court ordered a mental examination by an expert of the State's choosing. This ruling was subsequently

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[313] *Id.* at 712.
[314] 758 N.E.2d 1030 (Ind. Ct. App. 2001) (*Jackson* was not a capital case).
[315] *Id.* at 1033-34; *see also Ex Parte Grayson*, 479 So.2d 76 (Ala. 1985) (there existed an alternative means to determine the composition of the substance sought to be analyzed); *Ruffin v. State*, 447 So.2d 113 (Miss. 1984) (the state's analyst did not give testimony harmful to the defendant).
[316] 803 So.2d 1 (La. 2001).
[317] *Id.* at 10.

vacated as "unwarranted" in light of the independent panel appointed by the trial court to examine the defendant.[318]

[3.9] Change of Venue

The Sixth Amendment guarantees the accused the right to a trial by an impartial jury, and the Fourteenth Amendment secures that right to all criminal defendants in state courts. The First Amendment protects the media's role as the people's monitor of the government. Press-enhanced public participation in the criminal trial process has resulted in an increased number of appeals based on claims of unfair trials due to media-created juror bias.

Practical Tips: change of venue. Change of venue motions are fairly common. In practice, they are not frequently granted. However; when granted, they can be extremely disruptive. Advanced planning is essential any time a motion for change of venue is filed. Planning for the possibility of a venue change is far superior than no contingent planning. It is prudent to make inquiries of a court that may be asked to accept the case. Such inquiries should include:

- ✓ Is the prospective court receptive and does it have adequate facilities?
- ✓ Is the new jurisdiction in the same media market which may just invite a second venue problem?
- ✓ Under local law, will the trial judge changing venue need to be appointed to preside in a different forum?
- ✓ Will security staff need to be authorized in a new forum?

A host of logistics should at least have some inquiry and thought. To simply wait until venue is changed invites a host of problems and often extensive delays.

[318] *State v. Frank,* 812 So.2d 620 (La. 2002), *rehearing denied,* 813 So.2d 415 (La. 2002).

[3.10] General Standard

The grant or refusal of a motion to change venue is within the sound discretion of the trial judge.[319] To achieve the change of venue, the moving party must demonstrate that pre-trial publicity was inflammatory and sensational rather than factual and objective, and that such publicity has been so extensive, sustained, and pervasive without sufficient time between publication and trial for the prejudice to dissipate. The trial court should grant the motion where the movant satisfies the court of these factors, and the court finds a substantial likelihood exists that in the absence of a change of venue a fair trial cannot be held or that an impartial panel cannot be selected.

[3.11] General Procedures

Preliminarily, a motion to change venue is most often *premature* prior to *voir dire* of prospective jurors.[320] After *voir dire,* the defense may make a motion for change in venue or venire, and the trial court should grant it only if the moving party can show *actual prejudice* in impaneling the jury.[321]

The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so tainted by knowledge of the crime and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.[322]

Once a defendant raises the partiality of the venire, the trial court must analyze (1) the extent and nature of any pre-trial publicity; and (2) the difficulty encountered in actually selecting a jury.[323] More specifically, the trial court must assess how much

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[319] *See State v. Vaccaro*, 411 So.2d 415 (La 1982); *Commonwealth v. Paolello*, 665 A.2d 439 (Pa. 1995); *State v. Wallace*, 528 S.E.2d 326 (N.C. 2000); *Gregg v. State*, 844 P.2d 867 (Okla. Crim. App. 1992); *State v. Clements*, 334 S.E.2d 600 (W.Va. 1985); *State v. Galloway*, 211 S.E.2d 885 (S.C. 1975).
[320] *People v. Brown*, 387 N.Y.S.2d 318 (1976).
[321] *See Commonwealth v. Rolison*, 374 A.2d 509 (Pa. 1977), *cert. denied sub nom. Rolison v. Pennsylvania*, 434 U.S. 871 (1977).
[322] *Kelley v. State*, 212 So.2d 27 (Fla. 1968); *Manning v. State*, 378 So. 2d 274 (Fla. 1979).
[323] *See Foster v. State*, 778 So.2d 906 (Fla. 2000).

time has elapsed from the release of publicity, the severity of the offense charged, and the size of area from which the venire is drawn.[324]

The Wisconsin Supreme Court articulated the following factors for trial courts to consider:

> The inflammatory nature of the publicity; the degree to which the adverse publicity permeated the area from which the jury panel would be drawn; the timing and specificity of the publicity; the degree of care exercised; the amount of difficulty encountered in selecting the jury; the extent to which the jurors were familiar with the publicity; and the defendant's utilization of the challenges, both peremptory and for cause, available to him on *voir dire*. In addition, the courts have also considered the participation of the state in the adverse publicity as relevant, as well as the severity of the offense charged and the nature of the verdict returned.[325]

It is the defendant's burden to demonstrate that the pre-trial publicity has created such a feeling of prejudice against him or her in the community that he or she would most likely be unable to receive a fair trial.[326] The mere presence of routine pre-trial publicity does not necessarily satisfy this requirement.[327] Courts generally hold that granting or denying a motion for change of venue rests within the sound discretion of the trial court, and an appellate court will only reverse the decision on appeal when an abuse of discretion is clear.[328]

[3.12] Factors Considered in Determining Extent of Pre-trial Publicity

In assessing a motion for change of venue, an appellate court will generally consider the following factors in determining whether the trial court has abused its discretion in granting or denying a motion for change of venue based upon pre-trial publicity:

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[324] *See State v. Longoria*, 343 P.3d 1128 (Kan. 2015).
[325] *See Hoppe v. State*, 246 N.W.2d 122, 125 (Wis. 1976).
[326] *See Sheppard v. Maxwell*, 384 U.S. 333 (1966).
[327] *See State v. Hightower*, 661 A.2d 948 (R.I. 1995).
[328] *See State v. Manning*, 495 S.E.2d 191 (S.C. 1997).

1. Nature and extent of publicity;
2. Degree to which information is attributable to police or prosecution sources;
3. Community atmosphere;
4. Efforts to insulate the jury against and/or diminish impact of publicity;
5. Probable efficacy of a change of venue; and,
6. Length of time between publicity and trial.[329]

However, even if one of the elements exist, a change of venue will not be required where sufficient time has elapsed for the prejudice to dissipate between the publication and the trial.[330] A change of venue becomes necessary when a fair and impartial jury cannot be selected. This standard is equally applicable where the trial court is to impanel the jury solely for the penalty phase of a capital case.[331]

[3.13] High Profile Case Publicity

Once a defendant raises the partiality of the venire, the trial court must analyze (1) the extent and nature of any pre-trial publicity; and (2) the difficulty encountered in actually selecting a jury.

In a New Jersey case that led to the creation of "Megan's Law," defendant moved for a change of venue because of extensive publicity surrounding his case.[332] In his motion, he cited 437 separate articles from the *Trentonian* and the *Trenton Times,* Mercer County, New Jersey's two larger circulation newspapers.[333] He claimed those articles prevented him from receiving a fair trial in Mercer County. The court characterized the situation as follows:

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[329] *See Commonwealth v. Bradfield*, 508 A.2d 568 (Pa. Super. Ct. 1986), *appeal denied*, 520 A.2d 1384 (Pa. 1987); *see also State v. Yager*, 85 P.3d 656 (Idaho 2004); *Eads v. State*, 577 N.E.2d 584 (Ind. 1991); *Commonwealth v. Keeler*, 448 A.2d 1064 (Pa. Super. Ct. 1982).

[330] *See Commonwealth v. Casper*, 392 A.2d 287 (Pa. 1978).
[331] *See People v. Alfaro*, 163 P.3d 118 (Cal. 2007).
[332] *State v. Timmendequas*, 737 A.2d 55 (N.J. 1999), *subsequent appeal,* 773 A.2d 18 (N.J. 2001), *cert. denied sub nom. Timmendequas v. New Jersey,* 534 U.S. 858 (2001).
[333] *Id.* at 73.

> The pre-trial publicity in this case was constant, prolonged, and horrendous. The Trentonian, a Mercer County newspaper, referred to defendant as "scum," a "predator," a "piece of trash," an "animal," a "pervert," a "dirtball," a "sicko," a "monster," and a "bottom-feeder." The articles often assumed defendant's guilt and disclosed defendant's prior sex offense convictions, including the fact that he had refused psychological treatment while serving a previous sentence. The Trentonian frequently stressed that defendant had confessed to the crime, and many articles called for his execution. The case also received nationwide publicity as a result of the activity associated with Megan's Law.[334]

The New Jersey Supreme Court ruled that the trial court correctly granted a change of venue due to the media coverage. The trial court analyzed the motion for change of venue based on five factors contained in *State v. Koedatich*.[335] The five factors are:

1. The extent of the coverage was significant;
2. The nature and gravity of the offense cannot be more serious than in a death penalty case;
3. The size of the Mercer County community and its potential exposure to media coverage regarding the case were serious concerns;
4. The respective standing of the deceased and the accused (Megan Kanka had become a national figure after her death);
5. Although there had not yet been crowds or major protests in the courtroom, that did not mean that the community . . . and surrounding municipalities did not feel and harbor a silent rage against the defendant.[336]

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[334] *Id.*
[335] 548 A.2d 939 (1988), *cert. denied*, 488 U.S. 1017 (1989).
[336] *Timmendequas,*737 A.2d at 73-74.

[3.14] Self-Represented Defendants

In 1975, the U.S. Supreme Court recognized a criminal defendant's constitutional right to defend him or herself.[337] Fortunately, the incidence of self-represented defendants in capital cases is rare. Because execution is the ultimate penalty, a self-represented capital defendant creates the ultimate challenge for the trial judge.

The evolution of capital case jurisprudence demonstrates that the law takes extra precautions to ensure that trial courts impose the death penalty only on those defendants guilty of the most heinous forms of the crime of murder. Unschooled in the legal principles that could bolster his or her defense, however, the self-represented capital defendant seems to face a greater risk of conviction. Thus, courts have found themselves faced with the difficult task of determining when, if ever, the State's interest in promoting reliability in capital cases outweighs the defendant's interest in conducting his or her own defense.

Self-represented defendants always require extraordinary protocols, and presiding over a self-represented capital defendant's trial necessitates the pre-establishment, implementation, and publication of those protocols to all who will be present during the trial. The court should consider what the defendant will be allowed to say, how the defendant will be allowed to act, and how to deal with the defendant's lack of understanding of the judge's rulings. As an example: Will the prosecution and the defendant be permitted to approach witnesses? Unless the defendant has provided just cause, the rules should apply to both the prosecution and the defense. The court must also instruct the courtroom staff and counsel as to how they should interact with the self-represented defendant.

The court also should ensure that two important steps are taken. First, the defendant should sign a written waiver. Second, the court should conduct a detailed hearing on the record informing the defendant of the rights he is waiving by proceeding *pro se*. The issue of competency to stand trial and competency to waive counsel must be considered. These are two related, but

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[337] *See Faretta v. California*, 422 U.S. 806 (1975).

separate, concepts that need to be resolved. When any doubt as to competency exists, order evaluations. The judge needs to remember the record, the record, the record. There is no such thing as a quick or abbreviated self-representation hearing.

[3.15] Overriding Principles for Self-Representation

The following fundamental principles should be considered when ruling on a defendants' request to represent themselves:

1. The right to self-representation must be afforded to all defendants, *even in capital cases*.[338]
2. The defendant's desire to represent him or herself must be clear and unequivocal.[339]
3. The appropriate criteria for a trial judge to consider are the defendant's reasons for the self-representation request, the quality of the counsel representing the party, and the defendant's prior proclivity to substitute counsel.[340]
4. A valid waiver of the right to counsel must be made by the defendant. The waiver should appear from the record to be made knowingly and intelligently with a full understanding of the consequences.[341] (The extent of the required record is more fully discussed in section 3.16 below.)
5. When any doubt exists as to competency, order evaluations and make the record.
6. The U.S. Supreme Court permits states to insist upon representation by counsel for those who are competent enough to stand trial but who still suffer from severe mental illness to the point that they are not competent to conduct trial proceedings by themselves. Judges may take a realistic account of a particular defendant's mental capacities by asking whether the defendant who

[338] *See Commonwealth v. Davis*, 388 A.2d 324 (Pa. 1978).
[339] *See U.S. v. McKinley*, 58 F.3d 1475 (10th Cir. 1995).
[340] *See United States v. Matsushita*, 794 F.2d 46, 51 (2d Cir. 1986); *States v. Matsushita*, 794 F.2d 46, 51 (2d Cir. 1986).
[341] *See Commonwealth v. Payson*, 723 A.2d 695 (Pa. Super. Ct. 1999); *Faretta v. California*, 422 U.S. 806 (1975).

seeks to conduct his own defense at trial is mentally competent to do so.[342]

7. After a trial has commenced, the decision whether to grant a defendant's request to represent himself is within the discretion of the trial court.[343]
8. The trial court should appoint standby counsel where permitted. Some state courts have taken the position that standby counsel is preferred in every case where a defendant represents him or herself. Standby counsel attends all proceedings and is available to the defendant for consultation and advice.[344] Standby counsel should be qualified to handle a capital case.
9. Most jurisdictions agree the trial court is under no duty to advise a criminal defendant of his or her constitutional right to self-representation.[345]

[3.16] Record Required for Waiver of Right to Counsel

The majority view, held by seven circuits, maintains that although a colloquy on the record is always preferable, the trial judge may determine the "sufficiency of the waiver from the record as a whole rather than from a formalistic, deliberate, and searching inquiry."[346] By giving the trial judge broad discretion to determine waiver, these circuits allow for a more fact-specific, case-by-case analysis of a defendant's decision to proceed without counsel. A court may, however, fail to inquire deeply enough into the defendant's decision to represent him- or herself.

The Third, Tenth, and D.C. Circuits require the trial judge to

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[342] *See Indiana v. Edwards*, 128 S.Ct. 2379 (2008).
[343] *See Robards v. Rees*, 789 F.2d 379, 384 (6th Cir. 1996)
[344] *See Sherwood v. State*, 717 N.E.2d 131 (Ind. 1999) (listing the factors to consider when a defendant requests to change from self-representation to representation by standby counsel).
[345] *See Hopkins v. Hopper*, 215 S.E.2d 241(Ga. 1975); *Williams v. State*, 252 S.W.3d 353 (Tex. Crim. App. 2008).
[346] *U.S. v. Gallop*, 838 F.2d 105, 110 (4th Cir. 1988), *cert. denied,* 487 U.S. 1211 (1988); *see also Gilbert v. Lockhart*, 930 F.2d 1356, 1358-59 (8th Cir. 1991); *Strozier v. Newsome*, 926 F.2d 1100, 1104-05 (11th Cir. 1991), *cert. denied,* 502 U.S. 930 (1991); *U.S. v. Bell*, 901 F.2d 574, 576-77 (7th Cir. 1990); *Wiggins v. Procunier*, 753 F.2d 1318, 1320-21 (5th Cir. 1985); *U.S. v. Hafen*, 726 F.2d 21, 24-26 (1st Cir. 1984), *cert. denied,* 466 U.S. 962 (1984); *U.S. v. Kimmel*, 672 F.2d 720, 721-22 (9th Cir. 1982).

record a "searching inquiry sufficient to satisfy him [or her] that the defendant's waiver was understanding and voluntary."[347] Similarly, the Second Circuit advocates a "recorded colloquy" between the court and the defendant in which "the accused is informed of his right to an attorney, his right to self-representation, and the decided advantages of competent legal representation."[348] These standards create a record of the trial judge's inquiry into the defendant's waiver of counsel, which can simplify appeals of waiver.

The only safe action is a full hearing on the record. Self-representation will be a pivotal issue in the appellate process. The record needs to be complete.

Practical Tips: Self- Representation. During the self-representation hearing, the judge should use the sample questions included in this publication. These may be modified but this is not a time to skimp. The questions serve two important components of a complete record. First, they cover the needed waiver requirements. Second, the dialogue provides evidence to either show competency to stand trial and to be self-represented, or to raise a red flag as to competency. This is one place where an ongoing dialogue is the best practice to make the record complete. Remember, when appropriate, the record may need to be made complete, by verbally indicating gestures or other actions made by the defendant. Any waiver should also be in writing.

[3.17] Rejection of a Request for Self-Representation

In *State v. Vrabel*,[349] the trial court rejected the defendant's request to represent himself. The Ohio Supreme Court stated:

> We have held that if a trial court denies the right of self-representation when properly invoked, the denial is per se reversible error. In our view,

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[347] *U.S. v. Welty*, 674 F.2d 185, 189 (3d Cir. 1982); *see also U.S. v. Padilla*, 819 F.2d 952, 956-57 (10th Cir. 1987); *U.S. v. Bailey*, 675 F.2d 1292, 1300-02 (D.C. Cir. 1982).
[348] *U.S. v. Tompkins*, 623 F.2d 824, 828 (2d Cir. 1980).
[349] 790 N.E.2d 303 (Ohio 2003) (citations omitted).

> however, the right of self-representation here was not properly invoked.
> In the recent case of *State v. Cassano,*[350] we reasoned that the defendant's request to represent himself was untimely since it was made only three days before the trial was to begin.
> Other courts, as noted in *Cassano,* have also found that invocation of the right of self-representation can be disallowed where such a request is untimely.[351]

In making its decision that appellant's request to represent himself on the day the state would present evidence was untimely,[352] the Court noted that the Sixth Circuit upheld the Kentucky Supreme Court's denial of a defendant's motion for self-representation as untimely where the motion was made on the day of trial after the clerk had called the roll of jurors[353] and the Minnesota Supreme Court more recent finding that a trial begins at the commencement of *voir dire* and that the trial court has discretion about whether to grant a motion for self-representation at that point in the trial.[354]

[3.18] Protocols for Self-Representation

After the court determines a defendant's waiving the right to counsel is made voluntarily, knowingly, and intelligently, the trial court faces certain logistical difficulties. Serious consideration should be given to the following issues:

1. The jailed defendant may need someone to coordinate the appearance of his or her witnesses. The court will need to consider providing the defendant with someone to prepare and file the subpoenas, call witnesses, and answer any questions about these and other arrangements.
2. A defendant handling weapons during trial will likely create concerns; however, different rules for the defendant and the prosecutor would create a problem of

[350] 772 N.E.2d 81 (Ohio 2002).
[351] *Id.* at 314 (citations omitted).
[352] *Id.*
[353] *See Robards v. Rees*, 789 F.2d 379 (6th Cir. 1986).
[354] *See State v. Christian*, 657 N.W.2d 186 (Minn. 2003).

appearances. Consider imposing the requirement that a sheriff's deputy handle all weapons.

3. Also cause for concern is a defendant potentially coming into close contact with witnesses and jury members. Consider partitioning the courtroom to create an area within which the prosecutor and defendant can operate that does not permit the defendant and counsel close contact with witnesses and the jury. Use the courtroom deputy to hand exhibits to witnesses from both parties. Note, these arrangements may require that a larger than normal number of deputies or court personnel be present.
4. Depending on the courtroom's configuration, special arrangements for sidebar conferences may be required. If necessary, the jury may need to be removed for sidebar conferences.
5. How much latitude will the judge give the defendant to "lead" direct examination? Will the judge act as a guardian against the prosecutor who takes advantage of the defendant's lack of knowledge of the rules of evidence? A defendant has no right to standby counsel, but one should always be appointed to deal with these issues. Standby counsel should be appropriately qualified, must attend all proceedings, and be available to the defendant for consultation and advice.
6. How will the defendant's own testimony be given? What if a defendant does not testify and, instead, uses the closing argument as an opportunity to do so without cross-examination? Will the judge allow the defendant to pick up exhibits and demonstrate, as the prosecutor is able to do? Special attention must be given to prohibit anything that may be used as a weapon. This includes hard pens and pencils.

This chapter identifies some of the unique pre-trial issues in capital cases. It is meant to guide you through areas requiring special attention. As always, be sure to consult your local statutes, case law, and rules to ensure you are properly handling these issues in your jurisdiction according to applicable law.

MEDIA AND THE COURTS

Hon. Cynthia Stevens Kent (ret.)
Hon. Sharen Wilson
Katheryn Yetter, J.D.

[4.1] Introduction

The trial judge is directly and personally responsible for maintaining the dignity and decorum of the courtroom proceedings. The media's interests do not involve issues of fair trial and due process. Rather, the media's interests involve issues of public information, readership or viewership, and financial benefits from coverage of a particular trial. Further, the attorney's interest in media coverage should be how media coverage might affect the resolution of his or her client's case and how he or she can appropriately deal with a capital case so as to protect his or her client and the integrity of our system of justice. The trial judge must be actively involved in media management to ensure the constitutionally protected rights of the defendant to a fair trial and the societal right to justice in a properly conducted trial.

Much of the legal focus on the First Amendment versus the Sixth Amendment battle has been in the criminal law field. Judges can begin their preparation for the capital trial by studying not only the case law, but also the guidelines from the state court. Development of a trial court checklist for media-intense cases can also assist the trial judge assigned to preside. For a comprehensive set of checklists from pre-planning through post-trial, visit the website Managing High-Profile Cases for the 21st Century.[355]

[355] Managing High-Profile Cases for the 21st Century, *What should the judge presiding over the case do?,* https://www.ncsc.org/Microsites/High-Profile-Cases/Home/High-Profile-Case-Team/Trial-Judge.aspx (last visited Feb. 3, 2020).

[4.1.1] The Decorum Order: An Essential Tool

The trial court should never enter a "gag order." The very sound of the word raises an objection. However, many courts now look to appropriate restrictive and protective orders to protect a case from unfair pre-trial publicity, inappropriate comments by counsel regarding pending litigation, access and conduct of the press, misconduct of spectators, and a host of other issues. These orders are termed decorum orders. The use of well-drafted, restrictive, and protective orders will set the tone of the trial. The decorum order is essential and invaluable. Attorneys and the public will sense that the judge is in control of the proceedings and is focused on providing the proper environment for a fair trial. Decorum orders can control every aspect of the trial to foster fairness, efficiency, a lack of error, and promoting justice.

The court should consider promptly issuing a decorum order to prevent counsel, parties, and potential witnesses from adversely influencing the jury pool or impeding the due and proper administration of justice. This order should be issued timely, with copies served on counsel, the parties, and witnesses, and amended as needed. The goal of the decorum order is to let all participants know, in advance, the rules of the proceeding. This includes the defendant, the prosecution, spectators, and the press.

By setting out the framework in advance, less problems will be encountered. Violations are handled quickly and decisively. Copies should also be available for the media. A sample restrictive and protective order is contained in Appendix 4-1. The decorum order can be used for an endless variety of issues including seating in the courtroom, ingress and egress while court is in session, the use of a single pool camera, designating a media room, counsel not publicly discussing the case, and a host of other issues.

[4.1.2] Case Law Related to Restraint

In *Nebraska Press Ass'n v. Stuart,*[356] the U.S. Supreme Court held that the state court's restraining order prohibiting the media from reporting accounts of the case was in violation of the First Amendment. These prior restraint orders are normally found to be in violation of the Constitution and should not be entered.

However, the court is permitted to enter appropriate protective orders controlling the dissemination of information from attorneys, parties, witnesses, court staff, and law enforcement agencies where the orders are necessary and appropriate for due process protection of rights. The American Bar Association Model Rules of Professional Conduct require lawyers to respect the fairness of the proceedings by not litigating in the press.[357] The decorum order is designed to protect the integrity and fairness of the proceedings.

The U.S. Supreme Court has held that the media has the same right of access to criminal trials as the public and that absent an overriding interest articulated in a finding, the trial of a criminal case must be open to the public.[358] Therefore, any restrictive order must be based on specific findings and articulate the overriding interest that made the basis of the restrictions. The decorum order does not restrict access to the press; it simply provides the rules for orderly access.

[4.2] Statutes and Rules for Media Issues

Each state has some provision of law or rule which gives some guidelines for media management. In fact, the court or state judicial department may have a Public Information Officer (PIO) who should be informed when there is a potential for a high-profile case. Find out what your state law requires, prohibits, or leaves to your discretion regarding the media management of a case, and, if you have one, be sure to inform your PIO about the case.

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[356] 427 U.S. 539 (1976).
[357] *See* Model Rules of Prof'l Conduct R. 3.6 (2019).
[358] *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

[4.2.1] Court Proceedings Are Open to the Public

The overwhelming case law provides that court proceedings are public and cannot be closed. As a rule, all court proceedings should be held in open court and on the record. That should be the mindset: everything in open court and on the record. The exceptions are rare and there are very few cases where closing court proceedings has been allowed.

There are some situations where statute or case law allows for the court proceedings to be closed. Examples of proceedings which may be closed to the public include certain juvenile proceedings and mental health commitment hearings. Whether or not to close criminal proceedings should be carefully considered in light of the requirements for public trial. Criminal cases generally protect the right to public and open proceedings. If any portion of a criminal hearing is closed, the judge should make extensive findings and have truly extenuating circumstances before closing the proceedings. Closing the courtroom should be an extremely rare circumstance and then only after making an extensive court record.

A four-part test is utilized for determining whether the right to a public trial has been violated: (1) the party seeking to close the hearing must advance an overriding interest which is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the court must consider reasonable alternatives; and (4) the court must make findings adequate to support its action.[359]

In *Globe Newspaper Co. v. Superior Court for Norfolk County*,[360] the U.S. Supreme Court held that the protection of witnesses from extreme embarrassment or intimidation that would traumatize them or render them unable to testify is an overriding state interest sufficient to justify partial or complete exclusion of the press or public.[361] No state's interest, however compelling, can sustain the exclusion of press and public from part of a trial, absent findings of necessity articulated on the record.[362] Before

[359] *See Johnson v. State*, 137 S.W.3d 777 (Tex. App. 2004).
[360] 457 U.S. 596 (1982).
[361] *Id.* at 606.
[362] *Id.*

closing a trial, the judge should state on the record his or her reasons for doing so to inform the public and enable the appellate court an opportunity to review the adequacy of the reasons.[363]

[4.2.2] Cameras in the Courtroom

While traditionally the American justice system has been open to the public, fewer individuals attend trials in favor of receiving information about trials through the media. If a court, on its own motion or the motion of a party, or the media is considering allowing broadcast of the court proceedings, a hearing on such decision might be considered even in a criminal case. The court can certainly consider evidence and argument from the parties on how the broadcast of the proceedings may affect the rights of the parties or the ability of the court to provide a forum for the due and proper administration of justice in the case.

The court should carefully consider the requests and objections which may be raised by the parties, witnesses, media representatives, other court personnel, and other individuals as to the inclusion or exclusion of broadcasting from the courtroom. Some factors to consider carefully before deciding on a motion to broadcast the proceeding include:

- ✓ Would the broadcasting interfere with the ability of the court to receive honest and complete testimony from any witness?
- ✓ The unfair public criticism of a witness or party.
- ✓ The potential for tampering with the jury or the jury pool.

Many states have specific rules on broadcast media to guide the trial judge in determining whether the proceedings will be subject to broadcast or to photographers. When issues develop hold a hearing and make the record.

The trial judge oversees the courtroom and determines the extent of courtroom access to cameras and recording devices. However, the law dictates public trials. Even if a state does not

[363] *See* Rovinsky v. McKaskle, 722 F.2d 197, 200 (5th Cir.1984).

allow cameras in the courtroom, there will still be media considerations in a capital case. In high profile cases, such as capital cases, the media's demands for access may be intense and the trial judge should understand the options, benefits, and pitfalls of media and capital case management. Visit the Radio-Television News Directors Association's website to find a state-by-state guide on use of cameras in the courtroom. [364]

In 1935, a judge allowed still photography in the courtroom for the famous Lindbergh Baby Kidnapping Trial.[365] There were about 700 reporters and 132 photographers in the courtroom during the trial. Although the media had agreed wait until after the trial, they published and showed newsreels during the trial.

After this trial, the American Bar Association adopted Canon 35 of the Code of Judicial Conduct which made it unethical for a judge to allow broadcasting or still photography of courtroom proceedings.[366] The vast majority of state courts now allow some form of cameras in the courtroom during proceedings. As of publication, Federal Courts still prohibit cameras.

One of the most practical ways to handle cameras is to use a single pool camera. Per agreement between the press organizations, one will provide this camera and the footage and any photos will be shared among all participating media. This procedure takes some planning but in practice it works. The proceedings are minimally disturbed with a single camera, the media get instant and equal access, and this procedure can be easily implemented with modern technology.

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[364] Radio Television Digital News Association, Freedom of Information: Cameras in the Court: A State-By-State Guide (Current as of Summer 2012). https://www.rtdna.org/article/cameras_in_the_court_a_state_by_state_guide_updated (last accessed Feb. 3, 2020).
[365] *State v. Hauptmann*, 180 A. 809 (N.J. 1935).
[366] The text of A.B.A. Canon 35 of the Model Code of Judicial Conduct is as follows: "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of such proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted." (A.B.A. 1937, pgs. 1134-1135).
[366] *See Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493 (Iowa, 1976); *State, ex rel. New Mexico Press Ass'n v. Kaufman*,648 P.2d 300 (N.M. 1982).

It is not recommended that courts prohibit electronic devices from the courtroom. However, courts should describe parameters, such as keeping devices in silent mode and using devices for note taking and transmitting messages. Judges have a responsibility to ensure that disruption is kept to a minimum and that, in criminal cases, a defendant's right to a fair trial is protected. Court decorum orders are an excellent mechanism to balance these interests.

One helpful means is to set up a media room where the proceedings are streamed live. Such a room permits the media to have access to their computers without disturbing the proceedings. It also allows the media to come in and out without disturbing the trial.

[4.2.3] Restricting Access to Jurors and Juror Information

The courts have held that the unwarranted prior restraint on freedom of the press violates the First Amendment even when there existed a threat of harassment to the jurors if their names were disclosed during the trial.[367] The courts have stated that where the prohibition of the release of jurors' names is in violation of free press right and where the jury list was a public record, the prior restraint on the publication of the jury list was illegal.[368]

However, there is case law which supports a judge's careful exercise of discretion to forbid news media from publishing the names and addresses of jurors in criminal cases. The decisions in *Nebraska Press Ass'n v. Stuart* and *Nixon v. Warner Communications, Inc.* provide guidance in entry of restrictive orders dealing with the names and addresses of jurors.[369] The U.S. Supreme Court set out the following determinations to be made by the trial court:

- ✓ The nature and extent of pretrial news coverage;

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[367] *See Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493 (Iowa, 1976); *State, ex rel. New Mexico Press Ass'n v. Kaufman*,648 P.2d 300 (N.M. 1982).
[368] *Id.*
[369] *See Nebraska Press Ass'n v. Stuart* 427 U.S. 539 (1976); *Nixon v. Warner Communications*, Inc 435 U.S. 589 (1977).

- ✓ Whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and
- ✓ How effectively a restraining order would operate to prevent the threatened danger.[370]

Many states have laws which specifically provide for the confidentiality of juror information. Strict protection of this right should be provided by the courts.

Judges should consider the issuance of appropriate orders regarding the photographing of jurors both in and out of the courtroom. If appropriate, jurors should report to a discrete location and then be transported by security to a secure entrance at the courthouse.

[4.2.4] Discharge Contact with and Instructions to Capital Jurors

Most federal courts have local rules which severely limit, if not prohibit, post-verdict contact with jurors. Before an attorney may contact a juror, counsel must file a motion with the court, show good cause, and obtain specific permission for the contact. Such permission is seldom granted. The historical purpose of these rules is to prevent the impeachment of jury verdicts and the harassment and manipulation of jurors to second guess their jury decisions. Even where there is no local rule against contact with jurors, the appellate courts have restricted such contact by counsel. The American Bar Association has also provided in its Code of Professional Conduct that a lawyer should not ask questions of or comment to a juror which might influence future jury service.[371]

The trial judge may provide the jury with discharge instructions. Variations on these instructions assist the court in protecting the jury from undue press attention or adverse public criticism. The jury can be instructed that they are free to talk to anyone they want to about the case but can also refuse to talk about the case and their verdict. Jurors should be advised that if the jurors report any threat or other security concern, the sheriff's office will assist the jurors and their families in maintaining their privacy

[370] *Stuart*, 427 U.S at 562.
[371] *Model Rules of Prof'l Conduct* R. 3.5 (2009).

and peace free from outside threat, harassment, or intimidation. An example of discharge instructions is located at Appendix 4.5.

[4.3] Practical Applications in a Capital Case

A capital case will attract interest at the time of the alleged incident, the filing of the case, pre-trial hearings and the trial. Normally, pre-trial hearings will not attract significant media interest unless one of the parties or attorneys are improperly fanning the fire of media interest. However, capital cases are different, and every hearing will generate some type of media comment or focus, particularly in smaller counties. Because of the unique attention of the media to capital cases, the trial court should carefully manage the timing of pre-trial hearings. The trial court should enter appropriate pre-trial orders and discuss with counsel the need to limit the rhetoric at pre-trial hearings which could unduly affect the potential jury pool.

A cautious trial court will enter a detailed pre-trial and trial management order with specific deadlines for discovery, hearings, jury selection, and trial. A carefully crafted decorum order is essential. Some of the court's rulings can be carried until after the jury is selected to limit the effect of the publicity upon the jury pool. Once the jury is selected and placed under the court's instructions or sequestered, then the court can issue certain rulings which might generate additional publicity, or which might contain prejudicial information.

The trial court should utilize its sanction authority if counsel attempts to try their case in the media or unduly prejudice the jury pool by filing pre-trial motions which try the case in the pleadings. A hearing on a pre- trial matter can be set so that it does not hit the prime-time media market or on the highest distribution day.

At the first hint that a case will be the focus of exceptional media attention, the trial judge should take appropriate steps to prepare the court staff to deal with this added complexity. Development of protocols for dealing with a capital case should be addressed before the chaos that may erupt with a capital

case. Once the case hits the press, the swirl of media attention may interfere with preparation of a capital case management plan by the court.

The trial court should promptly issue pretrial orders, court decorum orders, orders on conduct of counsel, and such other security or media orders necessary to focus counsel, the parties, and the witnesses, on organization of the case for trial in a courtroom and not in the press. The entry of such orders and limitations on the number of pre-trial hearings and motions heard by the court may help protect the jury pool from damaging and prejudicial pretrial publicity. The trial court should stand ready to enforce its orders through appropriate sanctions against the witnesses, parties, and counsel who seek to improperly influence the outcome of a case through the press.

[4.3.2] Public Information Officer (PIO)

As mentioned earlier, the court, or the state's judicial department, may have a Public Information Officer (PIO) to assist the media with obtaining accurate information regarding state law and procedural matters in the case. The PIO is not allowed to give opinions about the merits or demerits of the case. This person's role is to make sure non-lawyer media representatives receive accurate information.

Many jurisdictions are not large enough to have a designated PIO. In a high-profile case, it is advisable that the court designate, by order, a particular court staff member to serve as the PIO. The order should direct the responsibilities and duties of the appointed PIO. In some courts, the appointed PIO will be the court administrator. The goal is a central, single point of contact for the media, therefore, a detailed order is a best practice.

During the pre-trial hearings, the PIO can moderate any press briefings and serve as a contact for information regarding case setting and court orders. During the trial, the PIO may hold daily press briefings, obtain public information for the press, and serve as a liaison to the press for public information about the case from the court and clerk's office.

A benefit of looping in the PIO is that he or she can become an effective presence in obtaining media compliance with the court's orders in the case. The eyes and ears in the press room allow the court to problem solve before the problem becomes serious enough to influence the trial.

The PIO should develop an open dialogue with the media to problem solve and yet maintain compliance with the court's orders. This will allow the media to obtain information and the court to maintain the proper dignity and decorum for judicial decision making. If there is no PIO available, it is important to determine who within the court has the expertise and authority to successfully serve as the court's representative to the media.

[4.3.2] Your Media Team

Effective media management in a high-profile capital case requires a broad base of skills and extensive preparation. A judge working alone will not be able to manage all the administrative requirements while still having the time and focus to carry out the adjudicative functions that the case demands. Having a team of professionals can help in the planning and day-to-day administration of the media.

The judge should appoint high-profile team members with extensive expertise in court management, media relations, and court security. These three areas will be essential in all high-profile cases. However, it may be necessary or beneficial to additionally appoint members of the court staff for key trial-support functions such as jury operations, information technology support, court reporters, and court interpreters. Depending on the nature of the high-profile case, the insights and efforts of these additional members may be very beneficial to the high-profile case team.

The judge should be actively involved in planning for the high-profile case, but once the details have been established, the actual implementation of the plans should be delegated to the membership of the high-profile case team. For more assistance with assembling and overseeing the team, see Managing High-

Profile Cases for the 21st Century.[372] It is essential that the judge be briefed and ultimately in command of the case. The buck still ultimately stops with the judge!

[4.4] Effectively Communicating and Working with the Media

Both journalists and judges have unique, important roles to play. When each respects and understands the other's role, the public benefits. Sometimes you want the media to communicate your message, not just cover the trial. Your message is the good things you are doing or the goals you are trying to accomplish. Sometimes the media wants you to give them a story. Whatever you do, don't let the media overwhelm you—it provides you the opportunity to broadcast your message. We are all afraid of getting bad press. Use your reputation and your relationship with reporters, as well as your skill in the mechanics of media, to encourage them to cover your story the way you want it covered.

[4.4.1] When the Media Calls

Whenever a call is received from any media person, have your staff get answers to the following questions:

- ✓ Caller's name?
- ✓ Name of the media organization?
- ✓ Is the judge familiar with caller?
- ✓ Specific topics you want to address?
- ✓ When do you need a response by?
- ✓ Phone number?

Media Management Order

A well written and edited media management order is essential to handle the press of a capital case. This order should be developed with input from the media expert, attorneys, sheriff, facility plant manager at the courthouse, court clerk, court

[372] Managing the High-Profile Cases for the 21st Century, High-Profile Case Team https://www.ncsc.org/Microsites/High-Profile-Cases/Home/High-Profile-Case-Team.aspx (last accessed Feb. 3, 2020).

information officer, and the trial court. The trial judge must sign the order and be willing to enforce its provisions.

[4.4.2] Media Room

For capital cases, the court should consider setting up a media room. This room may prove very useful in diverting the media professionals from the courtroom to a place more accessible to them, more convenient to conduct their writing and reporting tasks, and to a location that does not distract the court, counsel, litigants, witnesses, and most importantly, the jury from the trial focus and work in the courtroom.

Many courthouses will not have adequate space for a proper media room, but if the judge looks at surrounding buildings, a media room space might be conveniently located adjacent to the courthouse. If the case is capital, many courthouses will cooperatively work to provide a media room in the courthouse with a little advanced planning. The media room should contain sufficient space, tables, chairs, telephone lines, cable/internet access (preferably high speed), a copier, and an interview area.

Most media plans will have the media committee allocate the expense of such a set up among the media members requesting media room access passes. It is important to have the cooperation of the courthouse facility plant manager, the sheriff's office, and the presiding judge when making the media room arrangements.

If the court is allowing cameras in the courtroom, the designated pool television camera organization should make arrangements to provide the feed into the media room for the other media outlets. This organization should also arrange access for the other cameras to pool the audio and video feeds.

Organizations such as truTV[373] are extremely efficient in setting up the pooling arrangements and the gavel-to-gavel feed to the media room. This setup normally takes one day of advance work by an experienced court television organization.

[373] Formerly known as Court TV.

If the trial is not receiving gavel-to-gavel coverage, setting up the pool and media room feed may be a little more complicated and the media committee should take the lead in making those arrangements.

[4.4.3] Reserved Seating Plan

In a capital case, there may be a large number of media representatives who want access to the courtroom during the trial, as well as members of the public, local schools, attorneys, courthouse officials and employees, and court security officers and their families. A courtroom, that is usually empty behind the bar, may be overflowing with interested persons during a high-profile trial.

The court must address the seating plan and the attorneys should communicate their needs with the court. Counsel may need extra seating for their staff, co-counsel, parties, expert witnesses and room to stack the boxes of exhibits, depositions, and other documents needed for the trial. In a high-profile case, the space needs of counsel, the court, and the media may conflict. This demands early and cooperative planning.

It is important for counsel to notify the court, in writing, of any specific seating and space needs during the trial of the case. The importance of having the legal team available to assist in document handling, evidence retrieval, and production of deposition summaries during the trial is critical. Placement of these team members in a convenient location to counsel tables can assist in an orderly presentation of the case.

The court must assign seats for the general public to ensure compliance with the spirit of the open courts provisions of many state constitutions. The media will always request courtroom seating, but the media professionals seldom utilize all the seating made available to them. This is especially true if the court is allowing gavel-to-gavel coverage which is delivered by closed circuit to the media room. The media will generally prefer to remain in the media room to snack, drink, work, talk, and watch the trial at the same time.

The court can assist by preparing a reserved seating chart. In a capital case, the court should issue seating passes, have a bailiff assigned outside the courtroom door to check passes before entry, and issue a public, press, student, and public information packet to give instructions to those wishing to watch the trial in the courtroom.

[4.4.4] Suggestions for Dealing with the Media

Providing an interview to the press in a capital case is almost universally not a good policy. Such actions put the court in a difficult position. An interview or press conference rarely serves any good purpose. The pitfalls almost always outweigh the benefits. If you feel you must communicate with the press, do it by issuing a meticulously crafted and reviewed press release. The press release keeps you from being misquoted or misspoken! The temptation to speak with the press is often great. Seriously consider there are real potential negative downsides. The temptation should be avoided. No matter what you say, your neutrality will be questioned. When communication is necessary, the press release resolves the need with the message being accurately communicated.

However, if you do choose to be interviewed or to give a statement to the media, consider the following helpful suggestions:

- ✓ You should know exactly what you want the media to cover before you talk to them. Until you have a good idea of your message, you are not ready to talk to the media. You have many resources to assist you in preparing your message, and it's important you take the time to do it BEFORE you talk to a reporter.
- ✓ Stay with your message; it should not change.
- ✓ They can ask any question they want to ask. And you can answer any question you want to answer, even the one that "should have been asked." How often in a broadcast do you see the question being used? Look past the reporter to the public.
- ✓ Learn to talk in sound bites. Make a direct statement, elaborate a few key phrases and stop. The average sound bite is seven seconds.

    - First, start with a declarative sentence.
    - Say what you mean.
    - Then, elaborate on your point. Add a brief explanation.
    - Now, stop. STOP.
- ✓ Don't say more than you want to. Reporters have ways of encouraging people to say more than they should. When you are finished with your answer, stop. Saying more than is necessary is usually a mistake.
- ✓ Don't say anything to a reporter that you don't want to see in print. There are no exceptions to this rule.
- ✓ Reporters are never off duty so always assume you're on the record.
- ✓ You can always call back. If a reporter asks a question that attempts to knock you off your guard, stop and think. If you are off guard, say you need to check and call back with an answer. Whatever the question, there's one answer that works, "Let me get back to you on that one."
- ✓ Know the reporter's deadline. This is important. Knowing the deadline means you won't miss having a good quote in the paper. On the flip side, if you don't want to be quoted, you can also choose to miss the deadline.
- ✓ Get the facts straight. Never say anything that isn't positively true. If you have made an error, call back with a correction. Reporters rely on you for correct information. Once you let them down with incorrect facts, they will be skeptical of you as a knowledgeable source.
- ✓ Don't let them put words in your mouth. When you get a "don't you think" question from a reporter, stop. Then repeat your own statement. Reporters will often repeat back to you something close to what you said but using more inflammatory words. They often then attribute the inflammatory words to you.

[4.5] Jury Room and Jury Break Management

In order to protect the jurors from the press, the court will need to provide the jurors with a safe, convenient, and secure location to assemble in the morning before court, during breaks, and during deliberations. This area should be carefully protected from the inquiring eyes and voices of the media, witnesses,

attorneys, and the parties. In extremely high-profile cases the court should consider sequestering the jury or, at least, protecting their arrival and departure from the courthouse from becoming publicly disseminated news.

Special pre-trial orders as to secure areas can help protect the jury from press exposure. The trial court should work with the local sheriff to help escort the jurors and keep others away from their jury room, break area, and ingress or egress from the courthouse. The court's bailiff should arrange snacks, drinks, and stretch breaks for the jury. Accommodations for rest rooms, smoke breaks, and meals should be planned so that the jury is not paraded in front of the press, witnesses, or litigants.

The court should give the jury careful instructions with constant reminders regarding their duty not to talk to anyone about the case; not to read, listen to, or watch anything discussing the case, or allow anyone to discuss the case within their hearing. Special attention must be given to the use, reading or posting on social media. Jurors need constant reinforcement of these admonitions especially as to social media.

Jurors need to be tactfully advised that communications with jurors during their service can result in contempt penalties, criminal punishment, and mistrials. The parties need to assist the court by carefully instructing their witnesses, litigation team, and parties not to have any contact or communication with the jury. Admonitions need constantly repeated. One helpful tool is to have each juror sign a juror pledge that recites the various admonitions. Routinely polling the jury about their admonitions aids in compliance.

[4.6] Witness Ready Room and Instructions

Another asset in protecting a case from being adversely affected by the media and public interest is to have a location for the witnesses to assemble when at the courthouse. They should receive careful instructions not to talk about the case. These instructions should also be posted in and around the witness ready room and counsel should be directed to discuss these instructions with their witnesses.

[4.7] Scheduling of Trial Day

The trial schedule and media schedule are generally on two different planes of existence. The media's deadlines vary by media outlet and organization. The court's schedule varies depending on what other work the court has that day and the organization of counsel in having witnesses and evidence prepared for presentation.

Consider clearing your calendar of other matters and devoting extra time to the trial of the capital case. This will keep the lawyers working on the trial and not playing to the press, keep the courthouse and security personnel focused on their trial duties, and keep the jurors in a more controlled environment. Jurors can then can focus on the evidence produced in the courtroom and get to deliberations more quickly, which limits opportunities for jury misconduct or tampering.

The trial court should schedule the workday, publish that schedule, and keep the attorneys on track. Unscheduled delays are frustrating to the jury, counsel, the court's schedule, and allow the media to show a judicial system which appears unorganized and unprofessional. Keeping to a trial day schedule is difficult, but it can be accomplished by professional attorneys and an efficient and firm judge.

[4.8] Preparing the Judge and Court Staff for a Capital Case

Remember that no matter how many capital cases you have presided over, the case which is drawing significant media attention should be carefully handled by the attorneys and the trial judge. This case is "on show" more than any other and tends to demonstrate that our justice system is effective or an embarrassment.
A high degree of professionalism, ethics, and abilities of the judge and staff are essential in all cases but are particularly important in a case where the public will be judging how our system of law responds to claims brought before the bar of justice. In handling a capital case, it is important that the public

remain confident that the judge and attorneys are committed to fairness, justice and a scholarly application of the law.

The court's staff is an important part of the successful trial of a capital case. Before the first media event, whether pre-trial or trial, the judge and staff should review and discuss the media and trial management plan.

The plan could be a formal document, or a plan developed by experience in dealing with capital cases and should include procedures, schedules, and conduct. The court staff should consider the following:

- ✓ Limit casual remarks to jurors, other staff, and even friendly attorneys;
- ✓ Show no emotion or physical reaction to testimony, events in the courtroom, or to the jury at any time;
- ✓ Always be courteous and professional especially in the stress of the capital case;
- ✓ Remember jury panel processing and the trial are open to the public even when jury empaneling is in a remote location;
- ✓ Always communicate problems and concerns to the judge as they arise; and
- ✓ Review in detail the plans for jury, media, and witness rooms and restrictive and protective orders.

[4.9] Local vs. National Media Interest and Compliance

Generally, the court will have better success in having local media comply with the court's orders because local media will likely need access to other cases in the future. Many times, the national media anticipate this is the one and only time they will need access to that court and, therefore, their vested interest in compliance is directly related to how much access they are deprived of if they violate the court's order.
Some organizations, such as truTV, have developed an excellent reputation for cooperative and professional work on a capital case. The key is to provide information to these media organizations about what the rules of access are and that they will be enforced. A detailed well-crafted decorum and media

order will establish the appropriate ground rules. Violations should be decisively and immediately handled on the record.

[4.10] Courtroom and Courthouse Violations of Orders

The trial judge must be committed to enforcing the courtroom and courthouse orders. If violators go unsanctioned, the violations will grow exponentially. Many judges will not relish the responsibility of enforcing orders against the media, but this is critical to an orderly trial.
The maximum penalty is not needed for all violations. However, quick, decisive, and firm direction, correction, and response are needed when a violation occurs. The media should have a vested interest in working within the court's orders, not around them. If the media wants access to cameras in the courtroom, reserved seating, a media room, and the other arrangements that the court can provide in a carefully structured media order, then they must abide by the rules and restrictions which provide such open access.

It takes a strong judge acting with intention, professional and ethical attorneys, thorough preparation, and a bit of luck to provide a calm, reflective atmosphere in and around the trial proceedings to assure the proper decorum and adjudicatory environment for proper decision making.

The media may try to be responsive to the court's orders, but some may try to push the limits to get the best shot, sound bite, or journalistic advantage. There will be some media who will agree to abide by the orders and then violate them. Even when orders are specific and direct, some members of the media may read them with an eye to approving behavior in which they wish to engage and explaining away any prohibition on conduct they intend to perform irrespective of the court's orders.

The trial judge should clearly communicate the expectation that counsel will prepare their case so that the trial of a capital case is tried in a timely and efficient manner. The delays, unnecessary recesses outside the presence of the jury hearings, and unavailability of witnesses interrupt the trial momentum and provide fertile ground for mistrials, jury misconduct, and media

mischief. Plan and prepare the trial court's schedule before trial and organize the workdays for a smooth trial presentation flow. Encourage counsel to communicate with the court and opposing counsel regarding problems with witness availability and needed bench hearings.

JURY SELECTION

Hon. V. Lee Sinclair

[5.1] Introduction

What's the big deal about seating a capital case jury? The lawyers handle jury seating. All you have to do is ensure the defendant receives due process, and all will be fine. After all, it's just another criminal case.

Unfortunately, that attitude will not work in a capital case. A judge who thinks he or she can slide by in a capital case by simply extending due process to an accused is looking for disaster. You cannot just extend due process—you must extend *super* due process at every juncture of the proceeding.

Jury seating is no exception. Jury seating missteps are among the most cited assignments of error in appellate and post-conviction review of capital convictions. On review, every aspect of the jury selection process will be microscopically analyzed – from the makeup of the general venire, to the bailiff's interaction with jurors, to whether a shake of a juror's head was intended as meaning "yes" or "no." If you make an error during the seating process, there will be an almost automatic reversal of the conviction.

In a capital case, the judge cannot simply set the stage and let the lawyers conduct the jury seating. Almost all errors in jury seating are fundamental, structural errors. The judge must actively manage and control jury seating. The possibility of creating error must always be on the judge's mind. Errors are avoidable by careful, detailed planning along with an understanding of the substantive and procedural concepts of the jury seating process. A proactive role will also ensure a fair trial for the defense and the state.

[5.2] Protocol Overview

There are many variations on seating a capital jury. All variations involve general *voir dire* and death-penalty qualification. These two steps constitute the fundamental pillars of the capital case jury selection process.

State law and personal preference should control the order of the selection process. Some judges prefer using a long-form jury questionnaire the morning of trial. Some prefer sending a long-form jury questionnaire weeks in advance. Some judges start the jury selection process with death qualification and then move to general *voir dire*. Some prefer to start with general *voir dire* and then move to death qualification.

Some courts administer the death qualification in a completely individual session with one juror appearing in the courtroom at a time; others administer it in small groups of five to eight jurors. A few courts administer death qualification en masse (not recommended). Most of these variations have benefits and detriments. Everyone believes his or her system is the best. Again, the key is to extend super due process.

The seating needs to contain both general *voir dire* and death qualification. The process recommended in these materials was developed by the author. This process may be varied in a particular jurisdiction due to either local law or personal preference.

[5.3] Jury Selection Process

The following steps constitute an overview checklist for the jury selection process. Each of these items is important in order to select a jury that will be seated in an efficient manner as well as ensuring that there are no appealable errors of the case.

[5.4] Discuss Jury Seating at Pre-trial

The judge should cover the following jury seating matters on the record with the defendant present in the courtroom:

- ✓ Long-form jury questionnaire;
- ✓ Pre-trial publicity questionnaire;
- ✓ Death penalty views questionnaire;
- ✓ First and second round of preliminary jury excuses;
- ✓ Rules of jury seating:
    - Initial *voir dire* – approximately 125 jurors;
    - Death qualification (individual or small groups);
    - Final group *voir dire*;
    - Instruct prosecutor and defense counsel that they may not discuss death penalty or sequestering during initial *voir dire*; and
    - Issue appropriate written and oral orders.

[5.5] Summon Jurors

Be sure to issue an appropriate order summoning a sufficient number of jurors. This should take place approximately six weeks prior to trial. A typical capital case will consist of summoning approximately 300 jurors, which, hopefully, yields approximately 125 jurors in the courtroom during the first day of jury seating. Raise or lower the number summoned based on pre-trial publicity and local non-appearance rates.

[5.6] Keep Tabs on Jurors

The jury commission should maintain detailed records on each juror. This permits every juror to be located and enables the determination that a particular juror cannot be found. The jury commission should follow up with any non-complying jurors by telephone or letter. The jury commission uses local telephone directories, cross directories, voter lists, and other sources to locate jurors. Everything is documented and maintained for inclusion in the record.

[5.7] Hold First-Round Jury Excuse Hearing

The first-round jury excuse hearing is set approximately two weeks prior to trial. This is sometimes called the automatic excuse hearing. At this on-the-record hearing, the jury commissioner, counsel, defendant, prosecutor, and the judge should all be present.

Although most of the jury questionnaires are returned prior to the hearing, some jurors will likely have not been found and some may not be complying. By the time of the first excuse hearing, the jury commission has followed up by telephone and letter to locate and seek compliance with the summons and long-form jury questionnaire. The jury commission details the use of telephone directories, cross directories, voter registration records, etc.
The parties discuss the requests that have been returned for either deferral of service or for removal from the venire. The hearing also covers unlocated and non-complying jurors. Any request to be excused should be in writing and contain any appropriate documentation.

The jury commissioner provides the list of requested excuses to the parties and the court. The court proceeds through each requested excuse, along with the documentation. The court permits input from the respective sides. If both sides agree that the juror may be excused, the juror is excused and notified. The court rules on each request. These excuses are generally jointly agreed strikes for cause. They typically deal with old age, physical health, death, and prepaid vacations.

The court acknowledges that all parties are present. The hearing is on the record. The jury commission provides a list of all requested excuses and a list of all jurors who have not been found or are not in compliance. The court reviews each requested excuse on an individual basis. A sample dialogue would be as follows:

Jury Commissioner or Clerk: "Juror 204, Jane Smith, is a ninety-four-year-old individual living in a nursing home. We received a letter from the nursing home indicating she is a full-time resident and is not able to attend court."

Court: "Does the prosecution have a position on this juror?"

Prosecutor: "Your Honor, we agree to strike this juror for cause."

Court: "Does the defense have a position?"

Defense: "Your Honor, we agree to excuse this juror for cause."

Court: "This juror will be excused for cause and the juror will be so notified by the jury commission."

Jury Commissioner: "Juror 149, John Jones, is a stay-at-home parent who does not wish to leave a four-year old at home with a babysitter. He provided us with a letter indicating this fact."

[The letter is handed to the court and the court provides the letter to counsel.]

Court: "Does the prosecution have a position?"

Prosecutor: "Your Honor, we have no problem with excusing this juror."

Defense: "Your Honor, we would like to have this juror appear because the reason does not appear to be significant enough to excuse the juror at this time."

Court: "The juror will not be excused at this point. The jury commission shall notify the juror that the juror may request an in-person hearing next week to provide further information to the court and the parties. If the juror does not wish to come for this special hearing, the juror will need to report for jury service. The jury commission shall notify the juror by telephone and by letter."

Jury Commissioner or Clerk: "Juror 182, Xi Liang, indicates that he suffers from a back problem and has had numerous back surgeries and cannot sit for long periods. The juror did not provide any letter from a physician."

Court: "Mr. Liang should be advised that he may either appear in person at the hearing next week with appropriate medical documentation or he may provide an appropriate letter from his physician which the court and parties will consider next week at the second round excuse hearing."

Proceed through each juror who has requested to be excused. Also discuss the status of jurors who have not been found, and the status of non-complying jurors. Order the jury commissioner

to follow up on such jurors and to report back to the court at the second-round jury excuse hearing.

Keep all documentation. Notify the excused jurors by phone and letter. Jurors not excused should be contacted immediately by telephone and letter and provided various options. First, they may provide documentation to substantiate their requested excuse, such as a physician's letter. A second option is to request they appear, in person, at the second-round jury excuse hearing. The third option is to request they appear, in person, at the initial general *voir dire*.

The jury commissioner should not provide case-specific information to prospective jurors. When jurors telephone the jury commissioner, they should be told that all requested excuses must be in writing and supported by appropriate documentation.

[5.8] Hold Second-Round Jury Excuse Hearing

The second-round jury excuse hearing is held one week prior to trial. At this hearing, jurors not excused at the first jury excuse hearing are provided the opportunity to appear and provide further information concerning the reason to be excused. Also, some jurors from the first automatic round that did not have appropriate documentation may have supplied requested documentation to the court.

This hearing is also on the record with the jury commissioner, counsel, defendant, prosecutor, and the judge all present. It proceeds much like the first hearing. The major difference is that the jurors who requested an appearance are brought into the courtroom individually to provide their information.

After the juror is placed under oath, the court should ask the juror to explain the reason for the request and allow the juror to respond. Give counsel the opportunity to ask any follow-up questions concerning the reasons for excusal. Do not inform the juror of the type of case, the defendant's name, or any other facts involving the case. Limit the discussion to the juror's personal situation. Ask the juror to step out of the courtroom while the court and counsel confer, then issue a ruling. If the

court excuses a juror without both sides in agreement, be sure the record is complete with appropriate reasoning and details. Return the juror to the courtroom and tell him or her whether he or she must report or whether the juror has been excused. Normally, approximately 15 jurors can be heard in an hour.

Typically excuses in this hearing involve work hardships, childcare problems, and other physical health issues. The entire hearing can normally be completed within an hour to an hour and a half. Not many jurors exercise the right to come in person. After you complete all "live" juror matters, the jury commission should then provide an update on all unlocated and non-complying jurors.

The jury commission should provide an update on those jurors providing further documentation. The court should confer with counsel and issue rulings. The jury commission should then advise the jurors by letter and telephone as to whether they have been excused.

[5.9] Remind Prospective Jurors

One week prior to trial, the jury commission should send a follow-up note to all prospective jurors reminding them of the trial date. Make sure the notice does not contain case-specific information. Approximately three days prior to the trial, the jury commission should telephone the venire members as a last reminder.

[5.10] Tie Up Loose Ends

Before the jury is escorted into the courtroom, complete any final matters on the record, with the defendant present, including:

- ✓ All remaining issues, motions, directives, etc.
- ✓ Discuss the juror pamphlet and juror orientation process.
- ✓ Review with jury commissioner and parties any remaining jurors that have not been located, etc.
- ✓ Explain all jury seating procedures.
- ✓ Review any motions not previously decided.
- ✓ Explain court security measures.

- ✓ Address spectators, press, etc. Instruct spectators to remain seated at all recesses until the jurors have left the courtroom. If special orders have been issued, review the specifics of each. Consider posting and distributing decorum orders.
- ✓ Review the preliminary draft of jury instructions with counsel.
- ✓ Review the potential witness list for use by the court during general *voir dire*.
- ✓ If applicable, discuss issues regarding jury view and timing of the jury view.
- ✓ Advise the attorneys that during their questioning in the initial general *voir dire* process, they should not indicate to the jury the potential for the death penalty or the fact that the jurors will be sequestered. The court should discuss these issues at the end of the initial group *voir dire*. These issues remain until the end of the initial group *voir dire* so that jurors are not looking for excuses not to sit on the jury by hearing this information first. Advise the attorneys that they will have the opportunity to inquire on all of these areas during death penalty qualification and during final general *voir dire*.
- ✓ Review any other jurisdiction-specific requirements.

[5.11] Seat the Panel

Have the bailiff escort jurors into the courtroom and seat the jurors in numerical order. Advance planning may be necessary as the venire may be approximately 125 people. Space availability could necessitate an alternate location, seating in two shifts, or starting with death qualification first. Should an alternate location such as a gymnasium be used, file a court order naming the building as a temporary courtroom. Also, if an off-site location is used as a temporary courthouse, review any security concerns.

[5.12] Conduct Initial General *Voir dire*

Provide jurors the oath and general instructions from the court. The court should take the lead with the initial general *voir dire*, in this order:

1. Court questions.[374]
2. Counsel questions.
3. Court considers challenges for cause.
4. Court informs venire of potential death penalty and sequestering.[375]
5. Court describes death penalty qualification questioning.
6. Court distributes death penalty view questionnaire.[376] Allow approximately 10 minutes to complete.
7. Court personnel finalize death penalty qualification timetables. (This takes about 10 minutes.)
8. Death penalty questionnaire collected and timetable distributed.[377]
9. Court provides oral and written admonitions.[378]

[5.13] Death Penalty Qualification

Some jurisdictions require that individuals be death-qualified one at a time. However, if permitted by law, small group qualification is far superior. If you use small groups, schedule approximately eight jurors for each 60- to 90-minute period. Some judges find that scheduling a 90-minute time period for the first two groups of jurors works well. After the first two groups have been completed, the process tends to move faster, and you can generally schedule eight jurors every 60 minutes. If the court conducts individual death penalty qualification, then the schedule will typically be approximately eight jurors per half day or about one every 30 minutes. The procedure is as follows:

1. The group (or individual) is escorted to the courtroom.
2. The oath is administered.
3. Ask each juror if the long-form jury questionnaire, pre-trial publicity questionnaire, and the death penalty views questionnaire are accurate and truthful. Provide the juror with a copy of each.
4. The court reviews pre-trial publicity issues, including whether the juror has discussed the case or learned about the case since the initial group *voir dire*. Should a juror have significant information or strong opinions, the

[374] An initial general *voir dire* checklist is contained in Appendix 5-1.
[375] Sample remarks are contained at Appendix 5-2.
[376] A sample death penalty views questionnaire is contained at Appendix 5-11.
[377] A sample timetable is contained at Appendix 5-10.
[378] A sample admonition order is contained at Appendix 5-3.

court may delay answers until the group is finished. The juror may then remain for individual questioning.

5. The court conducts death penalty qualification.[379] Each juror must respond individually.
6. The court discusses personal juror questions that were not appropriate for initial general *voir dire*.
7. The court questions the group about any prior criminal record(s).
8. Counsel then poses follow-up questions to the individual members of the group.
9. Excuse the small group while the court entertains challenges for cause and issues rulings. Have the jurors returned to the courtroom and instruct them as to further reporting requirements.
10. Provide each group with appropriate admonitions.

[5.14] Sequestered (Individual) *Voir dire*

The criminally accused is entitled to an impartial jury and a fair trial, a right that is absolute when a defendant faces the death penalty.[380] *Voir dire* in a capital case should probe the beliefs of the prospective jurors to ascertain whether they hold biases, which would interfere with their ability to decide cases fairly and impartially.[381]

In most jurisdictions, court rules dictate jury selection.[382] In the absence of a statute or rule of court requiring or prohibiting the sequestration of prospective jurors, the trial court has discretion whether to question the jurors individually or in groups.[383] In jurisdictions without statutory or rule requirements for individual *voir dire*, the defendant must make a showing of special circumstances that would require individual *voir dire*.

Additionally, the defendant must prove, before the trial court grants a motion for sequestered *voir dire*, that those

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[379] A death qualification checklist and a death qualification flowchart are contained at Appendices 5-4 and 5-12.
[380] *See Morgan v. Illinois*, 504 U.S. 719, 727 (1992).
[381] *See Smith v. State*, 513 S.W.2d 823, 826 (1974).
[382] *See, e.g.,* PA. R. CRIM. P. 631(E) (2001). This was amended in 2015. Is now PA.R. Crim P. 631(F) (stating that in capital cases the court must use the individual *voir dire* method unless the defendant waives that alternative).
[383] *See Randolph v. State*, 562 So.2d 331 (Fla. 1990), *cert. denied*, 498 U.S. 992 (1990).

circumstances would deny him or her the right to a fair trial. The fact that the defendant is on trial for his or her life does not necessarily create "special circumstances."[384]

However, in *State v. Claybrook*,[385] the Tennessee Supreme Court held that the ultimate goal of *voir dire* is to ensure that the jurors are unbiased, and impartial, and the decision of how to conduct *voir dire* of prospective jurors rests within the sound discretion of the trial court.[386] The Tennessee Supreme Court, for instance, has consistently adhered to the position that death qualification in a capital case does not necessitate sequestration during *voir dire*.[387]

The Appellate Court in Louisiana dealt with these issues in *State v. Comeaux*.[388] The defendant contended that "the trial judge erred" in denying his motion for individual, sequestered *voir dire*.[389] He argued that extensive pre-trial publicity in the local media required that the prospective jurors be called in this manner. Despite evidence of several newspaper articles and radio and television broadcasts concerning the case, the trial judge denied the motion for individual *voir dire*. The Louisiana Appellate Court held that:

> There is no provision in our law, which either prohibits or requires the sequestration of prospective jurors for an individual *voir dire*. The manner in which the veniremen are called and the scope of examination are left to the court's discretion. The burden is on the defendant to

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[384] *See, Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991), *cert. denied,* 507 U.S. 1043 (1993); *State v. Comeaux*, 514 So.2d 84 (La.1987), *appeal after remand*, 699 So.2d 16 (La. 1997), *cert. denied sub nom. Comeaux v. Louisiana*, 522 U.S. 1150 (1998); *State v. Lindsey*, 404 So.2d 466, 476 (La. 1981).
[385] 736 S.W.2d 95 (Tenn. 1987).
[386] *Id.* at 100.
[387] *See, State v. Smith*, 857 S.W.2d 1 (Tenn. 1993), *cert. denied sub nom. Smith v. Tennessee*, 510 U.S. 996 (1993); *State v. Harris*, 839 S.W.2d 54 (Tenn. 1992), *modified, reh'g denied,* 1992 Tenn. LEXIS 557 (Tenn. Sept. 8, 1992), *cert. denied sub nom.* Harris v. Tennessee, 507 U.S. 954 (1993) (noting individual *voir dire* is mandated only when there is a 'significant possibility' that a juror has been exposed to potentially prejudicial material).
[388] *State v. Comeaux*, 514 So.2d 84 (La.1987), *appeal after remand*, 699 So.2d 16 (La. 1997), *cert. denied sub nom. Comeaux v. Louisiana*, 522 U.S. 1150 (1998).
[389] *See, e.g.,* La. Code Crim. Proc. art. 791(B) (1998): "In capital cases, after each juror is sworn he shall be sequestered, unless the state and the defense have jointly moved that the jury not be sequestered."

> show that the court abused its discretion in refusing to sequester the venire at *voir dire*. A trial court has the discretion to permit individual *voir dire* if a defendant can demonstrate that special circumstances are present. Absent special circumstances, the trial court does not err in refusing requests for individual *voir dire*. The fact that defendant's case is capital does not by virtue of that fact alone establish a "special circumstance" requiring a variation from the general rule of trial court discretion.[390]

[5.15] Motion for Sequestered Jury[391]

Ordinarily, a court will sequester a jury when a defendant establishes that the jurors may be subject to extraneous influences or pressure or that the case is the subject of unusual prejudicial publicity.[392] Prohibition against jury separation during deliberations is one of the most fundamental and ancient legal rules in jurisprudence and is strictly enforced in order to prevent jury tampering.[393]

In most jurisdictions, a court may vacate a sequestration order before the conclusion of the trial where the danger of any influence upon the jury because of prejudicial publicity has abated.[394] Review your local court rules for specific information about sequestering jurors.

The court may adjourn the venire to any day of the term. When the court has sworn in jurors in a felony case, it may, at its discretion, permit the jurors to separate until the court has given its charge to the jury. After having given its charge to the jury, the court on its own motion, may and on the motion of either party shall, order that the jury not be allowed to separate. The court shall ensure that the jury remains together and not permit them to separate except to the extent of housing female jurors

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[390] *Comeaux*, 514 So.2d at 88 (internal citations omitted; italics added).
[391] Jury sequestration is known in Texas as an Order against Separation.
[392] *See Commonwealth v. Chambers*, 685 A.2d 96 (Pa. 1996), *cert. denied sub nom.* Pennsylvania v. Chambers, 522 U.S. 827 (1997), *post-conviction proceeding, remanded on other grounds by* 807 A.2d 872 (Pa. 2002); *Commonwealth v. Jackson*, 392 A.2d 1366 (Pa. 1978).
[393] *See Adams v. State,* 765 S.W.2d 479 (Tex. Ct. App. 1988).
[394] *See Commonwealth v. Reeves*, 387 A.2d 877 (Pa. Super. Ct. 1978).

separate and apart from male jurors until the jury renders a verdict or the court finally discharges the jury. The court shall punish, for contempt of court, any person who makes known to the jury which party made the motion not to allow separation of the jury.

If the court keeps the jurors overnight, the court shall provide facilities for female jurors separate and apart from the facilities provided for male jurors. In any case in which the court permits the jury to separate, the court shall first give the jurors proper instructions with regard to their conduct as jurors when they are separated.[395]

In *Commonwealth v. Reeves*, the Superior Court of Pennsylvania held that the failure to sequester the jury amounted to an abuse of discretion.[396] When a trial court fails to properly instruct, or question, jurors relative to their exposure to prejudicial news accounts which disclose the defendant's criminal records and casts a general impression that the defendant was a member of a dangerous criminal organization and impugning defense strategy, the granting of a new trial is required.[397]

In *Commonwealth v. Bracero*,[398] the Superior Court of Pennsylvania reiterated that the trial judge has the sound discretion whether to sequester the jury. Absent a proper showing of potential prejudice to the defendant, the trial judge's refusal to sequester the jury is not an abuse of his or her discretion.[399]

In *Jackson v. State*,[400] the Texas Court of Criminal Appeals determined that the trial court erred when, after deliberations had begun in the punishment phase of trial, the court allowed a juror to go to the hospital over defendant's timely objection and motion for mistrial.[401] However, it was further determined that the trial court's error in doing so was harmless beyond a reasonable doubt and did not contribute to the punishment.[402]

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[395] *Id.*
[396] *Id.* at 889.
[397] *Id.*
[398] 442 A.2d 813 (Pa. Super. Ct. 1982).
[399] *Id.* at 374.
[400] 931 S.W.2d 46 (Tex. Ct. App. 1996).
[401] *Id.* at 47.
[402] *Id.* at 48.

This decision was based upon the fact that the juror was absent from the courthouse for just over one hour, during which time the trial court ordered the remaining 11 jurors to be sequestered and to cease deliberations pending the absent juror's return.[403]

In *State v. Young*,[404] the Supreme Court of Appeals in West Virginia held that "while [West Virginia Code] places the matter of jury sequestration within the discretion of the trial court, such discretion is necessarily limited by the requirements of due process."[405] Therefore, to determine whether sequestration is necessary, the court should look at several factors as follows:

- The nature of the crime with which the defendant is charged;
- The existence and pervasiveness of pre-trial publicity provided by print and electronic media;
- Whether any such publicity is prejudicial to the defendant;
- The existence of daily newspapers or television or radio stations which can be expected to provide continuing media coverage of the trial;
- Expressed public sentiment for or against the accused;
- The expected length of trial;
- The physical facilities of the courthouse where trial will take place and whether they provide an exclusive means of ingress and egress for members of the jury; and
- Any other factors which may be considered relevant in the issue of sequestration of the jury.[406]

Sequestration may be something that would not be effective in a particular case for many reasons including:

- The costs associated with secluding a jury in a complicated and lengthy case;
- The hardships placed upon the jurors; and
- The resulting possibility of resentment towards the defendant.[407]

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[403] *Id.*
[404] 311 S.E.2d 118 (W. Va. 1983).
[405] *Id.* at 130.
[406] *Id.* at 130.
[407] *Id.* at 130.

[5.16] Conduct Final General *Voir dire*

Final general *voir dire* should proceed after approximately 50 jurors have been qualified. Once 50 jurors have been qualified, assemble the entire death penalty qualified panel for final questioning. This number may need to be increased if the jurisdiction allows more than eight peremptory challenges per side. At this point, the jurors are "hardship free," "publicity free," and "death qualified." Final general *voir dire* should proceed as follows:

1. Death qualified prospective jurors are brought into the courtroom. All participants should be present and on the record.
2. The oath is administered.
3. The court questions the jurors as to whether they have followed the court's admonitions.
4. The court addresses final matters, hardships, scheduling, etc.
5. Counsel proceeds with final questioning.
6. The court hears challenges for cause—outside the presence of the jury, but on the record.
7. The court hears peremptory challenges—outside the presence of the jury, but on the record.
8. The court seats alternates. (Consider the maximum permitted.)
9. The court administers the final oath to jurors.
10. The court admonishes the jury at every recess.

[5.17] Jury Seating: Obtaining the Venire

Administrative staff performs much of the actual assembly of the capital jury venire. The court needs to be active in overseeing the assembly of an appropriate jury venire. Remember, the devil is in the details and the responsibility ultimately rests on the shoulders of the trial judge.

[5.18] Duties of the Jury Commission/Circuit or District Clerk

The jury commission is a vital cog in the jury selection process. It maintains and retains every document that touches the process.

Detailed records are essential. Follow-ups and attempts to locate non-complying and unlocated jurors are logged.

Because this is a capital case, the court and jury commission must extend super due process. Every detail is covered on the record during pre-trial conferences. At some point, all documents and records should be filed as part of the record.

Jurors who telephone should be told to place requests for excusal in writing with proper documentation. Provide follow-up phone calls and follow-up letters as an excellent way to secure compliance and attendance of jurors. A reminder letter a week before initial general *voir dire* is helpful. Telephoning a few days before the commencement of initial general *voir dire* dramatically increases the attendance of jurors.

[5.19] The Long-Form Jury Questionnaire

Sending a long-form jury questionnaire to the jurors at the time of the initial summons provides a feel for the size of the responding potential venire. This aids in planning for adequate jurors on the day of trial. It also provides a valuable advance planning device for the lawyers. Having juror information prior to trial significantly speeds up the jury selection process. The completed long-form jury questionnaires are copied and distributed to counsel and the court prior to trial and will eventually be made part of the record.

During the pre-trial stages of the case, the court and counsel—on the record—confer concerning the extent and use of the long-form jury questionnaire. File a judgment entry approving the questionnaire, along with a sample questionnaire.

A good long-form jury questionnaire is designed to give counsel an overview of the particular juror's background and general views on the criminal justice system. The instructions the questionnaire should instruct jurors not to write on the back of the pages and that a request to be excused must be in writing with appropriate documentation. The questionnaire should not disclose or cover any of the following topics:

- Any references to the name of the defendant, the case number, or to any identifying facts involving the specific case;
- Names of any witnesses or victims;
- Details of the specific crime;
- The potential for imposition of the death penalty;
- Questions regarding any views on the death penalty (these will come later in the death penalty views questionnaire); and
- Questions regarding sequestration.

It may appear to be unusual to leave out the above questions and information. However, there is sound logic to this approach. This list below lays out the reasoning behind this approach:

- ✓ It Eases the Jurors into the Process. Jurors may be asked to decide the ultimate question in jurisprudence: Does someone live or die? Ease the jurors into the process. Many jurors feel uncomfortable disclosing personal information to a group of strangers. Let the jurors establish a comfort level before they are blindsided by being asked "What do you think about the death penalty?"
- ✓ It Prevents Outside Research. Jurors want to be the best they can be at their new "job." If the trial court gives details of the case in advance, jurors will search out the facts, read every newspaper article, and record every television broadcast. They will knock themselves out to be conscientious and well-informed jurors. By giving advance knowledge of the case or the facts, the judge simply promotes research and discussion with others. This makes jury seating in a high-profile case all that more difficult. It is almost always best not to have the specific case in the jurors' minds before the day of trial.
- ✓ It Avoids the "Uncle Joe" Syndrome. Jurors seeking release from service should be motivated by true problems that prevent jury service. Some jurors have exceptional personal situations which make jury service impossible. There are jurors who really need to take care of "Uncle Joe" who relies on them for his daily needs. However, by discussing a murder and the death penalty in a questionnaire, you will get many more "Uncle Joe"

excuses. All of a sudden everybody has an "Uncle Joe." There is a direct correlation between when jurors are told about the death penalty and the number of "Uncle Joe" excuses that surface. By waiting to inform the venire concerning the potential for the death penalty and for sequestering, the easier it is to sift out the real "Uncle Joe" excuses from the "I don't like this case" excuses.

- ✓ It Minimizes Collective Answers. Jurors are warned not to discuss the long-form jury questionnaire answers with others. However, they are only people. If you list the facts or the death penalty in the questionnaire, you significantly raise the likelihood of a discussion and collective answer influenced by family or friends.

[5.20] The Request to be Excused

Any request to be excused from the venire must be in writing with documentation. Documentation must be presented, such as a medical letter, voucher receipt for a pre-paid vacation, etc. It should be clear that the request for an excuse from jury service does not release the juror from the requirement of returning the long-form jury questionnaire.

Telephone requests to the jury commission for excusal are discouraged. The jury commission never informs any juror that the case may be a potential death penalty case. The jury commission never informs any juror as to the case name or number.

Every request to be excused is reviewed at one of the excuse hearings. The jury commission maintains detailed records, including all documents, letters, and other related matters, which are ultimately included in the record (often at the conclusion of the case). By handling these requests at two preliminary jury excuse hearings, considerable time is saved the day of trial. Further, a number of "non-usable" jurors can be deleted from the potential venire before the first day of initial general *voir dire*.

[5.21] Jury Seating: The Day of Trial

The first morning of jury seating in a capital trial can be daunting. The courthouse seems to be overflowing with prospective

jurors. The media swarm to the courthouse and everything seems about to give at the seams. With advance planning and using tested techniques, the first day of jury selection can pave the way for a successful trial proceeding.

Remember that jurors are leaving their familiar and comfortable worlds to enter an unknown world. Not only will they enter with some trepidation, but they are about to be asked to potentially make one of the most important decisions of their entire lives. Attention to details and congeniality are hallmarks of a good jury seating plan in every capital case.

[5.22] Handling the Throngs of Jurors

The day a capital case starts is not a normal day in most courthouses. A flood of jurors descends on the courthouse. Plan ahead for the number of jurors and the staff needed to accommodate them. Provide extra security. Additional screening at the courthouse entrance may be appropriate so that jurors do not get delayed. Be sure sufficient seats, clipboards, pens, and other necessities are there for the jurors. Clear the jury room in advance of all objectionable materials, such as newspapers. If there is a television in the jury assembly room, prohibit news broadcasts that may cover the case.

An orderly process will set the tone for the entire case. Make necessary arrangements for the press, victims, and onlookers. Separate the prospective jurors from other jurors and spectators. Do not tell jurors the type of case or the particular case number to which they were assigned. Do not tell them they were summoned for a capital case.

Consider issuing a protective and decorum order as it relates to spectators, the press, and others so as to isolate and protect the jury. Plan accordingly if demonstrators, gang members, family with photo tee-shirts of the victim, or any other "spectacle" are rumored. The worst scenario is not to plan for the unexpected. Ten family members wearing t-shirts with the victim's photograph can taint and disqualify an entire venire.

[5.23] The Pre-Trial Publicity Questionnaire

Provide a pre-trial publicity questionnaire to the jurors while they wait for the initial general *voir dire* to begin. The questionnaire is distributed as the jurors check in for jury service. It is collected, copied, and sent to the courtroom immediately after completion. The questionnaire is designed for use during death penalty qualification. However, note it is used prior to the initial general *voir dire* to determine whether any "red flag" jurors lurk within the venire.

The court and counsel scan the completed forms to see if any such jurors exist (this usually takes less than 10 minutes). While many jurors have some knowledge of the case, it is nothing that needs to be addressed at this juncture. These questions wait until the death-penalty-qualification hearing. However, if a "red flag" juror exists, he or she may be isolated and brought before the court immediately for individual questioning. This prevents the potential taint of the entire venire. Although rare, these situations must be handled immediately.

Why not send pre-trial publicity questions prior to trial with the long-form jury questionnaire? It is simply good preventive medicine. Delaying the pre-trial publicity questionnaire avoids the investigative juror from seeking out the case facts. It permits the court to formally admonish the jurors during the initial phase of general *voir dire* not to seek out information about the case or discuss any of the facts of the case with any other individual.

[5.24] Protecting the Privacy of Jurors

It is not uncommon in a criminal case for jurors to have concern over their privacy. Jurors also may have concern for their personal and family's safety. This level of concern is certainly heightened in a capital case.[408] Make every effort to alleviate these concerns. At the beginning of *voir dire*, the judge should announce to the jurors: "If there is a matter that is particularly

[408] If a member of the press or public subsequently requests a copy of the transcript of the in chambers *voir dire* sessions, the judge must review each in chambers session and determine whether the prospective juror had a legitimate reason for keeping the juror's answers out of the public domain. The prospective juror must initiate the request for an in-camera hearing. Important cases include *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Waller v. Georgia*, 467 U.S. 39 (1984); and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

private or deeply personal that you do not wish to discuss in open court, please tell me. We can then discuss the matter privately in chambers, on the record, with counsel present."

Address these issues so the jurors understand the nature and the use of the information they have provided. These matters should be thought through well in advance of trial:

- ✓ How will the court alleviate the concerns of the jury?
- ✓ What is filed on the public record?
- ✓ When does the information become part of the public record?
- ✓ Can the court restrict the distribution of the questionnaires to the defendant?
- ✓ Can the judge keep the press from contacting the jurors?
- ✓ What about juror names? Can you give the jurors numbers and not provide juror names in the courtroom?
- ✓ Can the judge file the jury questionnaires at the conclusion of the case? Can they be filed under seal?

Every one of these items has potential pitfalls. Each issue takes on a magnified role due to the nature of a capital case. Each jurisdiction must be researched. There is little uniformity throughout the United States on how to deal with these issues.

[5.25] The Anonymous Jury

In rare cases, juror safety may require the court to consider utilizing an anonymous jury. State and federal law should be consulted prior to making this decision. For example, in *Commonwealth v. Angiulo*,[409] the Supreme Judicial Court of Massachusetts held that "no anonymous jury is to be empaneled in the courts of the Commonwealth unless the trial judge has first determined on adequate evidence that anonymity is truly necessary and has made written findings on the question."[410]

Additionally, although there is no statutory provision or rule of procedure that provides for an anonymous jury in the state of Tennessee, the Supreme Court of Tennessee holds that anonymous juries may be empaneled under Tennessee law, so

[409] 615 N.E.2d 155 (Mass. 1993).
[410] *Id.* at 171.

long as the trial court uses the two-prong analysis set forth in *U.S. v. Talley*,[411] which is set forth below.

Federal law provides that in capital cases, the defendant must be provided with a list of the venire persons, including their places of residence, three days prior to the trial except "if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person."[412] Therefore, in order to empanel an anonymous jury in a capital case, a court must determine if there is sufficient evidence that disclosure of the name and residence of the jurors would jeopardize their lives and/or safety.

In *Talley*, the Sixth Circuit Court of Appeals, citing the Second Circuit's decision in *U.S. v. Paccione*,[413] held that an anonymous jury should not be empaneled without "(a) concluding that there is a strong reason to believe that the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected."[414]

As to the first prong of the *Talley/Paccione* analysis, the court in *Talley* set forth the following situations in which an anonymous jury should be utilized:

- Cases with very dangerous persons who were participants in large-scale organized crime, who participated in mob-style killings, and previously attempted to interfere with the judicial process;
- Cases where the defendants have a history of attempted jury tampering and serious criminal records; and
- Cases where there have been allegations of dangerous and unscrupulous conduct by the defendant, coupled with extensive pre-trial publicity.

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[411] 164 F.3d 989 (6th Cir. 1999); *see also State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006).
[412] 18 U.S.C.A. § 3432 (1994).
[413] 949 F.2d 1183 (2d Cir. 1991).
[414] *Talley*, 164 F.3d at 1001 (internal citations omitted). NOTE: While *U.S. v. Talley*, 164 F.3d 989 (6th Cir. 1999), U*.S. v. Paccione*, 949 F.2d 1183 (2d Cir. 1991), and *U.S. v. Krout*, 66 F.3d 1420 (5th Cir. 1995) are non-capital cases, the same analysis has been used in a capital case. *See U.S. v. Honken*, 378 F.Supp.2d 880 (N.D. Iowa 2004).

With respect to the second prong, a court empaneling an anonymous jury should conduct a *voir dire* designed to uncover any bias as to the issues and, further, to "[provide] the jury a neutral and non-prejudicial reason for requiring that [the jury] be anonymous, so that jurors will refrain from inferring that anonymity was necessary due to the character of the defendant."[415]

The Fifth Circuit Court of Appeals has also identified the following factors to review when considering the use of an anonymous jury:

- The defendant's involvement in organized crime;
- The defendant's participation in a group with the capacity to harm jurors;
- The defendant's past attempts to interfere with the judicial process or witnesses;
- The potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and
- Extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.[416]

Again, because state statutes and case law vary on this topic, the appropriate research should be conducted prior to deciding to use an anonymous jury in a capital case.

[5.26] Jury Seating: The Mechanics in Detail

Capital jury seating involves a two-step process: general *voir dire* and death qualification. Which comes first?
In many jurisdictions, it is a matter of personal preference. However, both concepts are integral to the jury being properly seated. These areas are fraught with pitfalls. This is not a time to improvise. Stick with a script and avoid creating reversible error.

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[415] For example, in *Talley*, the trial court explained to the jurors that they were being referred to by number only and the parties did not have their names due to media interest and to ensure the jurors were "not bothered or approached by the media about this case or any aspect of it." *Talley*, 164 F.3d at 1002.
[416] *See U.S. v. Krout*, 66 F.3d 1420 (5th Cir. 1995).

[5.27] Initial General *Voir Dire* or Death Qualification First?

Some judges prefer to start with death qualification then move to general *voir dire*. It allows the court to start with only a few jurors at a time. Once approximately 75 jurors have been death qualified, the court brings the 75 together for group *voir dire*. This method has advantages if the courthouse is small.

However, some judges start with a brief introductory general *voir dire* of approximately 125 jurors,[417] which can be tailored higher or lower depending upon the pre-trial publicity and the availability of space. In this method, the initial general *voir dire* is for basic general jury seating questions. The jurors are then ordered to report for the death penalty qualification process. The jurors are released with further instructions as to when to report. Following the death penalty qualification, the qualified jurors reconvene as a large group of at least 50 to 75 jurors for final general *voir dire*.

If state law doesn't require a specific procedure, each variation has advantages and disadvantages. The author prefers the initial general *voir dire*-death penalty qualification-final general *voir dire* system as it works well. It allows the court to ease jurors into the process. Fewer jurors try to get excused for cause. Counsel has ample opportunity to explore all the issues.

Judges with limited space, or if required by law, may follow other procedures. Some judges believe other procedures work better in their particular situations. The final choice should be determined only after consulting state law, the physical facilities available, and the judge's personal preference. In the final analysis, no method is necessarily best. The key is to follow all the substantive requirements by conducting a complete and thorough general *voir dire* and death penalty qualification.

[417] Judges with limited space start with a limited group seating of approximately 40 jurors at a time. By necessity, they will conduct three groups of jurors through the initial general *voir dire* process.

[5.28] Discussing the Death Penalty with the Jury

It is a matter of personal preference as to when the issue of death is raised with the jury for the first time. There is no best method. However, the court—not counsel—should be the first to raise the issues of the death penalty and sequestering. Some judges prefer the direct immediate notice when they introduce the case. The author prefers a different approach. If the jurors are death-qualified first then a subtle approach is moot.

The mood in the courtroom changes dramatically when the death penalty is first mentioned. You can hear a pin drop. Jurors instantly become aware of the awesome responsibility that may be placed on their shoulders.

Given the dramatic impact of the mere utterance of "the death penalty," this discussion should be undertaken by the court at the conclusion of the initial general *voir dire*. Delaying this topic until the conclusion of the initial general *voir dire* has certain advantages. For example, jurors have been able to establish a comfort level with the proceedings. After filling out the pre-trial publicity questionnaire, the jurors have a general idea that this case involves a possible murder. The concept of the death penalty has crossed each juror's mind. By letting jurors proceed through the initial general group *voir dire* without a discussion of the death penalty, you obtain more honest answers on the general issues.

In contrast, if a judge informs the jury initially that this case involves a potential for the death penalty, many jurors will be overwhelmed. They are more likely to give "shock-based" answers. Holding the discussion to the end of the initial *voir dire* process prevents this shock effect from overshadowing the jurors' general feelings about the criminal justice system.

This procedure works very well but should not be sprung on the lawyers on the day of trial. The entire procedure should be handled on the record at a pre-trial conference. Once the attorneys realize they will have adequate time to discuss the death penalty during death qualification and in final general *voir*

dire, they are generally accepting of the procedure. Make a journal entry of the order during the pre-trial stages of the case.

[5.29] Initial General *Voir Dire*

The following procedure assumes the use of the initial general *voir dire*–death penalty qualification–final general *voir dire* procedure.

Bring the entire prospective venire into the courtroom. Seat the jurors in numerical order and have the bailiff confirm proper seating. The jurors are placed under oath. Presumably, you previously advised counsel not to mention the issue of the death penalty and sequestration. The court covers these issues at the end of initial general *voir dire* after taking initial challenges for cause. The court and counsel cover these issues in detail during death penalty qualification. At the conclusion of the court's general *voir dire*, counsel questions the venire. The court takes initial challenges for cause. The court next discusses the potential for the death penalty and sequestering.

The following topics are covered by the court at the conclusion of the initial group *voir dire*:

- Challenges for cause by counsel (made at the bench);
- The length of trial, including the court's normal working hours;
- The capital punishment potential for the case;
- The sequestrating procedures during deliberations;
- The procedure for death penalty qualification. During death penalty qualification, the following issues will be discussed:
    - Views on capital punishment and the death penalty;
    - Knowledge of this case or any pre-trial publicity jurors have heard concerning this case;
    - Any other issues that have been raised in individual jury questionnaires;
    - Any other issues that jurors wish to have come before the court as part of the jury seating process;

- The death penalty views questionnaire (to be completed before leaving); and
- Explain and provide copies of the timetable schedule for further reporting.

[5.30] Death Penalty Qualification

Death penalty qualification is a constitutionally mandated requirement in seating a capital jury. It is the most microscopically reviewed area of the jury seating process. It is one of the more common areas of reversal on both direct appeal and in post-conviction proceedings. Three methods are typically used to death-penalty qualify a jury. These are: (1) individual *voir dire*; (2) small group *voir dire*; and (3) the bold or mass *voir dire*.

State law must be considered to determine whether a specific method of death qualification is required.[418] Most jurisdictions follow the individual or small group *voir dire* practice. The mass *voir dire* is generally not recommended.

From the standpoint of time and efficiency, the small group *voir dire* process works best. The process of small groups still permits individual questioning of each juror. If necessary, jurors may be individually isolated and questioned. Significant time is saved on various preliminary matters. Further, if a juror makes an extremely prejudicial remark, only a small portion of the entire jury venire is tainted. Small groups are normally five to eight jurors per group.

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[418] For example, Cal. Civ. Proc. Code § 223 (1990), provides: "[V]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." The law in New Jersey provides that "at trials of crimes punishable by death, the examination shall be made of each juror individually, as his name is drawn, and under oath." *State v. Accetturo*, 619 A.2d 272 (N.J. Super. 1992), (citing N.J. Ct. R. 1.8.3(a) (1982)). In Utah, the courts hold that "the individual, sequestered death-qualification *voir dire* of jurors in a capital homicide case does not, in and of itself, violate the defendant's rights to fair and impartial jury." *State v. Shaffer*, 725 P.2d 1301 (Utah 1986). In Delaware, it appears the courts have discretion as to whether to use individual or group seating. Spec'l Jury Plan for Cap. Cases §§ 5-10 (1994). Also noteworthy, in Texas, "in a capital felony case in which the State seeks the death penalty, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by the grand jury, presumption of innocence, and opinion. Then, on demand of the State or defendant, either is entitled to examine each juror on *voir dire* individually and apart from the entire panel, and may further question the juror on the principles propounded by the court." Tex. Code Crim. Pro. Art. 35.17(2) (1991).

It is often said that death-penalty-qualification questioning is designed to elicit a juror's general beliefs and feelings about the death penalty. While this is true, this purely philosophical approach cannot be dogmatically followed. Specific facts may need to be referenced. This is particularly true in instances where the victim is a police officer or the victim is a child, or in cases that involve rape, multiple murders, or murders with racial overtones.

Death penalty qualification is not designed to permit questions seeking to establish a specific set of facts that would lead to the death penalty. Exacting promises from jurors regarding the death penalty is improper. The goal is to have a jury that will listen to all of the facts, mitigation, and the law before deciding whether the death penalty would be appropriate or whether a life option would be appropriate. This is not the time that either prosecution or defense counsel should be permitted to attempt to bias the jury toward a specific set of facts or to obtain from the jury a promise concerning a given set of facts..

At the same time, questions that are too general will not suffice to determine if a potential juror lacks impartiality in this particular capital case, even though he or she may be generally fair in considering the death penalty or life imprisonment. For example, the status of the victim (such as a child or law enforcement officer) may prevent some prospective jurors from considering both possible punishments.

Similarly, some mitigation evidence may be controversial or hard for some jurors to weigh impartially. For example, some jurors may not consider alcoholism as a potentially mitigating factor or may be unwilling to consider psychological evidence. Thus, case-specific questioning is important and often mandated as long as it does not seek a commitment as to how a juror will vote.

[5.31] Final Group *Voir Dire*: The Chosen Ones

After a minimum of 50 jurors have been death-penalty qualified, the prospective venire is reconvened for the final selection process. At this point, the prospective venire has been initially

qualified, found to be initially free of hardship, and capital qualified. The jury is placed under oath. They are questioned concerning any violation of the court's admonitions. Counsel are permitted to discuss any remaining issues. Final challenges for cause are made at the side bar. Peremptory challenges are exercised. Even if not required by state law, it is the best practice that all challenges in a capital case take place at the side bar so the jury cannot hear.

It is a good rule of thumb to seat as many alternate jurors as the local jurisdiction permits. Capital cases are long affairs and the most unexpected things happen to jurors. There is rarely a time in a capital case where too many alternate jurors caused a problem. It is much more frequent that the court, after a long and arduous trial, has insufficient jurors to render a verdict. Once the selection is completed, the jury is given the final oath.

[5.32] *Batson* Challenges

No discussion of the jury selection process in a capital case (or any other case for that matter) would be complete without mentioning *Batson v. Kentucky*[419] and its progeny. In *Batson*, the U.S. Supreme Court held that an African-American defendant was denied equal protection when the prosecution exercises peremptory challenges to remove all African-American jurors from the venire solely on the basis of race. The U.S. Supreme Court in *Batson* devised a three-step analysis to determine whether a potential juror is excluded solely because he or she is the same race as the defendant.

First, the defendant must establish a prima facie showing of purposeful discrimination in jury selection by the prosecution.[420] In order to make such a showing, the defendant must show: (a)

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[419] 476 U.S. 79 (1986).

[420] *Id.* at 93-94. In light of the modification of *Batson* in *Powers v. Ohio*, 499 U.S. 400 (1991) and *Georgia v. McCollum*, 505 U.S. 42 (1992), an inference of purposeful discrimination no longer arises if the defendant is a member of a "cognizable racial group" and peremptory challenges are targeted at members of the venire who are within the same "cognizable racial group." Rather, it appears as though an inference of purposeful discrimination arises when the juror (or jurors) to whom *peremptory* challenges are directed is a member of a "cognizable racial group." In *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008), the U.S. Supreme Court indicated the trial court must evaluate the demeanor of the prosecutor exercising the challenge *and* the juror being excluded. (emphasis added).

he is a member of a cognizable racial group; (b) the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; and (c) in light of all attendant circumstances, there is an inference of purposeful discrimination.

Second, if the defendant has made the requisite prima facie showing, the burden then shifts to the prosecution to demonstrate a race-neutral reason for the challenge. Once presented with the prosecution's proffered race-neutral reason for the challenge, the court must determine whether such reason is credible or pre-textual and whether the defendant has met his or her burden of proving purposeful discrimination.[421]

In 1991, the U.S. Supreme Court expanded its holding in *Batson* and held that "[u]nder the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race."[422] Moreover, *Batson* has been held to apply in the reverse, i.e., it prohibits a criminal defendant from exercising peremptory challenges solely on the basis of race.[423]

In assessing the validity of a claim of a non-discriminatory reason for striking a potential juror, it is permissible and appropriate for a judge to consider whether other potential jurors of a different race had the same attribute(s) but were kept on the jury. Thus, for example, if a party says, "I struck juror 12 [an African-American] because she is employed" but a white unemployed female was kept on the jury, the explanation may be found to be pretextual.

More recently, the U.S. Supreme Court noted that "[u]nder the Equal Protection Clause, a defendant [or the prosecution] may not exercise a peremptory challenge to remove a potential juror

[421] *Id.*; *see also State v. Manns*, 864 N.E.2d 657 (Ohio 2006).
[422] *Powers v. Ohio*, 499 U.S. 400, 111 (1991).
[423] *See Georgia v. McCollum*, 505 U.S. 42 (1992); *People v. Rambersed*, 649 N.Y.S.2d 640 (N.Y. Sup. 1996).

solely on the basis of the juror's gender,[424] ethnic origin,[425] or race."[426] In addition to applying to African-Americans, *Batson* has been held to apply to Hispanics, Asian-Americans, and Native Americans.[427]

However, as noted by the Third Circuit Court of Appeals in *Rico v. Leftridge-Byrd*,[428] the U.S. Supreme Court's holding in *Martinez-Salazar* has left lower courts to ponder the following questions: "What . . . does 'ethnicity' or 'ethnic origin' mean and how does one define the 'cognizable racial group' to which *Batson* itself referred? And how does one define 'race' when the understanding of 'race' itself had changed over the centuries?"[429] In an attempt to define what constitutes a "cognizable racial group," courts reviewing the issue have considered the following factors:

- The group must be definable and limited by some clearly identifiable factor;
- A common thread of attitudes, ideas, or experiences must run through the group; and,
- There must exist a community of interests among the members, such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process.[430]

Under this analysis, the First Circuit Court of Appeals in *Sgro*[431] held that, for the purposes of *Batson*, Sgro didn't offer enough evidence to prove Italian-Americans are a cognizable racial group.[432] However, under the same analysis, the U.S. District

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[424] *J.E.B. v. Alabama*, 511 U.S. 127 (1994). (Held the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man.)

[425] *See Hernandez v. New York*, 500 U.S. 352 (1991). (Held that *Batson* applies to Latinos.)

[426] *Batson*, 476 U.S. at 93-94; *U.S. v. Martinez-Salazar*, 528 U.S. 304 (2000).

[427] Use of Peremptory Challenges to Exclude Ethnic and Racial Groups, Other Than Black Americans, from Criminal Jury-Post-Batson State Cases, 20 A.L.R.5th 398 (1994).

[428] 340 F.3d 178 (3d Cir. 2003).

[429] *Id.* at 183.

[430] *People v. Rambersed*, 649 N.Y.S.2d 640 (N.Y. Sup. 1996) (citing U.S. v. Sgro, 816 F.2d 30 (1st Cir. 1987)).

[431] 816 F.2d 30 (1st Cir. 1987).

[432] "Other than general statements to the effect that "[c]ommon experience dictates that Italian-Americans are a distinctive ethnic group" and, that "[t]he members of this ethnic group certainly have common ideas, attitudes and experience," the record is singularly bare of any *evidence* from which such

Court, Eastern District New York, in *U.S. v. Biaggi*[433] held that Italian-Americans were a cognizable racial group to which *Batson* would apply.[434] Additionally, the Supreme Judicial Court of Massachusetts has recognized that *Batson* applies to peremptory challenges of jurors with Irish-sounding surnames.[435] The District Court of Appeals of Florida has held that those of the Jewish faith constituted a "cognizable class" to which state case law similar to *Batson* would apply.[436] Interestingly, however, peremptory strikes on the basis of age do not violate *Batson*.[437]

In light of all this confusion, the author finds the words of U.S. Supreme Court Justice Alito, then writing for the Third Circuit Court of Appeals in *Pemberthy v. Beyer*[438] to be of guidance. In that case, Judge Alito noted: "[w]e believe that *Batson* does not apply to peremptory challenges unless they are based on classifications, such as race or national origin, that are subject to 'strict' scrutiny under equal protection doctrine, or possibly those classifications, such as gender, that are subjected to 'heightened' scrutiny."[439]

In *Pemberthy*, the Third Circuit Court of Appeals concluded that *Batson* did not apply to peremptory challenges based on language ability, as long as it's not related to ethnicity.[440] Despite this guidance, a court confronted with a *Batson* challenge to an

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findings could have been reached by the trial court. Appellant did not request an evidentiary hearing on the issue of cognizability. Neither did he make an offer of proof as to facts tending to show *prima facie* the presence of a cognizable group. Furthermore, he offered no evidence showing what surnames are "Italian-American" or demonstrating the relationship between surnames and ethnicity. Appellant's conclusory allegations are insufficient to satisfy the burden of proving cognizability. We will not endorse such a practice. At the very least, a party seeking to invoke *Batson* must sketch out a fact-based *prima facie* showing of cognizability in the *Duren* sense." *United States v. Sgro*, 816 F.2d 30, 33 (1st Cir. 1987).

[433] 673 F.Supp. 96 (E.D.N.Y. 1987), *affirmed* U.S. v. Biaggi, 853 F.2d 89 (2d Cir. 1988).
[434] *Id.* at 101.
[435] *See Commonwealth v. Carleton*, 641 N.E.2d 1057 (Mass. 1994). *Compare Marchu v. U.S.*, 926 F.2d 50 (1st Cir. 1991) (holding that, even assuming people with Irish ancestry constitute a "cognizable racial group," there was a lack of evidence they were subject to unequal treatment at the time of the defendant's trial).
[436] *See Joseph v. State*, 636 So.2d 777 (Fla. Dist. Ct. App. 1994).
[437] *See Harris v. Burge*, 2004 WL 884437 (E.D.N.Y.); *Lawler v. MacDuff*, 779 N.E.2d 311 (Ill. App. Ct. 2002).
[438] 19 F.3d 857 (3d Cir. 1994).
[439] *Id.* at 870. (internal citations omitted).
[440] *Id.* at 870 and 872.

alleged "cognizable racial group" that falls in the penumbra of this area should conduct sufficient state and federal research on the issue.

[5.33] General Admonitions to the Panel

General admonitions are provided to the jury at the conclusion of every jury seating hearing. During trial, the court should give them at every recess. Admonitions are always provided orally to the jury. Providing written admonitions is an additional good practice. It provides a constant reminder to the jury and permits the jurors to explain to their families why they cannot discuss the case with them. Consider the use of a signed juror pledge as to admonitions. Routine polling regarding following the pledge is helpful to deter violations. Provide complete general admonitions and consider the following:

- ✓ Special and repeated admonitions concerning the reading of and/or posting on any type of social media. Jurors for some reason do not believe that social media must be avoided in all forms. It cannot be stressed enough.
- ✓ Explanation to jurors that they may not be photographed or contacted by the press or by anyone during their jury service or during any recesses while the case is progressing. Report any violations to the court. (Consult local law as to whether jurors may be photographed.) Note that there may be an issue as to whether the court needs to hold a special hearing before prohibiting jurors from being photographed.
- ✓ Explanation to jurors that they are to meet the bailiff in the jury assembly room, by using the following terms:
    - o You are to meet the bailiff in the jury assembly room at all times.
    - o You are not to enter this courtroom or any other courtroom under any circumstances unless accompanied by the bailiff.
    - o You shall always report to the jury assembly room until you are accompanied to the courtroom by the bailiff under my instructions.
    - o You are to communicate with the court through the bailiff, but the bailiff may not discuss any aspect of this case with you. The bailiff will answer

questions regarding scheduling or other related matters but cannot discuss any aspect of the case with you whatsoever. Report problems to the bailiff.
    - If you have any particular problem, we will try to help you in any way possible. The bailiff will act as my eyes and ears in regards to you and will report directly to my office.

Review all standard admonitions at every break.
Beyond general admonitions, if the trial is being photographed or broadcast on television, advise the jurors as follows:

- ✓ You will note that these proceedings are being broadcasted, photographed, and/or recorded by members of the news media. You must not allow this fact to divert your attention from this case or to interfere with your duties as jurors.
- ✓ You are not allowed to talk to members of the media during the trial and members of the media are not permitted to contact you. Should any member of the media attempt to contact you, you should notify the bailiff immediately.
- ✓ Jurors may not be photographed and may not be contacted during the course of the trial. Should any violation of this occur, you shall immediately notify the bailiff of such violation. (Consult local law as to whether jurors may be photographed.)

[5.34] Death Penalty Qualification: Challenges for Cause and the *Witherspoon* Standard

Death penalty qualification is the most crucial part of the jury selection process. Improper exclusion or inclusion of jurors will constitute reversible error. If a court excludes (for cause) a juror erroneously under the *Witherspoon*[441] standard, such an exclusion cannot be harmless error.[442] To understand the sheer

[441] *Witherspoon v. Illinois,* 391 U.S. 510 (1968).
[442] *See Gray v. Mississippi*, 481 U.S. 648 (1987).

importance of death penalty qualification, four U.S. Supreme Court decisions must be analyzed.

[5.35] *Witherspoon v. Illinois*

The bedrock decision is *Witherspoon v. Illinois*.[443] Illinois law permitted a for-cause challenge of jurors who voiced general misgivings about the death penalty. The prosecutor successfully asserted a for-cause challenge to every prospective juror with reservations regarding the death penalty. This resulted in almost half of the venire being excused for cause. The Illinois statute permitted exclusion for cause where jurors had "conscientious scruples against capital punishment."[444] The U.S. Supreme Court reversed the death penalty jury verdict, holding that a sentence of death must be vacated if jurors were excluded due to the juror's general opposition to the death penalty.[445] The U.S. Supreme Court held such an exclusion does not result in an impartial jury under Sixth Amendment standards. In definitive terms, the U.S. Supreme Court stated:

> [A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding venire men for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.[446]

In a footnote, the U.S. Supreme Court laid out what would ultimately become the framework for the death penalty qualification standard used in the United States. The footnote stated that nothing in the opinion prohibited the penalty of death by a jury, if those excluded for cause were only "those who made

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[443] *Illinois,* 391 U.S. 510 (1968).
[444] *Id.* at 534. (internal citations omitted.)
[445] *Id.* at 522.
[446] *Id.* at 521-23.

unmistakably clear[447] that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."[448]

Out of *Witherspoon* came the principle that a trial judge should grant a challenge for cause by the prosecutor only if: (1) the juror would automatically vote against the death penalty despite any evidence at trial (sometimes referred to as the automatic life or life only juror); or (2) the juror indicates an attitude toward the death penalty that prevents the juror from making an impartial decision concerning the defendant's guilt.[449]

[5.36] *Wainwright v. Witt*

In 1985, in *Wainwright v. Witt*,[450] the U.S. Supreme Court clarified the *Witherspoon* standard. In *Wainwright*, a prosecutor's motion for cause was granted excusing a prospective juror who had "personal beliefs" against the death penalty.[451] The U.S. Supreme Court modified the *Witherspoon* "unmistakably clear" standard. The U.S. Supreme Court held that it is not necessary that the trial judge find it to be "unmistakably clear" that a juror would automatically vote against the death penalty.[452] A juror may be excused for cause "because of [the juror's] views on capital punishment ... [when] the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[453] Ultimately, the exclusion of the particular juror in *Wainwright* was upheld.

[5.37] *Morgan v. Illinois*

Both *Witherspoon* and *Wainwright* involved challenges for cause made by a prosecutor against prospective jurors who held views

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[447] In 1985, *Wainwright v. Witt*, 469 U.S. 412 (1985) modified the phrase "unmistakable clarity" to the current standard of whether the juror's views would "prevent or substantially impair the performance of his duties ...."
[448] *Illinois,* 391 U.S. at 523 n. 21.
[449] *Id.*
[450] 469 U.S. 412 (1985).
[451] *Id.* at 416.
[452] *Id.* at 452.
[453] *Id.* at 424. (internal citations omitted.)

against the death penalty. In *Morgan v. Illinois*,[454] defense counsel objected to prospective jurors who held views in favor of the death penalty. This is often termed a reverse *Witherspoon* challenge. In *Morgan*, the U.S. Supreme Court held that any prospective juror who would automatically vote for the death penalty must be excluded for cause.[455]

These jurors are sometimes referred to as "automatic death jurors" or "death-only jurors." Questioning must be permitted to discover jurors who are so pro-death they cannot follow the law. Jurors who would never vote for a life sentence must be excluded. Also, jurors must be excluded whose views in favor of the death penalty are so strong that these views would substantially impair their ability to consider a life sentence.

Ultimately what comes out of *Morgan* is a standard that is, on its face, the same. Whether you consider a pro-life (*Witherspoon*) or a pro-death (reverse *Witherspoon*) challenge, the same legal analysis applies. A juror should be disqualified for cause if the juror would automatically vote for either a life sentence or a death sentence despite the facts of the case and the instructions of the court. A juror must also be excluded if the juror's views against or in favor of the death penalty would substantially affect the juror's willingness or ability to follow the law as instructed by the trial judge.[456]

By following the "script" questions provided in the appendix, most jurors will be either death penalty qualified or excluded. It is when the lines blur in some situations that error may occur.

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[454] 504 U.S. 719 (1992).
[455] *Id.* at 738-39.
[456] For an in-depth analysis of the many varied lower courts' interpretations of *Witherspoon*, *Wainwright*, and *Morgan*, *see*, John Holdridge, *Selecting Capital Jurors* Uncommonly Willing to Condemn a Man to Die: Lower Courts' Contradictory Readings of Wainwright v. Witt and Morgan v. Illinois, 19 Miss. C. L. Rev. 283, 303 (1999), wherein, in order to clarify "for cause" challenges capital jurors, Holdridge urges the U.S. Supreme Court to "state explicitly that the defense can challenge for cause prospective jurors whose ability to consider a life sentence is substantially impaired. The U. S. Supreme Court should also hold that prospective jurors cannot be excused for cause based on their views of the appropriateness of a particular penalty under the specific facts to be tried."

[5.38] *Uttecht v. Brown*

In 2007, the U.S. Supreme Court again revisited the progeny of *Witherspoon*. In *Uttecht v. Brown*,[457] the U.S. Supreme Court set forth and affirmed the following four relevant principles on the exclusion of jurors for cause during death penalty qualification:

1. A criminal defendant has the right to an impartial jury not tilted in favor of the death penalty by prosecutorial challenges for cause.
2. The state has a strong interest in having jurors who can follow the law in considering capital punishment.
3. To balance these interests, a juror who is substantially impaired in the ability to impose the death penalty under state law can be excused for cause, but, if the juror is not so impaired, removal for cause is impermissible.
4. In determining whether a potential juror's removal would vindicate the State's interest without violating the defendant's right, the trial court bases its judgment, in part, on the juror's demeanor, a judgment owed deference by reviewing courts.[458]

The gravamen of *Uttecht* is that under federal habeas actions, deference must be afforded the trial judge who has "eye balled" the juror. Therefore, in light of *Uttecht*, making the record becomes even more paramount when seating a juror. Body language, facial expressions, etc., all must be considered as part of demeanor. Give the record "eyes."

[5.39] Improper Exclusion (Inclusion) – Not Harmless Error

Improperly granting a challenge for cause, which excludes a prospective juror based on the juror's opposition to the death penalty, constitutes reversible error under almost all circumstances.[459] This reversible error standard also applies to the improper inclusion of a juror that is either a death only juror or a juror whose pro-death views would prevent or substantially impair the juror's ability to consider a life sentence. The one

[457] 551 U.S. 1 (2007).
[458] *Id.* at 9.
[459] *See Gray v. Mississippi*, 481 U.S. 648 (1987).

exception to the "automatic reversal" rule is where an erroneous ruling on a challenge for cause results in the temporary inclusion of a prospective juror, and the defendant is forced to exercise a peremptory challenge on the juror. This situation is subject to a harmless error analysis.[460]

The automatic reversal rule applies even though the state has not exercised all of its peremptory challenges. There is no justification for the improper exclusion of jurors who are generally opposed to the death penalty but who can consider it if so instructed by the court. Where a trial court improperly excludes a single juror, the matter will be reversed even though all peremptory challenges by the prosecution or the defense were not used.[461] Even where defense counsel fails to object to an improper challenge for cause, the reversal will still take place.[462] The error is constitutional in magnitude and cannot be subject to a harmless error review.[463]

[5.40] Additional Areas of Inquiry

The U.S. Supreme Court has made clear that death and life qualification are not the only subject matters that must be inquired into in a capital case *voir dire*. Pre-trial publicity and its effect must be examined,[464] so, too, must racial attitudes if the crime is cross-racial.[465] Although the U.S. Supreme Court has not spoken about whether the nature of the crime itself and the impact of sitting as a juror in a violent crime case must be explored, lower courts have found this to be required.[466]

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[460] *See Ross v. Oklahoma*, 487 U.S. 81 (1988).
[461] *See Speck v. Illinois*, 403 U.S. 946 (1971); *Childs v. North Carolina*, 403 U.S. 948 (1971).
[462] *But see Uttecht*, 551 U.S. at 12, ("While there is no independent federal requirement that a state-court defendant object to the prosecution's challenge . . . voluntary acquiescence to, or confirmation of, a juror's removal can be taken into account.").
[463] *See Wigglesworth v. Ohio*, 403 U.S. 947 (1971); *Gray v. Mississippi*, 481 U.S. 648 (1987).
[464] *See Mu'Min v. Virginia*, 500 U.S. 415 (1991).
[465] *See Turner v. Murray*, 476 U.S. 28 (1986).
[466] *See, e.g., U.S. v. Poole*, 450 F.2d 1082, 1084 (3d Cir. 1971) (reversible error to deny inquiry into whether venirepersons were victims of crimes similar to those charged at trial); *U.S. v. Shavers*, 615 F.2d 266, 268 (5th Cir. 1980) ("Certainly, a juror who has been the victim of a crime involving a knife or gun or who has suffered lacerations in an altercation might well be prejudiced against one charged with assault with a deadly weapon.").

[5.41] The Bottom Line

Jurors who are either "automatic life" jurors or "automatic death" jurors are excluded from the panel. On the other hand, jurors who can follow the law and consider the death penalty and any life options are death-penalty qualified, even though they may be personally in favor of or against the death penalty. It is the juror who falls outside these parameters that becomes the problem. The trial court must determine the "death qualification" of such jurors, keeping in mind the potential for automatic reversal.

A small amount of guidance relative to this conundrum was provided in *Lockhart v. McCree*[467] where the U.S. Supreme Court stated:

> [T]hose who firmly believe that the death penalty is unjust may nevertheless serve in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.[468]

Therefore, if a juror clearly states he or she can set aside his or her personal beliefs and follow the law, he or she may still be death-penalty qualified. The bottom line for the court is to determine whether a juror's views will substantially impair the performance of the juror's duties in accordance with the instructions of the court on the law.

[5.42] When You Just Do Not Know

The gravamen of death-penalty qualification is that jurors opposed to the death penalty should only be excluded where the court record definitely supports a finding of bias. The record must be complete. If facial gestures or body language are important, make sure the record is complete. There is no margin for error.

When the judge just does not know on a challenge for cause, he or she should gravitate toward the side of life. If a juror has a life sentence philosophy, do not exclude the juror for cause. These "I

[467] 476 U.S. 162 (1986).
[468] *Id.* at 176.

just don't know what to do" examples are unusual but occur in almost every case. By good questioning and using the suggested script, most jurors will fall into a category. However, rare occasions will occur and when they do, super due process says gravitate toward the side of life.[469]

[5.43] Jurors Excluded for Cause[470]

Below is a list of examples of when jurors were excluded for cause:

- A juror who would automatically vote for or against the death penalty regardless of the facts and the law. These jurors agree that they cannot follow the law and they are automatically excluded.[471]
- A juror who would automatically impose the death penalty without regard to mitigating circumstances.[472]
- A juror who would only consider the death penalty where the victim was a member of the juror's family.[473]
- A juror who would never impose the death penalty in a case based on circumstantial facts and would only impose the death penalty if the juror was a witness to the crime.[474]

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[469] For an excellent break down of juror excusals in capital cases, *see* Joseph E. Edwards, L.L.B., Annotation, *Comment Note – Beliefs Regarding Capital Punishment as Disqualifying Juror in Capital Case-Post-Witherspoon Cases*, 39 A.L.R.3d 550 (1971).

[470] Interestingly, in Idaho, "[a] challenge for implied bias may be taken for all or any of the following causes and for no other: . . . . If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror." Idaho Code Ann. § 19-2020 (2009). This is true even though the jury does not participate in the penalty phase. *See State v. Johns*, 736 P.2d 1327, 1334 (Idaho 1987) ("The statute recognizes that even though punishment is not a jury question, it is proper to exclude a juror if he objects to the death penalty.").

[471] *See Barnes v. State*, 496 S.E.2d 674 (Ga. 1998) (juror properly excluded who clearly stated that she could never vote to impose the death penalty regardless of the evidence and the court's instructions).

[472] *See Pope v. State*, 345 S.E.2d 831 (Ga. 1986), *overruled on other grounds by Nash v. State*, 519 S.E.2d 893 (Ga. 1999) (juror should have been excused who stated that "regardless of anything the defendant might put up in the way of mitigation" he would vote for the death penalty if the defendant was found guilty).

[473] *Id.* (juror properly excluded who stated she did not believe in the death penalty and could only vote to impose death sentence if it was a case involving the brutal murder of her family member).

[474] *See Jacobs v. State*, 361 So.2d 607 (Ala. Crim. App. 1977); *State v. Jordan*, 420 So.2d 420 (La. 1982).

- A juror who would automatically vote against the death penalty except in the "case of mass murder on the scale of Adolf Hitler or Charles Manson."[475]
- A juror who would vote for the death penalty in only two circumstances: when a child molester kills a child or when a rapist kills its victim.[476]
- A juror who feels the death penalty is morally and religiously wrong in all circumstances.[477]
- The juror's views on the death penalty would prevent the juror from making an important decision as to the guilt or non-guilt of the defendant regardless of the evidence.[478]
- The juror's views on the death penalty would prevent the juror from making an impartial decision as to the issues submitted at the sentencing stage regardless of the evidence.[479]
- The juror is in favor of the death penalty and after further questioning states that the juror would do their best to follow the law. Or under the same circumstances, the juror states, "I think I can follow the law." (Juror just will not give clear answer.)
- The juror's conscientious religious opposition to the death penalty, in and of itself, does not constitute grounds for a challenge for cause unless the prospective juror's views would prevent or substantially impair the

[475] *State v. Nicholson*, 437 So.2d 849, 854 (La. 1983).
[476] State v. Kell, 61 P.3d 1019 (Utah 2002).
[477] *See State v. Lindsey*, 543 So.2d 886 (La. 1989) (juror properly excluded who stated initially that he could consider the death penalty if dealing with someone who killed 35 elementary school students, but subsequently stated that "his moral beliefs would probably take over" and he would probably not consider the death penalty); *Morrow v. State*, 532 S.E.2d 78 (Ga. 2000) (juror properly excluded who would never vote for the death penalty "even in the worst case he could imagine.").
[478] *See State v. Kenley*, 693 S.W.2d 79 (Mo. 1985), *vacated on other grounds by Kenley v. Bowersox*, 234 F.3d 1339 (8th Cir. 2000) (three jurors properly excluded for cause, not because they could not impose the death penalty, but because they stated they could not return a verdict of guilty in a case where the punishment included the death penalty); *State v. Monk*, 229 S.E.2d 163 (N.C. 1976) (jurors properly excluded who stated that they would not return a verdict under any circumstances, knowing that the death penalty would be imposed, even if the state proved the offense beyond a reasonable doubt).
[479] *See Downs v. State*, 386 So.2d 788 (Fla. 1980) (jurors were properly excluded when they stated that they could not, under any circumstances, vote to impose the death penalty after a verdict of guilty was returned).

performance of the juror's duties in accordance with the court's instructions and the juror's oath.[480]

- The juror ultimately concludes that, although in favor of the death penalty, he can listen with an open mind. However, when all of his statements, taken as a whole, reveal the following: "I have mixed emotions ... because I feel – I am for the death penalty. I don't think I would be fair to the defendant. I feel by listening to everything, I think I could be fair, but I can't sit here and say "yes" I will be fair . . . . I would not automatically vote for the death penalty, but I am in favor of it as long as it's proven that it should be given . . . . I guess I had such strong feelings in the beginning and I want to be fair about it and I think I could go in and listen to all the facts, but I still have a little bit of doubt . . . . I would listen with an open mind." Where such statements are "internally inconsistent and vacillating . . . including numerous statements of strong doubt regarding impartiality and merely a few tentative or cursory statements [regarding fairness]," a court errs in denying request to excuse the juror for cause.[481]

[5.44] Jurors Not Excluded for Cause

Below is a list of examples of when jurors were not excluded for cause:

[480] *See State v. Billings*, 500 S.E.2d 423 (N.C. 1998) (juror who stated that his longstanding moral convictions about the death penalty would substantially impair him in the sentencing process and prevent him from voting for the death penalty was properly excluded); *State v. Kleypas*, 40 P.3d 139 (Kan. 2001), *overruled in part on other grounds by State v. Marsh*, 102 P.3d 445 (2004), *reversed and remanded by Kansas v. Marsh*, 548 U.S. 163 (2006), *vacated in part by State v. Marsh*, 114 P.3d 48 (Kan. 2006)) (A juror was properly excluded who stated her moral and religious beliefs would prevent her from returning a verdict which would result in the execution of another human being. However, upon questions posed by the defense counsel, she indicated that it would be possible for her to return a death penalty if the case fell within her list of very few exceptions, which she said she would know at once if the case met her exceptions.).

[481] *White v. Mitchell*, 431 F.3d 517, 538-41 (6th Cir. 2005) *see also*, *Peoples v. Samuels*, 113 P.3d 1125 (Cal. 2005) (juror properly excluded who gave contradictory answers regarding his views on the death penalty and regarding his ability to follow the law).

- Juror has general views against the death penalty but juror states they can temporarily set aside their own personal beliefs in deference to the rule of law.[482]
- Juror has religious objections to the death penalty but could nevertheless subordinate their personal view and vote for a death penalty where the evidence warrants it.[483]
- Juror does not believe in the death penalty but could follow the law and consider the death penalty and vote for the death penalty if the facts and the evidence warrant the death penalty.
- Juror cannot think of any specific example where they would grant the death penalty, but states they could consider the death penalty in an appropriate case.
- Juror states, "It would be difficult for me to vote for the death penalty" or "I doubt very much whether I could vote for the death penalty," are not sufficient without more to exclude the juror.[484]
- It is improper to sustain a challenge for cause concerning a juror that states that the juror would automatically vote against the death penalty if a case rested entirely on circumstantial evidence. This does not permit a challenge for cause based on the juror's views regarding the death penalty. The court could consider whether the juror should be excused for cause because he or she could not be fair in applying the law as to circumstantial evidence depending on the law. This is a matter for a general *voir dire* challenge for cause as opposed to the death penalty qualification (*Witherspoon*) challenge for cause.

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[482] *See Riley v. State*, 889 S.W.2d 290 (Tex. 1993) (juror was improperly excluded for cause who, despite a moral and personal religious opposition to the death penalty, testified that she would not disobey the law or the jury instructions by answering the statutory punishment issues negatively in order to avoid rendering the death penalty).

[483] *See Mead v. State*, 645 S.W.2d 279 (Tex. Crim. App. 1983) (juror was improperly excluded who, although he was against the death penalty, stated that he could listen to the evidence and answer the special issues or questions; that he would render a true verdict according to the law and the evidence; and that he would not answer the questions "untruthfully").

[484] See, *Dunlap v. People*, 173 P.3d 1054, 1086-87 (Colo. 2007), *as modified on denial of reh'g* (July 2, 2007) (Court left finding of whether juror's statements showed he was substantially impaired in his ability to fairly and impartially way aggravating and mitigating evidence to trial judge as he/she could assess juror's credibility, demeanor, and sincerity).

[5.45] The Attempt to Rehabilitate

If a juror has clearly expressed an inability to vote for the death penalty regardless of the evidence, the court has discretion to limit further questioning directed toward persuading the juror. There may be some circumstances in which the juror would be able to vote for the death penalty.

As an example, it is not error for a court to prevent defense counsel from asking a prospective juror who had clearly expressed an inability or unwillingness to vote for the imposition of the death penalty, if the juror would be able to impose the death penalty if the state proved beyond a reasonable doubt that the defendant would pose a danger to other inmates if sentenced to a life without possibility of parole. This concept also applies to "automatic" death jurors.

However, the court should be cautious in forestalling all further questioning. Use discretion in determining when a juror has made the opinion of the juror fully known and if further questioning is simply an attempt to change the juror's mind.

[5.46] Final Thoughts on Jury Selection

Jurors are only human. It is hard for them not to discuss the facts of the case with family or friends. It is difficult for them not to watch the news or read the newspaper. Constant admonitions and inquiry of the panel by the judge is the best preventive practice. Staff must be warned about unintended consequences of improper contact with jurors. For example, it is inappropriate to pray with, eat lunch with, or give rides home to jurors. Proactive and constant admonitions to jurors and staff will pay off.

Sitting on a capital jury is one of the most important life experiences most jurors will ever undertake. We ask twelve people to make the ultimate decision between life and death. It is an arduous, harrowing, life-changing process. Respect the magnitude of the task. Give jurors complete explanations. Understand that advanced planning is vitally important. Give as much notice as possible on all dates and on sequestering. Jurors

will do the best to follow your orders. They respect the trial judge. Do your part to earn that respect.

CAPITAL CASE TRIAL COMPLICATIONS

Judge Michael Sage
Magistrate Megan Maag
Hon. Janet Burnside
Hon. John Molaisan

[6.1] Self-Represented Defendants

In 1975, the U.S. Supreme Court recognized a criminal defendant's constitutional right to defend him- or herself.[485] Fortunately, the incidence of self-represented defendants in capital cases is rare. Because execution is the ultimate penalty, a self-represented capital defendant creates the ultimate challenge for the trial judge.

The evolution of capital case jurisprudence demonstrates that the law takes extra precautions to ensure that trial courts impose the death penalty only on those defendants guilty of the most heinous forms of the crime of murder. Unschooled in the legal principles that could bolster his or her defense, however, the self-represented capital defendant seems to face a greater risk of conviction. Thus, courts have found themselves faced with the difficult task of determining when, if ever, the state's interest in promoting reliability in capital cases outweighs the defendant's interest in conducting his or her own defense.

Self-represented defendants always require extraordinary protocols, and presiding over a capital self-represented defendant's trial necessitates the pre-establishment, implementation, and publication of those protocols to all who will be present during the trial. The court should consider what the defendant will be allowed to say, how the defendant will be allowed to act, and how to deal with the defendant's lack of understanding of the judge's rulings. The court must also instruct counsel and the courtroom staff as to how they should interact with the self-represented defendant.

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[485] *See Faretta v. California*, 422 U.S. 806 (1975).

The court should also ensure that two important steps are taken. First, the defendant should sign a written waiver. Second, the court should conduct a detailed hearing on the record informing the defendant of the rights he is waiving by proceeding *pro se*.

[6.2] Overriding Principles

Courts should be cognizant of the following fundamental principles when defendants wish to represent themselves:

1. The right to self-representation must be afforded all defendants, *even in capital cases*.[486]
2. The defendant's desire to represent him- or herself must be clear and unequivocal.[487]
3. The appropriate criteria for a trial judge to consider are the defendant's reasons for the self-representation request, the quality of the counsel representing the party, and the defendant's prior proclivity to substitute counsel.[488]
4. A valid waiver of the right to counsel must be made by the defendant. The waiver must appear from the record to be made knowingly and intelligently with a full understanding of the consequences.[489]
5. The U.S. Supreme Court permits states to insist upon representation by counsel for those who are competent enough to stand trial but who still suffer from severe mental illness to the point that they are not competent to conduct trial proceedings by themselves.[490] Judges may take a realistic account of a particular defendant's mental capacities by asking whether the defendant who seeks to conduct his own defense at trial is mentally competent to do so.
6. After a trial has commenced, the decision whether to grant a defendant's request to represent himself is within the discretion of the trial court.[491]

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[486] *See Commonwealth v. Davis*, 388 A.2d 324 (Pa. 1978).
[487] *See U.S. v. McKinley*, 58 F.3d 1475 (10th Cir. 1995).
[488] *See United States v. Matsushita*, 794 F.2d 46, 51 (2d Cir. 1986).
[489] *See Commonwealth v. Payson*, 723 A.2d 695 (Pa. Super. Ct. 1999); *Faretta v. California*, *supra*.
[490] *See Indiana v. Edwards*, 128 S.Ct. 2379 (2008).
[491] *See Robards v. Rees*, 789 F.2d 379, 384 (6th Cir. 1996).

7. The trial court should appoint standby counsel where permitted. Some state courts have taken the position that standby counsel is preferred in every case where a defendant represents him- or herself. Standby counsel attends all proceedings and is available to the defendant for consultation and advice.[492]

[6.3] Protocols

Once the court has determined that the defendant is voluntarily, knowingly, and intelligently waiving the right to counsel, the trial court faces certain logistical difficulties. Serious consideration must be given the following issues:

1. The jailed defendant may need someone to coordinate the appearance of his or her witnesses. The court will need to consider providing the defendant with someone to prepare and file the subpoenas, call witnesses, and answer any questions about these and other arrangements.
2. A defendant handling weapons during trial will likely create concerns; however, different rules for the defendant and the prosecutor would create a problem of appearances. Consider imposing the requirement that a sheriff's deputy handle all weapons.
3. In addition, the potential for the defendant coming into close contact with witnesses and jurors is also a cause for concern. Consider partitioning the courtroom to create an area within which the prosecutor and defendant can operate that does not permit the defendant and counsel close contact with witnesses and the jury. Use the courtroom deputy to hand exhibits to witnesses from both parties. These arrangements may require that a larger than normal number of deputies or court personnel be present.
4. Depending on the courtroom's configuration, special arrangements for sidebar conferences may be required. If necessary, the jury may need to be removed for sidebar conferences.

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[492] *See Sherwood v. State*, 717 N.E.2d 131 (Ind. 1999) (listing the factors to consider when a defendant requests to change from self-representation to representation by standby counsel).

5. How much latitude will the judge give the defendant to "lead" direct examination? Will the judge act as a guardian against the prosecutor who takes advantage of the defendant's lack of knowledge of the rules of evidence? A defendant has no right to standby counsel, but one should always be appointed to deal with these issues. Standby counsel attends all proceedings and is available to the defendant for consultation and advice.
6. How will the defendant's own testimony be given? What if a defendant does not testify and, instead, uses closing argument as an opportunity to do so without cross-examination? Will the judge allow the defendant to pick up exhibits and demonstrate, as the prosecutor is able to do? Special attention must be given to prohibit anything that may be used as a weapon. This includes hard pens and pencils.

Since the defendant may at any time decide the burden of self-representation is too difficult or frustrating, standby counsel must be prepared to step in and assume the role of defense counsel at any time. Standby counsel should be instructed on this possibility and responsibility on the record with the defendant present. Both the defendant and standby counsel should be instructed to assume that such a change during trial is irrevocable and the defendant cannot thereafter insist on resuming his self-representation.

Standby counsel should have appropriate death penalty experience and certification. In states that require two appointed counsel, the best policy is to appoint two standby counsel who have proper qualifications. Standby counsel do not normally sit at counsel table. They are in the courtroom at all proceedings but not participating. Although not constitutionally required, it is a best practice to allow a defendant to reasonably consult with the standby counsel if requested.

[6.4] Jury View[493]

Jury views are rarely a good policy. They should be discouraged. The court should not automatically grant a jury view. The parties should be required to specify exactly why the jury view would help the jury understand the evidence. If a jury view is granted, the judge should plan the details beforehand with foresight. The judge should keep in mind that the jury will be out of the courthouse and subject to improper influence, accident, and other difficulties that may lead to a mistrial or adverse publicity.

The court should require the parties to stipulate in writing to everything the bailiff is pointing out to the jury. In addition, the court should prohibit the parties from rearranging or changing the script for items to be pointed out to the jury. The judge should specify that any disputes between the parties will be resolved after a hearing.

The court should advise the jury members that they are not to comment or gesture to each other or anyone else. The judge should require them to speak to the bailiff privately about anything they need. During jury views, the judge should make it clear that the bailiff, or other designated person, is in charge and order the parties and other participants to take their orders from that person. He or she will effectively be the court's representative on the scene. All of these measures set a tone of control that will help the process run smoothly.

The court should arrange for the appropriate law enforcement authority to protect and escort the jury and court staff to the scene during the view and their return trip to the courthouse. The court should also consider the amount of media involvement, if any, that will be permitted during the jury view. If media involvement at the scene is permitted, the court should order the media to refrain from photographing any body part of any juror. It is the judge's responsibility to ensure that all jury members feel safe, and many jurors may fear any media

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493 "While a defendant does not have a substantive right to have the jury view the crime scene, it is discretionary with the court whether it will allow the jury to view the place where the alleged crime was committed, or where some fact or material transaction occurred, or to view some object that might aid the jury in its determination." 23A C.J.S. Criminal Procedure and Rights of Accused § 1588 [citations omitted].

presence.

The court should take measures to obtain a waiver of the defendant's right to attend the jury view. If a waiver is not executed, the defendant should remain in the custody of the sheriff and in the sheriff's vehicle. Also, the court should order the defendant to refrain from making any gesture or uttering any sounds at the scene. Likewise, the jury should not see the defendant in handcuffs or jail attire. However, the jury should be told upfront that the defendant will attend the view but will stay inside a sheriff's vehicle with a deputy.

The court may be wise to anticipate that someone connected to the defendant, the victim's family, or the community at-large, may attempt to make a statement or stage a demonstration at the scene and plan to circumvent this possibility. Prepare the jury members for anything that might surprise them or make them uncomfortable.

The following instructions are an example of what may be given to the jury before visiting the scene:

- ✓ You are going to be taken to the premises or scene involved in this case. You will be required to remain together under the supervision of the bailiff until you return to the courtroom. Counsel and the parties may be present at the time, but they may not discuss this case or demonstrate anything in relation to it. The bailiff may point out certain things to you.

- ✓ What you observe at the scene is not evidence since conditions may have changed since the time of the events in this case. The evidence as to the physical appearance of the scene must come to you from the witnesses who testify at trial. The sole purpose of viewing the scene is to help you understand the evidence as it is presented during the trial.

[6.5] Confrontation Issues

The Sixth Amendment provides that every criminal defendant shall have the right to confront the witnesses against him or her at trial. The landmark case of *Crawford v. Washington*[494] effected a "fundamental re-conception of the Confrontation Clause."[495] Prior to *Crawford*, the Supreme Court in *Ohio v. Roberts* held that the Confrontation Clause permitted a hearsay statement to be used as evidence against a criminal defendant either if the statement fell under a "firmly rooted hearsay exception"[496] or, if not, at least had "particularized guarantees of trustworthiness."[497] Essentially, the effect of the *Roberts* doctrine was to constitutionalize the traditional hearsay exceptions of evidence law and to offer the possibility of expanding those exceptions with modern ones based on guarantees of trustworthiness.

The key test of a Confrontation Clause violation in *Crawford* is whether the hearsay statement offered against a criminal defendant is testimonial.[498] If the statement is testimonial, the Sixth Amendment requires that the hearsay statement be excluded from the evidence against a criminal defendant, even if the statement falls within a traditional hearsay exception, unless the person who made the out-of-court statement is unavailable at the trial and the criminal defendant had an opportunity to cross-examine the declarant before trial.[499]

The majority did not define what is and is not testimonial; however, they concluded that testimonial hearsay includes prior testimony at a preliminary hearing, prior testimony before a grand jury, prior testimony at a former trial, or statements made in answer to police interrogations.[500] Moreover, *Crawford* suggests that unconstitutional testimony may include hearsay statements made by one who subjectively expects, or even reasonably expects, the statement to be used in a criminal prosecution.[501]

Therefore, put simply, *Crawford* only applies when four elements

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[494] 541 U.S. 36 (2004).
[495] *U.S. v. Cromer*, 389 F.3d 662, 671 (6th Cir. 2004).
[496] *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).
[497] *Id.*
[498] *Crawford*, 541 U.S. at 53.
[499] *Id.* at 42-50.
[500] *Id.* at 51.
[501] *Id.* at 51-52.

are present:

1. The statement is offered against the defendant by the state in a criminal prosecution;
2. The statement at issue is testimonial;
3. The declarant of the statement is unavailable to testify at trial; and
4. The defendant did not have a prior opportunity to cross-examine the declarant regarding the statement at a prior formal legal proceeding, preliminary hearing, or deposition.

[6.6] *Davis v. Washington*[502]

As stated, *Crawford* does not apply to non-testimonial statements that the declarant did not intend to be preserved as evidence at trial.[503] In *Davis*, the U.S. Supreme Court held that statements made in the course of a police interrogation, under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency, are non-testimonial.[504]

Statements made when the circumstances objectively indicate there was no such ongoing emergency, and that the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution are testimonial.[505] Therefore, *Davis* suggests that courts should focus on the primary purpose of the interrogation when determining whether a statement is testimonial under *Crawford*.[506]

If a statement is found to be testimonial, it must be excluded unless a court finds that the declarant is unavailable as a witness at trial and that the defendant had a prior opportunity to cross-examine the declarant. If a statement is non-testimonial, then it does not implicate the Confrontation Clause, and the only consideration before the court is whether it may be admitted

[502] 547 U.S. 813 (2006).
[503] *Id.*
[504] *Id.* at syllabus ¶ 1.
[505] *Id.*
[506] *Id.* at syllabus ¶ 2.

under one of the hearsay exceptions.

[6.7] Dying Declarations

The *Crawford* majority conceded that some historical exceptions to the general rule against hearsay admissibility exist and that some were established prior to the adoption of the Sixth Amendment in 1791.[507] However, the U.S. Supreme Court left open the question regarding whether the Confrontation Clause as interpreted by *Crawford* includes a historical exception for dying declarations.[508]

An exception for dying declarations defies the logic of *Crawford*. For example, a statement given to a police officer by a living hearsay declarant unavailable at trial, such as the wife in *Crawford* who incriminates her husband by giving a statement to the police and becomes unavailable at trial because of the marital privilege, is barred by the Confrontation Clause.[509] However, if the same wife were to give the same statement on her deathbed to police interrogators in order to implicate her husband in her death, the Confrontation Clause might not be a bar for historical reasons.[510] Therefore, the U.S. Supreme Court's refusal to label all dying declarations as non-testimonial suggests that lower courts should consider the specific circumstances surrounding the statement.

The U.S. Supreme Court, without using a dying declaration analysis, held a mortally wounded victim's statements to police should be analyzed under the primary purpose test of *Hammon,* which was *Davis'* companion case. It clarified that to determine whether the primary purpose of the victim's interrogation was to enable police to meet an ongoing emergency, courts must objectively evaluate the circumstances in which the encounter between the individual and the police occurs and the parties' statements and actions.[511]

The California Supreme Court decided that the Sixth Amendment does incorporate an exception for dying

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[507] *Crawford*, 541 U.S. at 46.
[508] *Id.* at 56.
[509] *Id.* at 36.
[510] *Id.* at 56.
[511] *Michigan v. Bryant*, 562 U.S. 344 (2010).

declarations.[512] In that case, a murder victim made a statement at the crime scene, which described the perpetrator.[513] That statement was admissible as a dying declaration even though the victim lingered for eleven more days before dying from gunshot wounds.[514] The officer testified that the victim knew he was shot, was in great pain and on the ground in the fetal position, was fearful of dying, and never spoke again.[515] Other states have reached a similar conclusion.[516]

[6.8] Non-Testimonial Statements

Some state and federal courts hold that *Ohio v. Roberts*[517] is still applicable to non-testimonial statements.[518] Some read *Crawford* to suggest that *Roberts* is still applicable to non-testimonial statements because of this language:

Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny all together.[519]

In *Whorton v. Bockting*,[520] the U.S. Supreme Court held that the *Crawford* decision, which overruled *Roberts*, did not announce a "watershed rule" of criminal procedure, which could be applied retroactively on collateral review.[521] Therefore, *Crawford* applies only to cases still on direct review and does not apply retroactively in collateral proceedings.

[6.9] Expert Testimony

The court should oversee the amount that is spent to appoint

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[512] *People v. Monterroso*, 101 P.3d 956, 971 (Cal. 2004).
[513] *Monterroso*, 101 P.3d at 763.
[514] *Id.* at 764.
[515] *Id.*
[516] *See Harkins v. State*, 143 P.3d 706 (2006); *Wallace v. State*, 836 N.E.2d 985 (Ind. Ct. App. 2005); *State v. Martin*, 695 N.W.2d 578 (Minn. 2005); *People v. Gilmore*, 828 N.E.2d 293 (Ill. App. 2005).
[517] 448 U.S. 56, *supra*.
[518] *See State v. Murray*, No. 20301, 2004 WL 2659176 (Ohio App. Nov. 19, 2004); *U.S. v. Saget*, 377 F.3d 223, 230 (2d Cir. 2004).
[519] *Crawford v. Washington*, 541 U.S. 36, 68 (2004).
[520] 127 S.Ct. 1173 (2007).
[521] *Id.* at 1184.

experts. A defendant's access to obtain expert opinion relates to providing a fair trial. The standard for appointing experts is whether defense counsel provided a prima facie showing that the funds for experts requested are needed to pay for services necessary to a competent defense.[522]

The U.S. Supreme Court, in *Ake v. Oklahoma,*[523] left to the states the implementation of defendant's right to experts. Many states have done so by statute and the results vary widely. In Ohio, *e.g.,* an indigent defendant has a right to "investigation services, experts, or other services [that] are reasonably necessary" to his representation at trial or a sentencing hearing.[524]

Defendants may seek an *ex parte* order from the court for the appointment of potential experts. A defendant has a right to such an *ex parte* request. The defendant only needs to disclose to the state the identity of an expert if the expert will testify. One way to handle *ex parte* requests is to have the defendant submit the request and the order under seal. Payments should also remain under seal until the expert becomes a witness and subject to discolosure.

The refusal to grant requests for expert assistance are a fertile appellate assignment of error after a capital conviction. This area is a minefield for the trial judge. The best rule of thumb is to remember super due process. This does not mean that every requested expert must be appointed . What it means is, when in doubt, appoint the

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[522] *See State v. Quezada*, 834 N.W.2d 258, 261 (Neb. 2013) ("An expert need not be supplied every time a request is made by an indigent defendant, nor must the court provide defense counsel with equipment for a "fishing expedition." There must be some showing by defense counsel that the expert is necessary for an adequate defense."); *Hodges v. State*, 856 So. 2d 875, 915 (Ala. Crim. App. 2001), *aff'd sub nom. Ex parte Hodges*, 856 So. 2d 936 (Ala. 2003) ("...[D]efendant, in order to be entitled to funds to pay for an expert, must ... show a reasonable probability that the expert would aid in the defense and that the denial of an expert to assist at trial would result in a fundamentally unfair trial."); *Moore v. State*, 889 A.2d 325, 339 (Md. 2005) (internal cites omitted); ("[D]efendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.")

[523] 105 S.Ct. 1087 (1985).

[524] Ohio Rev. Code Ann. § 2929.024 (West 2019-2020).

expert. Case law throughout the country supports this policy.

[6.10] *Frye v. U.S.*[525]

Frye is an early D.C. Circuit Court case setting forth the "General Acceptance" test for admissibility of expert opinion testimony. The Court held that "while courts will go a long way in admitting expert testimony deducted from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have *gained general acceptance in the particular field in which it belongs*."[526]

Some states still use the *Frye* standard for admission of expert opinion testimony. Others have rejected *Frye* in favor of the *Daubert* standard discussed below. Other states follow a modified version of *Frye* or *Daubert*. It is important to understand and follow the standard that applies to the trial court's jurisdiction when admission of expert testimony is challenged.

[6.11] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[527]

The U.S. Supreme Court found that the Federal Rules of Evidence supersede the *Frye* "General Acceptance" test.[528] The U.S. Supreme Court held that "'general acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring that an expert's testimony both rests on a *reliable foundation* and is relevant to the task at hand."[529] The trial judge is to make a preliminary assessment of "whether the testimony's underlying reasoning or methodology is scientifically valid and can be properly applied to the facts at issue."[530]

The U.S. Supreme Court found that many factors must be taken

[525] 293 F. 1013 (D.C. 1923).
[526] *Id.* at 1014 (emphasis added).
[527] 509 U.S. 579 (1993).
[528] *Id.* at 587.
[529] *Id.* at 595 (emphasis added).
[530] *Id.* at 592.

into account when making this assessment and set forth the following four:

1. Whether the theory or technique in question has been tested;
2. Whether it has been subjected to peer review and publication;
3. Its known or potential error rate and the existence and maintenance of standards controlling its operation; and
4. Whether scientific evidence has gained widespread acceptance within a relevant scientific community.[531]

The U.S. Supreme Court also found that the inquiry must be flexible, and that the focus must be "solely on principles and methodology, not on the conclusions that they generate."[532]

[6.12] *Kumho Tire Co. Ltd. v. Carmichael*[533]

The holding in *Kumho Tire* states that *Daubert* and its progeny apply to expert testimony grounded in the soft sciences and experience or skilled-based methodology as well as the so-called hard sciences. When empirical evidence may not be suitable to determine the reliability of an expert's methodology, the trial court must make certain that the expert employs the same "intellectual rigor" that defines the expertise of practitioners in the relevant field.[534]

In sum, under *Daubert* and *Kumho Tire,* the trial judge's role as gatekeeper extends to all forms of proffered expert testimony and not merely "novel" or "scientific" evidence. It would apply to all forms of "technical" or "other specialized" knowledge.[535]

Therefore, trial courts should conduct pretrial hearings to determine the admissibility of the proffered testimony in order to aid the trial court in fulfilling its gatekeeper function of ensuring that the proffered expert testimony is both relevant and reliable. However, the *Daubert* process should not be considered a strict set of rules that must be complied with prior to the admission of expert testimony. The ultimate goal both

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[531] *Id.* at 593-95.
[532] *Id.* at 595.
[533] 526 U.S. 137 (1999).
[534] *Id.* at 152.
[535] *Id.* at 137 (citing Fed. Rule of Evid. 702).

under *Daubert* and *Kumho Tire* is to ensure that the proffered expert testimony is relevant and reliable.

[6.13] Voluntary Intoxication

States take very different approaches concerning a voluntary intoxication defense. For example, in Kentucky a criminal defendant can assert the defense if, because of his or her intoxication, an element of the charged crime did not exist when the criminal act was committed.[536] Kentucky courts allow the defense for intentional crimes, but voluntary intoxication is not a defense for unintentional crimes.[537] Similarly, Wisconsin law allows a defendant to assert the voluntary intoxication defense when his or her intoxication negates specific intent.[538]

California takes a very different approach than that of Kentucky and Wisconsin. In California, a defendant can submit evidence of intoxication to the trier of fact to assert that he or she had not formed the requisite intent.[539] In addition, when charged with murder, a defendant can argue that because of intoxication, he or she was incapable of deliberating, premeditating, or harboring malice aforethought.[540] Many other jurisdictions are in line with the approach taken by California.[541] Twelve states, including Montana[542], follow the common law rule that intoxicated offenders are fully responsible for their conduct, regardless of their intoxication.[543]

In Pennsylvania, neither voluntary intoxication nor a voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negate the element of intent of the offense.[544] An exception exists for evidence of such intoxication whenever it is relevant to reduce

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[536] KY. REV. STAT. ANN. § 501.080 (West 2007).
[537] *See Brown v. Kentucky*, 575 S.W.2d 451, 452 (Ky. 1979).
[538] *See* Wis. Stat. § 939.42 (West 2005).
[539] *See* Cal. Penal Code § 22 (West 1999).
[540] *Id.*
[541] *See* Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 518-20 (1997) (providing a comprehensive listing of states that recognize the voluntary intoxication defense).
[542] *See* Mont. Code Ann. § 45-2-203 (West 2019).
[543] *See* Keiter, *supra*.
[544] *See* 18 Pa. Cons. Stat. Ann. § 308 (West 1998).

murder from a higher degree to a lower degree of murder.[545] Virginia courts have taken a similar approach, holding: "Voluntary drunkenness, where it has not produced permanent insanity, is never an excuse for crime. Except, where a party is charged with murder, if it appear that the accused was too drunk to be capable of deliberating and premeditating, then he can be convicted only of murder in the second degree."[546]

[6.14] Post-Traumatic Stress Disorder

Extreme cases of post-traumatic stress disorder (PTSD) may serve as the qualifying "mental disease or defect" for an insanity defense.[547] However, if the level of impairment does not rise to the level of insanity, PTSD may still be used as an element of diminished capacity. The acceptance of PTSD as a form of diminished capacity has not been universal, in spite of the generally accepted proposition that PTSD impairs an individual's mental functioning.[548]

Some critics have challenged the diagnosis of the disorder as being overly subjective.[549] There are efforts underway to provide a physiological basis for PTSD diagnosis, rather than relying on the patient's subjective assertions.[550] For now, in those jurisdictions that allow the use of diminished capacity evidence, mental health professionals are generally allowed to testify as to not only whether the defendant has PTSD, but also whether the disorder influenced the defendant's capacity to form the requisite criminal intent at the time of the offense.[551]

[6.15] Battered Spouse Syndrome

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[545] *Id.*
[546] *See Gills v. Commonwealth*, 126 S.E. 51, 53 (1925).
[547] *See* Debra D. Burke & Mary Anne Nixon, *Post-Traumatic Stress Disorder and the Death Penalty*, 38 How. L. J. 183 (1994); Michael J. Davidson, *Note, Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 Wm. & Mary L. Rev. 415 (1988).
[548] *See* Henry Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. Fla. J.L. & Pub. Pol'y 7, 54 (Apr. 2007).
[549] *See*, e.g., Roger K. Pittman & Scott P. Orr, *Psychophysiologic Testing for Post-Traumatic Stress Disorder: Forensic Psychiatric Application*, 21 Bull. Am. Acad. Psychiatry L. 37, 39 (1993).
[550] *Id.*
[551] *Id.*

Expert testimony on battered spouse, or partner, syndrome for defense purposes has been admitted in some form in every state.[552] The traditional self-defense doctrine recognizes the use of force only when necessary to prevent an imminent attack from unlawful force. In many cases, a battered woman acts against her abuser when there is not an imminent attack, and, therefore, is not acting within the technical requirements of self-defense. However, evidence of battered woman syndrome can help explain why a woman might reasonably believe, in light of her history of abuse, that her life was in danger, even though to the lay person she was not facing what objectively looked like a threat of imminent, unlawful force.[553]

Some cases that are important in this area are as follows:

- ✓ California: Expert testimony that a defendant was suffering from battered woman syndrome was generally admissible in murder prosecution not only on question of whether defendant actually believed that it was necessary to kill in self-defense, but also on question of reasonableness of that belief.[554]
- ✓ Indiana: Where a defendant claims that the battered woman syndrome affected her ability to appreciate the wrongfulness of her conduct, she must proceed under the insanity defense.[555]
- ✓ Nevada: Jury instruction in prosecution for involuntary manslaughter improperly limited the consideration of battered woman syndrome evidence to the defendant's perceptions that the victim's conduct put her in imminent fear of her life or great bodily harm. In addition, the instructions failed to reflect that the syndrome could be used to evaluate the defendant's state of mind at the time of the shooting and her claim that the shooting was an "accident." Evidence was

[552] *See* Janet Parrish, U.S. Department of Justice, Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases, at 12-17 (1996).
[553] *See State v. Kelly*, 478 A.2d 364 (N.J. 1984) (allowing battered woman syndrome testimony because it aided juries "in determining whether, under the circumstances, a reasonable person would have believed there was imminent danger to her life."); *see also Ibn-Tamas v. U.S.*, 407 A.2d 626 (D.C. 1979) (same).
[554] *See, People v. Humphrey*, 921 P.2d 1 (Cal. 1996).
[555] *See Marley v. Indiana*, 747 N.E.2d 1123 (Ind. 2001).

presented that women who suffer from battered woman syndrome often claim they accidentally killed their batterers.[556]

- ✓ New Mexico: Defense counsel made a strategic decision to present the defense of battered woman syndrome. Based upon the testimony of two trial experts on the syndrome, a professional conclusion as to whether the defendant suffered from the syndrome required a profound examination into the lives of both the defendant and her victim – "an examination that encompassed matters that would otherwise ordinarily be improper subjects of inquiry in a criminal trial."[557] Thus, inquiry into the religious beliefs of the victim was proper.[558]
- ✓ New York: The court held that a man has the right to bring in "Battered Syndrome"evidence in order to support a claim of self-defense.[559]

[6.16] Insanity

The insanity defense is an affirmative defense in that the defendant, who usually carries the subsequent burden of persuasion at trial, must raise it. It is also considered a complete defense, which means that it results in a complete acquittal, even if the government has proved all the elements of the crime beyond a reasonable doubt. A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk.

American common law consists of multiple standards for the insanity defense, each with distinct differences. However, all of these variations trace their roots to three traditional insanity standards: the M'Naghten standard, the irresistible impulse test, and the Durham test. The various elements used by different jurisdictions incorporate elements from each of these standards.

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[556] *See Boykins v. State*, 995 P.2d 474 (Nev. 2000).
[557] *State v. Swavola*, 840 P.2d 1238, 1241 (N.M. 1992).
[558] *Id.*
[559] *People v. Carl Colberg*, 701 N.Y.S.2d 608 (N.Y.S.C. 1999).

The traditional M'Naghten standard provides that a defendant is entitled to acquittal if the proof establishes that a disease of the mind caused a defect in reason such that the defendant lacked the ability at the time of his or her actions to either know the wrongfulness of the actions; or understand the nature and quality of the actions.[560]

Under the irresistible impulse test, the defendant is entitled to acquittal if the proof establishes that because of mental illness the defendant was unable to control his or her actions or conform their conduct to the law. Contrary to what the name irresistible impulse might imply, this inability need not come upon the defendant suddenly.[561] A number of jurisdictions apply both M'Naghten and the irresistible impulse test. Thus, a person is entitled to acquittal if he or she meets either standard.

Under the *New Hampshire* test, a defendant is entitled to an acquittal if the proof establishes that the crime was the "product of a mental disease or defect."[562] A crime is a "product of" the disease if it would not have been committed but for the disease.[563] In this way, the Durham test is broader than either the M'Naghten or irresistible impulse tests; it was intended primarily to give psychiatrists greater liberty to testify concerning the defendant's mental condition.

Under the American Law Institute ("A.L.I.") or Model Penal Code test, the defendant is entitled to an acquittal if the proof shows that he or she suffered from a mental disease or defect and as a result lacked substantial capacity to either appreciate the criminality of his or her conduct or conform his or her conduct to the requirements of law.[564] Notably, this test combines the M'Naghten and the irresistible impulse tests by allowing for the impairment of both cognitive and volitional capacity. The A.L.I. test is rapidly becoming the most popular standard, and the

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[560] *R. v. M'Naghten*, 1843 WL 5869, *a/k/a* McNaughton's Case, 8 Eng.Rep. 718 (1843).
[561] Harlow M. Huckabee, *Mental Disability: Evidence on Mens Rea versus the Insanity Defenses*, 20 W. ST. U. L. REV. 435, 442 (1993).
[562] *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954), *abrogated by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).
[563] *Id* at 875.
[564] Model Penal Code § 4.01 (1985).

prevailing trend is toward its use.[565]

The purpose of the insanity defense is to ensure that criminal responsibility is imposed only on those persons who have the mental understanding and capacity to comply with the law. A person who suffers from a mental disorder is deprived of this capacity; he is neither culpable nor capable of being deterred and is therefore not subjected to the same penalties as are others who are sane.

It is also important to bear in mind that insanity, as affecting the determination of criminal responsibility, is a legal and not a medical question: "At bottom, the determination whether a man is or is not held responsible for his conduct is not a medical, but a legal, social or moral judgment. Ideally, psychiatrists—much like experts in other fields—should provide grist for the legal mill, should furnish the raw data upon which the legal judgment is based. It is the psychiatrist who informs as to the mental state of the accused—his characteristics, his potentialities, his capabilities. But once this information is disclosed, it is society as a whole, represented by judge or jury, which decides whether a man with the characteristics described should or should not be held accountable for his acts."[566]

[6.17] Laboratory Tests and Analyses

The U.S. Supreme Court has held statements in laboratory test results and similar analyses are testimonial and require introduction of the testimony of the person who performed the test under *Crawford's* holding; and, testimony of that analyst's supervisor is not sufficient to introduce the original analyst's test results.[567] The Court approved the practice of some states to require prior notice to a defendant that the prosecution proposes to admit certified lab results in lieu of the analyst and noted the procedure gave the defendant the opportunity to

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[565] *See Phenis v. U.S.*, 909 A.2d 138 (D.C. 2006); *Norskog v. Pfiel*, 755 N.E.2d 1 (2001); *Commonwealth v. Johnson*, 663 N.E.2d 559 (1996); *State v. Martinez*, 651 A.2d 1189 (R.I. 1994).
[566] *U.S. v Freeman*, 357 F.2d 606, 619-20 (2d Cir. 1966).
[567] See, e.g., *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). (However, *Com. v. Munoz*, 958 N.E.2d 1167 (Mass. 2011), *cert. granted, judgment vacated sub nom. Munoz v. Massachusetts*, 568 U.S. 802 (2012)., held "testimony of substitute chemist did not violate Confrontation Clause.)

force the analyst's production as a witness to the test results for cross examination.

The Supreme Court has held that the testimony of an expert witness that is based on a laboratory or similar test the expert did not personally perform is admissible and does not violate the defendant's confrontation rights.[568]

[6.18] Conclusion

Presiding over a capital case is like no other matter handled by a trial court judge, and handling a capital case need not be an excruciating experience. No other type of case is so microscopically reviewed, so prone to error, and so often reversed. Therefore, the preceding materials are meant to highlight possible problems that a trial judge may encounter during the trial phase of a capital case, and make the process that much easier. They are only intended for reference purposes. Any judge should use his or her own judgment as to what is proper or not proper for a particular case.

[568] *See Williams v Illinois*, 567 U.S. 50 (2012).

INTELLECTUAL DISABILITY

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Hon. Mary Katherine Huffman

In 2002, the United States Supreme Court, in *Atkins v. Virginia*,[569] held that the death penalty represents a punishment not suitable under the Eighth Amendment for any mentally retarded individual. Only thirteen years before the *Atkins* decision, the Supreme Court reached a contrary conclusion in *Penry v. Lynaugh*,[570] finding that a death sentence for a mentally retarded accused was not categorically prohibited by the Eighth Amendment.

In the aftermath of *Penry*, at least seventeen states enacted legislative proscriptions against the death penalty for a mentally retarded offender. [571] Placing great weight on the number of states, through legislative efforts, that reacted to *Penry* and prohibited the death penalty for the mentally retarded, the *Atkins* Court explained that a societal consensus supported the proposition that mentally retarded offenders are less culpable than other death-penalty eligible offenders, and found the practice of executing mentally retarded individuals to have become "truly unusual," and thus prohibited as cruel and unusual punishment. [572] Still further, the Court reasoned that no penological purpose is served by executing an intellectually disabled person. [573]

The *Atkins* majority recognized the challenges implicit in qualifying the term "mentally retarded," the necessary defendant-specific analysis, and thus the questions to be faced by attorneys, jurists, and expert witnesses in the future. The Court noted that mental retardation includes "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care,

[569] 536 U.S. 304 (2002).
[570] 492 U.S. 302 (1989).
[571] *Atkins v. Virginia*, 536 U.S. 304, 313-316.
[572] *Id.* at 316..
[573] *Id.* at 317, 320.

and self-direction that became manifest before age 18."[574] Unfortunately, the *Atkins* Court did not provide definitive procedural or substantive guides for determining when a person is mentally retarded for purposes of death penalty consideration.[575] The Court acknowledged, though, that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus,"[576] and thus who categorically are excluded from imposition of the death penalty. Instead of adopting a clinical or other specific definition of mental retardation, the Court expressly left the implementation of the constitutional ban to the states, and the "task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[577]

The absence of a clear definition of mental retardation was not the only question left unanswered in the *Atkins* decision. As Justice Stevens noted in his majority opinion, "(t)o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded."[578] In his dissenting opinion, Justice Scalia likewise questioned the ability of courts to adequately distinguish between capital defendants who are mentally retarded, and those feigning limited intellectual capacity. Justice Scalia likened the majority's decision to strategic trickery:

> "This newest invention promises to be more effective than any of the others in turning the process of a capital trial into a game. One need only read the definition of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association to realize that the symptoms of this condition can readily be feigned."[579]

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[574] *Atkins*, 536 U.S. 318; *see also, United States v. Pervis*, _____ F.3d ____ (2019).
[575] *Walker v. Kelly*, 593 F.3d 319, 321 (5th Cir. 2010), *citing Bobby v. Bies*, 556 U.S. 825 (2009).
[576] *Atkins*, 536 U.S. at 317.
[577] *Id., quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986).
[578] *Atkins*, 536 U.S. at 317.
[579] *Atkins*, 536 U.S. at 353.

Thus began the challenging road for courts confronted with claims that a capital defendant experienced mental retardation or intellectual disabilities precluding the imposition of the punishment.

[7.1] Transitioning to an Intellectual Disability Paradigm

Over a decade ago, the American Association on Mental Retardation (AAMR) embarked on a campaign to shift popular and medical terminology away from one that had eroded in meaning to a stereotyped insult, toward what was deemed the more progressive language, "intellectual disability." The organization even changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD).[580] The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) abandoned the use of "mental retardation" in favor of the more sensitive "intellectual disability."[581] Post-*Atkins*, the United States Supreme Court also adopted the term "intellectual disability" to replace "mental retardation" in the legal nomenclature.[582] Given that courts, the medical profession, and some legislatures have transitioned to utilizing "intellectual disability" as the preferred term of art, this chapter will so refer.

The DSM-V categorizes intellectual disability as a "neurodevelopmental disorder," described as a family of brain-based conditions that arise during childhood and which are marked by limitations in cognitive development.[583] The origin of intellectual disability in any person remains largely unknown. The causes, though, include, "prenatal (chromosomal abnormalities, maternal consumption of alcohol during pregnancy, infections affecting the developing fetus, detachment of the placenta, etc.), perinatal (accidents during delivery, such as a cord compressed

[580] The American Association of Mental Retardation changed its name on January 1, 2007 to the American Association on Intellectual and Developmental Disabilities.
[581] American Psychiatric Association, *Diagnostic and Statistical Manuel of Mental Disorders* (hereinafter DSM-V) (5th ed.) (2013).
[582] *Hall v. Florida*, 572 U.S. 701, 704-705 (2014).
[583] DSM-V, *supra.* note 13, at 33.

or wrapped around the neck), or post-natal (early head trauma, brain-affecting infection, malnutrition, severe deprivation)."[584]

While there are several hundred known causes or risk factors for intellectual disability, the presence of such a cause or risk fails to guarantee an abnormal outcome for any individual.[585]

[7.2] Challenges to Defining Intellectual Disability

Intellectual disability defies a ready and clear definition. The term inhabits both the legal and medical universes. "*Atkins* did not bestow a substantive Eighth Amendment right to a fixed and rigid definition" of mental retardation or intellectual disability.[586] Judges confront evolving standards for determining intellectual disability, and courts must acknowledge and recognize that criteria, testing and definitions continue to evolve. Instead, states utilize differing definitions of intellectual functioning and articulate assorted factors applicable to an assessment of adaptive functioning; no uniform definition nor procedure has been developed among the states for determining intellectual disability.[587]

While the *Atkins* decision created a special class of defendants—those with intellectual disabilities—who are categorically exempt from the death penalty, inclusion in the protected class of individuals results not from a fixed clinical diagnosis, but from a decision by a judge or jury.[588] States responded to the challenges presented by the lack of a standard definition of "mental retardation" in the *Atkins* decision "by adopting their own measures for adjudicating claims of mental retardation."[589] *The Atkins* Court, suggested, though, that state measures for determining intellectual disability would fall within appropriate or

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[584] Nancy Haydt, JD, Stephen Greenspan, PhD, and Bhushan S. Agharkar, MD, *Advatages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases,* 82 UMKC L.Rev. 359 (2013).
[585] *Id.*
[586] *Hill v. Humphrey*, 662 F.3d 1335, 1351 (5th Cir. 2011).
[587] *See* Anna Hagstrom, *Atkins v. Virginia: An Empty Holding Devoid of Justice for the Mentally Retarded,* 27 Law & Ineq. 241, 242 (2009)
[588] *See* Nancy Haydt, *Intellectual Disability: A Digest of Complex Concepts in Atkins Proceedings*, 38 Champion 44 (2014).
[589] *Schriro v. Smith,* 546 U.S. 6, 7 (2005).

constitutional expectations provided those measures "generally conformed" to clinical definitions, and specifically referenced reliance on the AAMR[590] and DSM-IV-TR explanations.[591]

Since *Atkins*, most jurisdictions adopting definitions of mental retardation or intellectual disability substantially incorporate the AAMR/AAIDD and/or the DSM-IV-TR or DSM-V standards.[592] The authority reserved to the states to establish procedural and substantive standards for determining intellectual disability does not permit states to narrow the class of persons who fall within *Atkins'* protections.[593]

According to the AAIDD definition, "(i)ntellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills," originating before the age of 18.[594] The DSM-V definition is similar: "Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."[595]

The DSM-V criteria marked a significant shift from the prior DSM-IV-TR standards for determining mental retardation. The DSM-IV-TR continued to place significant emphasis on IQ score and required impairment in two or more adaptive-skill areas for a mental retardation diagnosis; the DSM-V diagnosis demands impairment in one or more adaptive domains, each of which includes three or more adaptive skills.[596] Additionally, the DSM-V

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[590] The *Atkins* Court cited the American Association of Mental Retardation standards (AAMR); however, the AAMR is now known as the American Association of Intellectual and Developmental Disabilities (AAIDD), and this chapter will thus refer only to the AAIDD definitions.
[591] *Atkins,* 536 U.S. at 317 n. 22.
[592] In jurisdictions where the legislature has not enacted legislation addressing the constitutional ban on the execution of the intellectually disabled, it remains the court's duty "to set the limits and define the procedure which will safeguard the Eighth Amendment protection of mentally retarded persons, as required by Atkins." *Chase v. State,* 873 So. 2d. 1013, 1027 (Miss. 2004).
[593] John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,* 18 Cornell J. L. & Pub. Pol'y 689, 694 (2009).
[594] Intellectual Disability: Definition, Classification, and Symptoms of Supports (AAIDD, 11th ed., 2010).
[595] DSM-V, at 33.
[596] For a comprehensive discussion of the significant changes in the DSM-V definition, and the transition from the adoption of "mental retardation" as a

represents a shift from prior standards, and away from reliance on established IQ score ceilings to establish intellectual disability.[597] The modification of the criteria for identifying those falling within the group of individuals categorized as intellectually disabled was undertaken with the intention of increasing diagnostic accuracy.

The diagnostic criteria for identifying intellectual disability necessarily originated with determining needed social services, and not "for the purposes of determining whether a person was 'so impaired as to fall within the range of mentally retarded offenders'" to whom *Atkins* applies.[598] Numerous state statutes specifically defining either mental retardation or intellectual disability closely resemble the AAIDD or APA standards.[599] Some states, through controlling statutes or case law have established a bright line applied to IQ scores necessary to qualify an individual as intellectually disabled, although the U.S. Supreme Court has rejected the ceiling of IQ scores in evaluating intellectual disability.[600]

While the AAIDD and the DSM-V definitions are not precisely the same, they share three common elements: significant subaverage general intellectual functioning, limited adaptive behavior, and an onset before age eighteen or during the developmental period. Generally, onset before age eighteen is not contested in intellectual disability determinations. Instead, the disputed issues generally focus on the presence of concurrent deficits in intellectual and adaptive functioning. The medical and psychological communities continue to refine the understanding of intellectual disability, and courts must be cognizant of prevailing definitions and criteria and must not rely upon outdated norms.[601]

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diagnosis to "intellectual disability" as the preferred term of art, contrasted with the prior criteria adopted by the American Psychiatric Association in the DSM-IV-TR, *see* Nancy Haydt, Stephen Greenspan, and Bhushan S. Agharkar, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases,* 82 UMKC L.Rev. 359 (2013).

[597] *Id. at 365.*

[598] *Chester v. Thaler,* 666 F.3d 340, 346 (5th Cir.2011).

[599] Ga. Code Ann. § 17-7-131(a)(3) (West 2020).

[600] *Hall v. Florida*, 572 U.S. 701 (2014).

[601] *See In re Lewis,* 4 Cal. 5th 1185, 1192 (2018).

[7.2.1] Limited Intellectual Functioning

Deficits in intellectual functioning, as defined in the DSM-V, "include reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing."[602] The starting point of the diagnostic process for determining intellectual disability often lies in assessing impairment of intellectual functioning through psychometric instruments.

Intellectual functioning is often measured by a standardized IQ test. While IQ tests today are quite sophisticated, the interpretation of the results requires "experienced and knowledgeable professional judgment."[603]

[7.2.2] Adaptive Functioning

Deficits in adaptive functioning, according to the DSM-V, result "in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life."[604]

An assessment of adaptive functioning results from measuring the conceptual, social, and practical skills that individuals employ in everyday life,[605] and "requires evaluation of the individual's ability to function across a variety of dimensions."[606]

[7.2.3] Onset before age 18

Onset of the intellectual disability during the developmental phase lacks any tie to an official diagnosis prior to the age of 18. No requirement exists in any definition of intellectual disability

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[602] DSM-V, at 33-38.
[603] *See* James W. Ellis, Caroline Everington & Ann M. Delpha, *Evaluation Intellectual Disability: Clinical Assessments in Atkins Cases,* 46 Hofstra L. Rev. 1307, 1372 (2018).
[604] *Id.*
[605] For an extensive review of the assessment of adaptive functioning, *see* Leigh D. Hagan, Eric Y. Drogin, and Thomas J. Guilmette, *Assessing Adaptive Functioning in Death Penalty Cases after Hall and DSM-5,* 44 J. Am Acad Psychiatry Law 96 (2016).
[606] *Brumfield v. Cain,* 576 U.S. ___ , 135 S. Ct. 2269 (2015).

for the actual identification of the individual as mentally retarded or intellectually disabled before the age of 18; the absence of any diagnosis prior to the age of 18 does not preclude a determination of intellectual disability for *Atkins* purposes. A variety of reasons exist for failure to diagnose an intellectual disability during the age of minority.

[7.2.4] Distinguish from Issue of Competence or Sanity

Whether an accused is competent to stand trial, or meets the criteria for a not guilty by reason of insanity plea, represent separate considerations from the determination of intellectual disability in the death penalty context.[607]

[7.3] Informing Decisions on Intellectual Disability

Complicating the various definitions of intellectual disability are the criteria and tools utilized by medical professionals to inform opinions and diagnoses. Psychologists and psychiatrists utilize a variety of assessment tools to diagnose intellectual disability, all of which bear some degree of potential error.[608]

[7.3.1] Measurement of IQ

For over one hundred years, psychologists have measured intelligence by employing standardized tests.[609] While standardized, IQ tests fail to perfectly measure intelligence. The Supreme Court recognizes that IQ test scores "should be read not as a single fixed number but as a range."[610] The potential error in IQ tests may impact an individual's score and thus discrepant conclusions about the diagnosis of intellectual

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[607] Ellis, Everington & Delpha, *supra.* note 32 at 1311.
[608] For an in-depth analysis of the challenges facing courts in implementing *Atkins*, *see* Richard J. Bonnie and Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislature and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases,* 41 U. Rich. L. Rev. 811 (2007).
[609] Gale H. Roid and R. Andrew Barram, Essentials of Stanford-Binet Intelligence Scales (SB5) Assessment 3-9 (John Wiley and Sons 2004).
[610] *Hall*, 572 U.S. at 712.

disability. To satisfy the intellectual impairment prong of intellectual disability, the measured intelligence must be "significantly subaverage," indicating that the individual's measured intelligence falls approximately two standard deviations below the mean score.[611]

[7.3.2] Commonly Utilized IQ Tests

Several different tests are commonly employed to measure IQ. The Stanford-Binet Intelligence Scales, currently utilized in the fifth edition (SB5), provides clinicians with three different interpretive indices, or scores: the Verbal IQ, the Nonverbal (previously known as the Performance) IQ, and the Full Scale IQ (incorporating the verbal and non-verbal results). The SB5 is utilized with individuals between the ages of two and a half years through young adults. The Wechsler Intelligence Scale for Children, also in its fifth edition (WISC-V), is designed for testing children between the ages of six and seventeen, while the Wechsler Adult Intelligence Scale, in the fourth iteration (WAIS-IV), is administered to subjects between the ages of 16 and 89.

The current versions of the Wechsler scales include four index areas—verbal comprehension, working memory, perceptual reasoning, and processing speed. All IQ tests must be administered in a standardized fashion in order to present valid findings. Administration must follow all test guidelines, such as reading the instructions and timing tests in a standardized manner. Departing from clinical standards of administration may lead to invalid IQ test results.

Some shorter IQ tests, which take less time to administer, are used for screening. The shorter tests screen for individual scores outside the normal IQ range, which results in closer evaluation of the test-taker. Screening IQ tests, also identified as "short form" tests, retain a greater tendency to error than standard IQ tests. In undertaking an *Atkins* analysis, screening tests are not adequate tools for consideration,[612] but instead are better employed merely as initial screening tools.

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[611] AAID 2010, *supra* note 25.

[612] *See Rivera v. Quarterman,* 505 F.3d 349 (5th Cir. 2007); J. Widroff and C. Watson, *Mental Retardation and the Death Penalty: Addressing Various Questions Regarding an Atkins Claim,* 36 J. Am. Acad. Psychiatry L. 413-415 (2008).

[7.3.3] Errors in Measurement

Psychological tests, like all measurement tools, have a potential for error. Because they often rely on subjective ratings, psychological tests may be more error-prone than other measurement instruments.[613] While an IQ score represents an integral component of an intellectual disability determination for *Atkins* purposes, the standard error or measurement of the test features as a necessary consideration in evaluating the IQ score.

"Each IQ test has a 'standard error of measurement,' often referred to by the abbreviation 'SEM.' A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself."[614] IQ scores fluctuate for a variety of reasons, including the test-taker's health, prior testing, environmental and logistical factors, the examiner's demeanor, fortunate guessing by the examinee, and the subjective scoring of some exam questions.[615] The Supreme Court, in *Hall v. Florida,* acknowledged that the SEM "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score," but instead allows clinicians to calculate a range within which the individual's true IQ score lies.[616] Thus, IQ scores should be expressed in terms of a range, rather than a fixed number.

Another area of potential error in IQ tests is a phenomenon knowns as the Flynn Effect, a general upward trend of IQ scores, "which causes a need for the test norms to be updated and recalculated so that the score can continue to provide an accurate reflection of the actual IQ."[617] "The Flynn effect accounts for the theory that the average IQ score on a particular test gradually increases over time and therefore 'a person who

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[613] Bonnie & Gustafson, *supra.* note 36 at 10.
[614] *Hall*, 572 U.S. at 713. *See* R. Futt & V. Bacharach, Psychometrics 118 (2d ed. 2014).
[615] *Hall*, 572 U.S. at 713. *See American Association of Intellectual and Developmental Disabilities,* R. Schalock, et al. *User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports* 22 (2012).
[616] *Hall,* 572 U.S. at 713.
[617] Jill V. Feluren, *Moving the Focus Away from the IQ Score Towards the Subjective Assessment of Adaptive Functioning: The Effect of the DSM-5 on the Post-Atkins Categorical Exemption of Offenders with Intellectual Disability From the Death Penalty,* 38 Nova L. Rev. 323, 337 (2014); Frank M. Gresham, *Interpretation of Intelligence Test Scores in Atkins Cases: Conceptual and Psychometric Issues,* 16 Applied Neuropsychol. 91, 92 (2009).

takes an IQ test that has not recently been normed against a representative sample of the population will receive an artificially inflated IQ score.'"[618] Theoretically An individual may score differently on IQ testing depending on which point in the cycle of calculation the assessment was administered.[619] "The Flynn effect accounts for the theory that the average IQ score on a particular test gradually increases over time and therefore 'a person who takes an IQ test that has not recently been normed against a representative sample of the population will receive an artificially inflated IQ score.'" The Flynn Effect may narrow the margins of intellectual disability and potentially exclude some defendants from qualifying for *Atkins* protection.[620] However, experts disagree on whether it is appropriate to subtract points from an IQ score for the Flynn effect,[621] and no legal authority or "consensus in the medical community" requires adjustment of a score for the Flynn effect.[622]

A third potential source of error in IQ tests is the "test-retest" or practice effect. If an individual is subject to IQ retesting within six to twelve months of an initial test, the retest score is likely to be higher resulting from familiarity and practice with the type of tasks required by the test.[623]

[7.3.4] Malingered Symptoms

Psychologists conducting evaluations for intellectual disability must address the potential for malingered symptoms.[624] Feigning of symptoms may take many forms, "including false psychiatric, neuropsychological, and somatic complaints."[625] The *Atkins*

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[618] *Bean v. State,* 448 P.3d 574, __ (Nevada Supreme Court 2019), *quoting Smith v. Schriro,* 813 F.3d 1175, 1184 (9th Cir. 2016).
[619] James R. Eisenberg, *Law, Psychology, and Death Penalty Litigation* at 113 (2004).
[620] For a detailed discussion on the Flynn Effect in *Atkins* cases, *see* Geraldine W. Young, *A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability,* 65 Vand. L. Rev. 615 (2012).
[621] *See* Leah D. Hagan & Thomas J. Guilmette, *The Death Penalty and Intellectual Disability: Not So Simple*, 32 Crim. Justice 21, 24 (Fall 2017).
[622] *Bean v. State*, *supra at* note 50.
[623] R.J. McCaffrey and H.J. Westervelt, *Issues Associated with Repeated Neuropsychological Assessments,* 5 Neuropsychol. Rev. 203 (1995).
[624] Anne Shandera, David Berry, Jessica Clark, Lindsey Schipper, Lili Graue, and Jordan Harp, *Detection of Malingered Mental Retardation,* 22 Psych. Assessment 50 (2010).
[625] *Id.*

decision provoked considerable research intended to validate malingering measures.[626] Psychologists recognize the imperative need to determine whether an IQ score obtained as part of an intellectual disability inquiry accurately measures an individual's abilities, or whether the score represents an intentional distortion of responses to feign limited functioning. There is no definitive test for malingering, and mental health professionals have no claim to superior detection of deception, although several malingering tests do exist that may assist in evaluating whether a subject is intentionally distorting true functioning.[627]

[7.3.5] Supreme Court Decisions Related to IQ Tests

Twelve years after its decision in *Atkins,* the United States Supreme Court again considered the criteria to be considered in assessing intellectual disability, particularly related to IQ test scores, in *Hall v. Florida.*[628] Hall sought an order vacating his death sentence and presented evidence that included an IQ test score of 71. The Florida Supreme Court interpreted the state statute narrowly, holding that a person whose IQ score exceeded 70 was foreclosed from any further exploration of intellectual disability.[629]

The U.S. Supreme Court disagreed, reasoning that the mandatory cutoff at a score of 70 effectively prohibited courts from considering "even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances."[630]

The *Hall* Court recognized that states lack unfettered discretion in establishing criteria for an intellectual disability determination. The Florida rule, though, disregarded established medical

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[626] For a discussion on various malingering measures, *see* Shandera, et al., *supra* note 51 at 50-51.
[627] Several malingering tests do exist and may be helpful in detecting grossly exaggerated deficits. Tests include the Test of Malingered Memory (TOMM) and the Stanford Binet Rarely Missed Items-Nonverbal (SBRMI-NV) Index.
[628] 572 U.S. 701 (2014).
[629] *Id.* at 704.
[630] *Id.* at 712.

practice by accepting an IQ score as final and conclusive evidence of a defendant's intellectual capacity, where experts would consider additional evidence, and a bright-line rule fails to recognize that the score itself is imprecise.[631] Thus, courts must consider IQ scores in evaluating limited intellectual functioning as well as any effective SEM. The *Hall* Court held when an "IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."[632]

Five years after the *Hall* decision, the U.S. Supreme Court again underscored the importance of courts adhering to scientific standards in adjudicating *Atkins* claims. In its 2017 decision in *Moore v. Texas,*[633] the Court emphasized that "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards."[634] The *Moore* decision reinforced the *Hall* demand that courts must consider evidence of adaptive functioning when an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual disability.[635] An IQ score, though, is not determinative of intellectual disability or absence of such a disability, and courts must closely evaluate circumstances where an accused's IQ scores fall close the bounds for intellectual disability. A defendant's IQ score, after adjusting for statistical error, acts as "the preliminary inquiry that *could* foreclose consideration of other evidence of intellectual disability, depending on the score."[636]

[7.3.6] Measuring Adaptive Behavior

The second prong of the intellectual disability definitions inquires into the impact the impaired intellectual functioning has on the individual's daily life.[637] Adaptive behavior consists of the

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[631] *Id.*
[632] *Id.* at 722.
[633] 137 S. Ct. 1039 (2017).
[634] *Id.* at 1049.
[635] *Id.* at 1050.
[636] *Woodall v. Commonwealth*, 2018 Ky. LEXIS 540 (Kentucky Supreme Court).
[637] *See* AAIDD 2010, *supra.* note 25.

collection of skills "that have been learned and are performed by people in their everyday lives."[638]

While IQ tests are administered directly to the person whose intellectual functioning is at issue, adaptive behavior scales also involve obtaining information from others with knowledge of the subject's functioning in everyday life activities. Informants may include family members, teachers, counselors, co-workers or supervisors, neighbors and friends, community support providers, and any other person familiar with the subject's abilities.[639]

The adaptive behavior component of intellectual functioning focuses on everyday activities expected in society, rather than in a controlled setting. Adaptive skills tests sample behavior in three or more domains. The areas evaluated include conceptual (communication and money skills), social (following rules, avoiding victimization and socializing) and practical (self-care, housekeeping and occupational skills). Similar to IQ tests, the mean score on adaptive behavior tests is set at 100 and the standard deviation is generally around 15. Significant deficits of adaptive behavior are noted in individuals scoring two or more standard deviations below the mean score.[640]

Four well-established instruments aid in measuring deficits in adaptive behavior, including the Adaptive Behavior Scale – School, Second Edition, published by AAIDD, the Adaptive Behavior Assessment System – Third Edition (known as the ABAS-3), the Scales of Independent Behavior – Revised (referred to as the SIB-R), and the Vineland Adaptive Behavior Scales – Third Edition (or the Vineland-3).

[7.3.7] Potential Errors in Measuring Adaptive Behavior

Error may be introduced in the results of adaptive behavior tests by several means. First, the term "functional deficit" may be interpreted in different ways. The AAID emphasizes deficit in

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[638] *Id.* at 43.
[639] Sara Sparrow, Vineland II, *Second Edition Survey Forms Manual 12* (AGS Publishing 2005).
[640] Bonnie & Gustafson, *supra.* note 36.

performance rather than capacity. That is, the individual may have the ability to function at a non-deficit level but may not know when to use certain skills or may lack motivation to employ skills.[641]

Second, the adaptive behavior of criminal defendants must often be assessed in a correctional setting. None of the adaptive behavior tests are specifically validated for use in a prison environment. The restricted range of performance required to function in correctional environments sets a low standard for adaptive behavior and there are few opportunities for third party respondents to observe an inmate's leisure or community skills. The AAID cautions that observations made outside of the community environment typical of the individual's age peers and culture warrant significantly reduced weight.[642] Outside record review and interviews with individuals who knew the defendant well before incarceration should better inform the examiner in an overall determination of adaptive deficits.[643]

A potential source of error in assessing adaptive behavior lies with the respondent. A close friend or relative of the defendant who understands the protective implications of a diagnosis of intellectual disability may exaggerate observed deficits in an effort to aid the accused. Similarly, respondents with limited knowledge of the defendant decreases validity of results. In evaluating the results of adaptive behavior assessments, the court must cautiously consider the source of the information that may affect the reliability of the interpretive results.

[7.3.8] Supreme Court Decisions Related to Adaptive Functioning

Adaptive behavior may be particularly difficult to evaluate. Courts and clinicians acknowledge that the adaptive behavior criteria are "exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue in most

[641] *Id.*
[642] Intellectual Disability: Definition, Classification, and Symptoms of Supports (AAIDD, 11th ed., 2010).
[643] Bonnie & Gustafson, *supra* note 36.

cases."[644] Generally, assessing adaptive behavior requires an "overall assessment of the defendant's ability to meet society's expectations of him" and does not neatly adhere to a clinical definition, which often bases an impairment in adaptive functioning on deficits in at least two life-skill categories without considering the strengths of the individual.[645] While the mental health community may disregard an individual's strengths when considering adaptive functioning, courts are not constitutionally required to consider adaptive deficits and ignore strengths.[646]

In 2005, Texas identified "other evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence" as indicative of intellectual disability in *Ex Parte Briseno.*[647] The *Briseno* factors, as they became known, were utilized by some courts in evaluating claims of intellectual disability.[648] The factors, though, were premised on lay perceptions of functioning, and focused on the purported anecdotal strengths of the individual, rather than on clinical standards.[649] Note that lay information necessarily influences clinical judgments in evaluating adaptive function. The *Briseno* factors, though, fall outside of the clinical standards for adaptive functioning decisions.

In 2017, the U.S. Supreme Court emphatically rejected the consideration of the *Briseno* factors as uninformed and stereotypical lay considerations.[650] The Court also rejected any

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[644] *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004*), abrogated by Moore v. Texas*, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017), and *abrogated by Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018).
[645] *State v. Escalante-Orozco*, 241 Ariz. 254 (2017).
[646] *Hooks v. Workman,* 689 F.3d 1148, 1172 (10th Cir. 2012); *Ortiz v. United States*, 664 F.3d 115, 1168-69 (8th Cir. 2011).
[647] *Id.* at 8.
[648] *See Chester v. Thaler*, 666 F. 3d 340 (2011);
[649] The *Briseno* factors include: (1) did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination? (2) Has the person formulated plans and carried them through or is his conduct impulsive? (3) does his conduct show leadership or does it show that he is led around by others? (4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable? (5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject? (6) Can the person hide facts or lie effectively in his own or others' interests? (7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose? *Ex parte Briseno*, 135 S.W.3d at 8.
[650] 1378 S. Ct. 1039 (2017).

evaluation of adaptive functioning of the claimant while incarcerated, noting that such evidence is likely to be distorted "in a controlled setting, as a prison surely is."[651]

Since the *Atkins* decision, various state statutes and judicially-created criteria have generally required significant limitations in two or more adaptive skills.[652] When considering the evolving criteria for adaptive functioning and the medical community's diagnostic framework, courts must pay particular attention to the DSM-V definition demanding significant adaptive-skill deficits in only *one* or *more* activities of daily life. Courts may be advised to consider the decision in *State v. Ford,*[653] where the Ohio Supreme Court found that significant adaptive deficits in *any* of the three adaptive-skill sets (conceptual, social, and practical) met the second core element of intellectual disability.

[7.3.9] Co-Morbidity

The diagnosis of intellectual disability does not rule out or exclude other diagnoses. For example, a diagnosis of a psychiatric disorder such as schizophrenia can co-exist with intellectual disability. Individuals with intellectual disabilities may also have personality disorders, substance use disorders, or other developmental disorders, such as autism.

In general, those with an intellectual disability have three to four times the number of co-morbid mental disorders when compared to the general population. The *Moore* Court recognized that a diagnosis of a personality disorder or mental-health issue does not preclude a finding of intellectual disability.[654] Caution must be employed in evaluating the defendant's overall functioning to determine whether adaptive functioning is limited by intellectual disability or some other disorder.

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[651] *Moore,* 581 U.S. at _____, 137 S. Ct. at 1050.
[652] *See Brumfield v. Cain*, 576 U.S. _____, 135 S. Ct. 2269 (2015); *State v. Lott*, 97 Ohio St. 3d 303 (2002).
[653] *State v. Ford*, 2019-Ohio-4539.
[654] *Id.* at 1051.

[7.4] Expert Assistance, Qualifications and Opinions

The Supreme Court recognized, in its decision in *Hall v. Florida,*[655] that medical experts represent an integral partner in the legal determination of intellectual disability.[656] Because intellectual disability relates to a clinical diagnosis, judges and juries require expert testimony in weighing and assessing a defendant's claim for *Atkins* relief. Not every psychologist, though, is necessarily trained or experienced to either administer or interpret test results and other available information, and thus to meet the standards under the Rules of Evidence for the qualifications of an expert witness. In considering the appointment of, or testimony from an expert, the AAIDD Guide[657] provides helpful considerations:

Experts who participate in *Atkins* proceedings must be knowledgeable about the challenges and complexities involved with conducting assessments of intellectual disability in capital case. The ultimate gravity of an Atkins determination calls for more than basic or minimal ability. Training in mental illness alone does not, without more, qualify one as an expert on intellectual disabilities or guarantee the necessary competence required to testify as an expert in this area for the purpose of *Atkins* proceedings.[658]

Experience assessing criminal defendants for other purposes, such as for competence, insanity pleas, and amenability concerns, does not suggest professional capabilities in *Atkins* assessments.[659] Unfortunately, a survey of *Atkins* decisions illustrates that the majority of testifying experts had no special training or experience in the field of intellectual disability. In

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[655] *Hall v. Florida*, Oyez, https://www.oyez.org/cases/2013/12-10882 (last visited Feb 12, 2020).

[656] *Hall,* 572 U.S. at 710.

[657] *The Death Penalty and Intellectual Disability: A Guide* (E. Polloway ed., 2013)(hereinafter "AAIDD Guide").

[658] *Id.*

[659] G.S. Macvaugh & T. Grisso, *Assessment of Mental Retardation in Death Row Inmates: A survey of Professional Practices* (presented at the conference of the American Psychology-Law Society, St. Petersburg, FL in March 2006). (In a survey of forensic clinicians in *Atkins* cases, less than half of the doctoral-level practitioners surveyed reported receiving any formal training in intellectual disability.) *See* Haydt, *supra.* note 19.

evaluating a purported expert's qualifications in *Atkins* litigation, the court should consider the following:

- ✓ Training and education
- ✓ IQ testing training and experience
- ✓ Adaptive behavior training and experience
- ✓ Professional experience
- ✓ Bias factors[660]

If the court determines the expert is qualified, the witness' opinions must be considered in light of all evidentiary requirements for the admission of expert testimony. In rendering opinions on intellectual disability, expert witnesses may rely on the testing administered by other qualified professionals.[661] Still further, the subsequent evaluation of the expert's opinions must include the basis of the expert's opinion, and the extent, breadth, and reliability of the information utilized in formulating any opinions.

Courts considering an *Atkins* claim may be confronted with evidence that reflects discrepant findings related to intellectual disability in a capital defendant. Discrepancies may be explained by:

1. The examiner's use of different tests to measure IQ and adaptive functioning;
2. The examiner may/may not have adhered to standardized expectations in the administration, scoring and reporting of tests results;
3. The examiners may use different versions of the same assessment (Flynn Effect);
4. The examiners may use different collateral sources or give different weight to collateral reports;
5. The test-retest practice effect on IQ tests, including consideration of which examiner first administered the IQ test;
6. The examinee experienced environmental disturbances during test-taking;

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[660] Haydt, *supra* note 20 at 46. For assistance in evaluating an expert's credentials to render opinions on intellectual disability, *see Goodin v. State,* 191 S.W.3d 20 (Mo. 2006); *Sasser v. Hobbs*, 735 F.3d 833 (8th Cir. 2013).
[661] *Chase v. State,* 112 So. 3d 421 (Miss. 2013).

7. The examiners utilized different interpretations of the intellectual disability definition;
8. Forensic bias on the part of the examiners.

[7.5] Concerns in Determining Intellectual Disability

Intellectual disability is a frequently occurring disorder, affecting over one percent of the American population.[662] Determining whether an accused meets inclusion in the category of persons exempt from the death penalty resulting from intellectual disability is a complex undertaking. *Atkins* hearings have been described by commentators as "highly disputatious, lengthy, and expensive proceedings, which pose intellectual challenges to judges and attorneys."[663]

Experts caution against considering outdated categorizations of mental retardation, the use of a mental age in determining intellectual disability, and consideration of developmental disabilities or borderline terminology. The AAMA/AAIDD abandoned the use of mild/moderate/severe/profound classifications of mental retardation, instead focusing on adaptive functioning and individual needs for support.[664]

References to "mental age" may permeate older documents, such as school or medical records; the term was historically used to describe the relative severity of an individual's intellectual limitation. A "mental age" equivalence to a child bears no correlation to the important determination of intellectual disability.[665] "Developmental disabilities" bears multiple meanings that does not precisely correlate with a clinical finding of intellectual disability. "Borderline" often references individuals

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[662] *See* Mary Beirne-Smith, James R. Patton & Shannon H. Kim, Mental *Retardation: An Introduction to Intellectual Disabilities* (7th ed. 2006); *see also* Haydt, Greenspan & Agharkar, *supra.* note 16.
[663] Haydt, Greenspan & Agharkar, *supra.* note 16 at 362.
[664] American Association on Mental Retardation. Mental Retardation: Definition, Classification, and Symptoms of Support 34 (9th ed. 1992).
[665] *See Penry v. Lynaugh,* 492 U.S. 302, 339-40 (1989); American Association on Mental Deficiency, Classification in Mental Retardation glossary at 170, 200 (rev. 1983).

who fall just outside the definition of intellectual disability, but the ambiguity in the use of the term must be considered.[666]

[7.6] Burden of Proof

The *Atkins* Court failed to address the burden of proof associated with a claim of intellectual disability in death penalty litigation.[667] Instead, *Atkins* reserved all procedural and substantive considerations to the states in evaluating intellectual disability. All jurisdictions place the burden of proof on the accused to establish intellectual disability. Some courts, relying on applicable state law criteria, apply a beyond a reasonable doubt burden.[668] Other jurisdictions employ either a clear and convincing evidence and still others a preponderance of the evidence burden to be carried by the offender.[669]

As the *Atkins* Court noted, the procedures and criteria for evaluating intellectual disability remain the prerogative of state legislative or judicial designs. The jurisdictions that allocate intellectual disability determinations to the jury have done so as a matter of state law.[670] However, no "constitutional mandate" requires that a jury determine whether a capital defendant is intellectually disabled.'"[671]

[7.7] Intellectual Disability Practical Considerations

The issue of intellectual disability should be explored early on in the proceedings as it may remove the potential for the death penalty. Getting the issue resolved early saves time and money if

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[666] Ellis, Everington & Delpha, *supra.* note 32 at 1322.
[667] *See Raulerson v. Warden*, 928 F.3d 987 (11th Cir. 2019); *Hill v. Humphrey,* 662 F.3d 1335 (11th Cir. 2011).
[668] *Id.*
[669] For a discussion on the various burdens of proof established by state statutes related to intellectual disability determinations in death penalty litigation, *see* Nancy Haydt, *Intellectual Disability: A Digest of Complex Concepts in Atkins Proceedings,* 38 Champion 44 (2014).
[670] *See People v. Woodruff,* 5 Cal. 5th 697, 778 (2018); *Commonwealth v. Sanchez*, 614 Pa. 1 (2011); *State v. Jimenez,* 188 N.J. 390 (2006); *State v. Johnson,* 244 S.W.3d 144 (Mo. 2008).
[671] *People v. Woodruff,* 5 Cal. 5th 697, 778 (2018), *quoting In re Hawthorne,* 35 Cal. 4th 40, 50 (2005); *Schriro v. Smith*, 546 U.S. 6, 7-8 (2005); *In re Pers. Restraint of Davis*, 188 Wn.2d 356 (2017)(the death penalty is not a "sentencing enhancer" under the *Apprendi* line of cases).

the defendant has sufficient proof of intellectual disability. If the death penalty is off the table, the case is significantly simplified. Even if the defendant fails on the issue of intellectual disability, the evidence uncovered is often of value to the defense. In many cases the issue of intellectual disability is raised but not sufficiently proved by the defendant. However, evidence developed as part of the claim of intellectual disability may still be utilized by the defense in the penalty (mitigation) phase of a trial.

[7.8] Conclusion

Courts confront unique challenges and concerns in applying medical and psychological criteria to the legal environment when evaluating claims of intellectual disability in death penalty litigation. Judges considering *Atkins* claims must employ caution in examining expert credentials, the evidence influencing clinical evaluations and opinions, and the expectations articulated the U.S. Supreme Court for such evaluations.

SENTENCING (PENALTY) PHASE

Hon. O.H. Eaton
Hon. Kristi Harrington

[8.1] Introduction

Capital punishment is a possible penalty for the most serious, "worst of the worst," homicides. In every jurisdiction that authorizes the death penalty, it is reserved for the worst homicides committed by the worst offenders. Virtually every jurisdiction has a two-step process on potential death penalty cases. First is the trial phase, where the emphasis is on whether the defendant is guilty of a particular homicide and also guilty of what is frequently called an "aggravating factor" or a statutorily defined death penalty specification. If guilt is proved at this first phase, then a second phase proceeds. This second phase is about the appropriate punishment including the potential for the death penalty. All capital punishment states have a post- trial phase verdict proceeding to determine whether the death penalty should be imposed. These proceedings are sometimes referred to as the "penalty phase," "mitigation phase," or more correctly, the "sentencing phase." Therefore, the case proceeds in two phases. The first is the trial phase to determine guilt as to the murder charge and any statutory aggravating factors. Then if guilt is established the penalty phase commences. This second phase is often referred to as a trial within the trial where the emphasis switches from guilt to the appropriate punishment. This death penalty procedure is also a utilized in the federal system and in the United States military.

There must be a verdict of guilt on the underlying charges and any statutorily required aggravating factors before the death penalty is considered in a capital case. While the procedure used to determine the penalty differs from state to state, arriving at that decision is the most difficult task presented to a judge or jury. And, due to the finality and severity of the death penalty, there is no decision that will receive more judicial scrutiny. A death penalty sentence will be microscopically analyzed by direct

appeal and by post-conviction proceedings. Judicial review will take place in both state and federal courts, and it is not unusual for these courts to review a single case several times.

A high percentage of death penalty sentences are overturned in the United States.[672] In 1972, based on its concern death sentences were being imposed arbitrarily and capriciously, the United States Supreme Court invalidated the death penalty schemes enacted throughout the United States.[673] In response, many states changed their death penalty statutes to address this concern.

While capital punishment is authorized in 29 states,[674] recently, "New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and New Hampshire (2019) have legislatively abolished the death penalty, replacing it with a sentence of life imprisonment with no possibility of parole."[675] The Nebraska Legislature also abolished capital punishment in 2015, but it was reinstated by a statewide vote in 2016.[676] Additionally, courts in Washington and Delaware recently ruled that the state's capital punishment laws are unconstitutional.[677] States across the country will, no doubt, continue to debate the fairness, reliability, and cost of the implementation of the death penalty.

Over the past two decades, the U.S. Supreme Court has continued to narrow the death penalty's application in the states. For example, the Court abolished the death penalty for mentally disabled offenders,[678] for juvenile offenders,[679] and for those convicted of raping a child where death was not the intended or

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[672] Frank R. Baumgartner and Ana W. Dietrich, *Most Death Penalty Sentences Are Overturned. Here's Why That Matters.,* The WA Post, Mar. 17, 2015, https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/.
[673] *See Furman v. Georgia*, 408 U.S. 238 (1972).
[674] *States and Capital Punishment,* Nat. Conf. of State Legislatures (Jun. 12, 2019) http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx (last visited Feb. 12, 2020).
[675] *Id.*
[676] *Milestones in Abolition/Reinstatement*, Death Penalty Information Center https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska (last visited Feb. 13, 2020).
[677] *See State v. Gregory*, 427 P.3d 621 (Wash. 2018); *Zebroski v. State*, 179 A.3d 855 (Del. 2018).
[678] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[679] *Roper v. Simmons*, 543 U.S. 551 (2005).

actual result.[680] In addition, the Supreme Court has required juries—not judges—to find facts that make a defendant eligible for capital punishment[681] and that they—not a judge—"find each fact necessary to impose a sentence of death…[; a] jury's mere recommendation is not enough."[682]

State courts have also had an impact on death penalty statutes. The Delaware Supreme Court struck down the state's death penalty statute, ruling that it violated the Sixth Amendment as interpreted by the U.S. Supreme Court's *Hurst* decision.[683] The Washington Supreme Court, in *State v. Gregory,* also recently struck down that state's death penalty on October 11, 2018. [684] This was the fourth time the court has ruled the state's capital punishment law unconstitutional, calling it "invalid because it is imposed in an arbitrary and racially biased manner."[685]

"Since 2015, 25 states enacted 59 new laws addressing state systems of capital punishment."[686] Because the law in this area is ever-changing, research of local statutes, rules, and case law is definitely required to adequately conduct a penalty phase proceeding.

After *Furman,* three schemes arose after states reenacted the death penalty—the Florida Scheme, the George Scheme, and the Texas Scheme. Below, each is discussed from a historic perspective.

[8.2] Florida Scheme: Historic Perspective

It is imperative to note the Florida scheme discussed herein was declared unconstitutional in 2016 in *Hurst v. Florida*.[687]

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[680] *Kennedy v. Louisiana*, 554 U.S. 407 (2008).
[681] *Ring v. Arizona*, 536 U.S. 584 (2002).
[682] *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).
[683] *Rauf v. State*, 145 A.3d 430 (Del. 2016) ("capital sentencing statute unconstitutionally allows a judge to find an aggravating circumstance for the weighing phase.")
[684] *State v. Gregory*, No. 88086-7, Oct. 11, 2018. (Opinion downloaded from https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx.)
[685] *See State v. Gregory, supra,* at p 2.
[686] *Recent State Enactments,* Nat. Conf. of State Legislatures (Jun. 12, 2019), *available at* http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx (last visited Feb. 12, 2020).
[687] 136 S. Ct. 616, *supra*.

After the U.S. Supreme Court held that all death penalty statutes in the United States were unconstitutional in 1972,[688] Florida was the first state to reenact the death penalty by statute. The Florida post-*Furman* scheme[689] required that the jury unanimously find a defendant guilty of first-degree murder. The same jury (unless the defendant waived a jury) then heard evidence to establish statutory aggravating factors and statutory or non-statutory mitigating circumstances. The aggravating factors were required to be established beyond a reasonable doubt. The fact finder needed only to be "reasonably convinced" as to the existence of mitigating factors.

If the jury found one or more aggravating circumstance and determined the circumstance(s) sufficient to recommend the death penalty, it determined whether sufficient mitigating circumstances existed which outweighed the aggravating circumstances. Then, based upon these considerations, the jury recommended whether the defendant should be sentenced to life imprisonment or death.

Under the Florida scheme, in order to avoid arbitrary sentences, review by the Florida Supreme Court was automatic and included a "proportionality review" comparing similar cases.

The bottom line is: the Florida scheme has little applicability to current death penalty schemes and states previously adopting this scheme have amended the extent to which they follow it.

[8.3] Georgia Scheme: Historic Perspective

The Georgia scheme,[690] while like the Florida scheme, differed in that the prosecutor was not limited to presentation of evidence establishing statutory aggravating factors. After one statutory aggravating factor had been established, the prosecutor would present all relevant evidence of aggravation. The jury was required to state in its verdict the aggravating factors found beyond a reasonable doubt, and if the death penalty was unanimously recommended, the court was required to impose the death penalty.

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[688] *Furman v. Georgia, supra*.
[689] Fla. State. Ann. § 921.141 (2008).
[690] Ga. Code Ann. § 17-10-30 *et seq*. (2006).

Under the Georgia scheme, there was automatic review of the death sentence by the state supreme court. The reviewing court was required to determine (1) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.

[8.4] Texas Scheme: Historic Perspective

The Texas scheme[691] had a different approach than the Florida and Georgia schemes.[692] In Texas, the jury was required to answer three interrogatories which had to be answered either "yes" or "no." The first two interrogatories were required to be answered "yes" unanimously or "no" by a vote of at least ten-to-two. The last interrogatory was required to be answered "no" unanimously or "yes" by a vote of at least ten-to-two. The three interrogatories were:

1. Whether there is a probability the defendant would commit criminal acts of violence which would constitute a continuing threat to society?
2. Whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another, or anticipated a human life would be taken.
3. Whether, taking into consideration all the evidence including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death sentence. The Texas Court of Criminal Appeals automatically reviewed the conviction and death sentence [693]

[691] Tex. Code Crim. Proc. Ann. art. 37.071 (2005).
[692] Virginia, a Georgia scheme state, required a finding that defendant both presents a future danger to society and that the murder was "outrageously or wantonly vile, horrible or inhuman" as the only aggravating factor. *See* Va. Code Ann.§ 19.2-264.2 (1977).
[693] Tex. Code Crim. Proc. Ann. art. 37.0711(j) (2001).

In reviewing the jury's finding on future dangerousness, the court must view all evidence before the jury in the light most favorable to its finding, then determine whether, based on that evidence and reasonable inferences, a rational jury could have found beyond a reasonable doubt that the answer to the punishment issue was "yes."[694]

[8.5] Constitutionality of the Three Schemes

All of these schemes were enacted since *Furman*. The three schemes were originally approved strictly on Eighth and Fourteenth Amendment grounds by the U.S. Supreme Court in the 1976 trilogy of cases—*Gregg v. Georgia*,[695] *Proffitt v. Florida*,[696] and *Jurek v. Texas*.[697] These three cases, along with *Roberts v. Louisiana*[698] and *Woodson v. North Carolina*,[699] are often referred to as the "Five Death Penalty Cases."

The Eighth and Fourteenth Amendments to the U. S. Constitution require that the judge or jury not be precluded from considering any aspect of the defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a mitigating circumstance as a basis for a sentence less than death.[700] The judge must instruct the jury that mitigating factors may not be limited by statute.[701]

[8.6] Understanding the Schemes and Their Modern-Day Variations and Interpretations

Taking the historical schemes into perspective, questions that must be addressed when comparing these variations are:

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[694] *See Salazar v. State*, 38 S.W.3d 141 (Tex. Crim. App. 2001); *Williams v. State*, 937 S.W.2d 479 (Tex. Crim. App. 1996).
[695] 428 U.S. 153 (1976).
[696] 428 U.S. 242 (1976).
[697] 428 U.S. 262 (1976).
[698] 428 U.S. 325 (1976).
[699] 428 U.S. 280 (1976).
[700] *See Eddings v. Oklahoma*, 455 U.S. 104 (1982).
[701] *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

- ✓ How much discretion the prosecutor has to seek or waive the death penalty?
- ✓ Is the prosecutor required to give notice to the defendant of intent to seek the death penalty? If so, how and when?
- ✓ Is the prosecutor required to give notice of which aggravating factors will be relied upon? If so, how and when? Must the aggravating circumstances be contained in the indictment?
- ✓ Do the rules of evidence, particularly the rules prohibiting hearsay, apply to the penalty phase?
- ✓ Who makes the sentencing decision: the jury exclusively, the judge or judges if a jury is waived, or the judge after receiving a jury's recommendation? If the defendant wishes to waive a jury, must the prosecutor agree?
- ✓ Does the jury's decision have to be unanimous or by some majority vote? If the decision is by majority vote, how much of a majority?
- ✓ Is the judge or jury required to "balance" or "weigh" aggravating and mitigating factors to determine the proper sentence? If not, how is this decision made?
- ✓ What are the potential problems with jury instructions? Note: jury instructions differ greatly from state to state; some have been reviewed by the U.S. Supreme Court and approved or disapproved. More importantly, some instructions may be ripe for review and may be struck down in the future. Following a state supreme court's jury instruction can still result in re-trying the penalty phase if the instructions are faulty.
- ✓ What is the burden of proof in deciding aggravation and mitigation?
- ✓ Can the judge override the jury's recommendation? If so, by what standard?
- ✓ What should be included and what should be excluded from the sentencing order if one is required?

This is only a partial list. There are other issues peculiar to some specific states; however, most states have a great deal in common in sentence determination. These common factors and some of the individual differences will be discussed below. Each state has its own procedural complexities and pitfalls, some of which are quite subtle. Research of local statutes, rules, and case

law is definitely required to adequately conduct a penalty phase proceeding.

[8.7] Overview of the Sentencing (Penalty) Phase

The sentencing phase turns the attention of the jury to the appropriate penalty. As a practical matter, the question becomes the appropriate penalty for the specific crime and the specific defendant. It is often said that at the sentencing phase, the emphasis moves from being crime-centered to being defendant-centered. Often the bulk of the evidence is presented by the defense. The key constitutional requirement is that the defendant must be given wide latitude to present evidence in mitigation.

The trial court needs to take an open view of the evidence presented by the defense. The defense will use expert testimony, family members, school, medical and military records, and a host of other materials to allow the jury to understand the person before the tribunal. The rules of evidence are relaxed as mitigation proceeds. The question becomes what facts exist that make for a penalty of less than death.

[8.8] Evidentiary Issues during the Penalty (Sentencing) Phase

During the penalty phase of a capital case, evidence is treated differently than during the trial phase. Many states lessen the burden of proof in establishing mitigating circumstances. Additionally, as required by the U.S. Supreme Court, hearsay evidence is treated differently. These issues are explored more fully below.

[8.9] Burden of Proof

Most state statutes require that aggravating circumstances to be proven beyond a reasonable doubt.[702] Some statutes are silent on the burden of proof required. But even if the statute is silent, the burden is on the prosecution to prove the aggravating

[702] *See Jones v. U.S.*, 526 U.S. 227 (1999).

factors beyond a reasonable doubt. Inferences or probabilities are not enough. However, most states provide for a lesser burden of proof in establishing mitigating circumstances.

Is there a constitutional problem in requiring the defendant to prove mitigating factors at all? This issue was specifically rejected by the U.S. Supreme Court in *Walton v. Arizona*.[703] Arizona required the defendant to prove, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency. *Walton* contended this requirement violated the Eighth and Fourteenth amendments, and that the Constitution required the defendant be able to claim mitigating circumstances unless the state negated them by a preponderance of the evidence. The U.S. Supreme Court found nothing wrong with Arizona's requirement that the burden of proving, by a preponderance of the evidence, any mitigating circumstances was on the

Some other states—New Hampshire,[704] Pennsylvania, and Wyoming[705]—also use the preponderance of the evidence standard for mitigating circumstances a defendant may bring into evidence. Alabama's statute gives the defendant the burden of "interjecting" the issue and once interjected, the prosecutor has the burden of disproving the factual existence of the circumstance by a preponderance of the evidence.[706] The majority of states do not give the burden of proof regarding mitigating evidence as part of their statute. In those states it is necessary to research relevant case law. If all else fails, rely upon the U.S. Supreme Court's approval of the "preponderance" standard as an appropriate burden.

In 2010, the U.S. Supreme Court reiterated that there are two well-established principles in capital cases: (1) "the Constitution forbids imposition of the death penalty if the sentencing judge or

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[703] 497 U.S. 639, (1990*), overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).
[704] N.H. Rev. Stat. Ann. § 630:5 (III) (West 2019) ("The burden of establishing the existence of any mitigating factor is on the defendant and is not satisfied unless established by a preponderance of the evidence.").
[705] Wyo. Stat. Ann. § 6-2-102(d)(i)(B) (West 2019) ("...jury shall deliberate and render a sentence based upon... whether, by a preponderance of the evidence, mitigating circumstances exist").
[706] Ala. Code § 13A-5-45(g) (West 2019).

jury is precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" and 2) "the sentencing judge or jury may not refuse to consider *or be precluded from considering* any relevant mitigating evidence."[707]

[8.10] Prosecution's Evidence for the Penalty Phase

It is not generally necessary for the prosecutor to reintroduce evidence of aggravating circumstances presented during the guilt phase of the trial if the same jury is trying the penalty phase. The jury should be instructed that all testimony and other evidence bearing upon an aggravating or mitigating factor that was presented during the trial may be considered part of the penalty phase. The judge must make a determination of what evidence from the trial phase will be admitted at the sentencing phase. This is not a simple admit everything order. Once determined the jury needs to be provided with limiting instructions.

The prosecutor will have to put on witnesses or introduce evidence of aggravation if a new jury has been selected for the penalty phase. Some states allow the prosecutor to introduce former testimony from transcripts of the guilt phase to the new jury if witnesses are not available.[708] Unless these witnesses are no longer available, and have previously been subjected to cross-examination, the prosecutor will have to use live witnesses.[709]

However, some death penalty cases are very old and have been in the appellate courts for years. It may be difficult for the prosecutor to obtain live witnesses upon retrial and he or she will have to rely upon former testimony. Jurisdictions with no provision for the use of former testimony present a problem for the prosecutor. The use of transcripts because a witness has died, has become incapacitated, or is unavailable may be the only

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[707] *Smith v. Spisak*, 558 U.S. 139, 144 (2010) (internal citations omitted).
[708] *See Russell v. State*, 670 So.2d 816 (Miss. 1995) (witnesses' former testimony allowed if prosecution proves the unavailability of the witnesses by diligent effort); *see also State v. Carter*, 888 P.2d 629 (Utah 1995) (oral testimony from transcripts allowed).
[709] *Crawford v. Washington*, 541 U.S. 36 (2004).

recourse. Whether to allow the use of former testimony under such circumstances must be determined by state law.

Aggravating factors that were not proven in the guilt phase (e.g., defendant's prior convictions for violent crimes) must be proven in the penalty phase by calling witnesses and introducing exhibits into evidence. Certified copies of prior convictions are admissible. Business records can be introduced to prove the defendant's custody status. Often a defendant will offer to stipulate to certain aggravating factors to avoid live testimony, particularly from victims of prior crimes of violence. Generally, the prosecutor can accept the stipulation or reject it. If a stipulation is accepted by the prosecutor, the jury should be informed of the stipulation and instructed to accept it as being true. If the stipulation is not accepted, the prosecution may introduce documents or live testimony to establish other aggravating factors.[710]

[8.11] Hearsay Testimony during the Penalty Phase

Some states, e.g., Louisiana, require the rules of evidence to apply during a penalty phase proceeding. Other states allow both the state and defense to introduce hearsay. Some states, e.g., Arizona, Arkansas, and Connecticut, permit the defense to use hearsay to prove mitigating circumstances but do not allow the prosecution to use it to prove aggravating circumstances.[711]

Some states do not allow the prosecution to use hearsay to prove aggravating circumstances but do allow hearsay to be used to rebut mitigating circumstances. In *Green v. Georgia*, the U.S. Supreme Court reversed a death penalty conviction because the defendant was not allowed to present hearsay testimony during the penalty phase.[712]

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[710] *See State v. Hessler*, 734 N.E.2d 1237 (Ohio 2000); *see also Singleton v. State*, 783 So.2d 970 (Fla. 2001) (prosecutor allowed to call prior victim to testify that defendant severed both of her forearms during prior crime).
[711] Conn. Gen. Stat. § 53a-46a (West 2019); Ark. Code. Ann. § 5-4-602 (West 2019); Ariz. Rev. Stat. Ann. §13-751 (West 2020).
[712] *Green v. Georgia*, 442 U.S. 95 (1979).

In Florida, Illinois, and North Carolina, hearsay is generally admissible so long as there is an opportunity to rebut it.[713] In *People v. Bilski*,[714] the Appellate Court of Illinois approved the prosecutor's investigator reading statements pertaining to defendant's past misconduct from individuals he interviewed. The Appellate Court of Illinois concluded the statements "displayed indices of reliability" because they showed a similar fact pattern of domestic abuse.[715]

Other rules of evidence may still have to be complied with before the hearsay is admissible. For example, unless a state permits transcripts of previous testimony and depositions to be used, the unavailability of the witness may have to be established before a transcript of that witness' previous testimony can be admitted. Some courts allow hearsay provided it can be rebutted.[716] Courts have not hesitated to exclude hearsay statements that cannot be rebutted. Admitting the statement of a non-testifying co-defendant that implicates the defendant on trial is not permitted.[717] Additionally, hearsay statements are not admissible from witnesses who are unavailable because of death, incompetency through mental illness such as Alzheimer's, or disappearance.[718]

Allowing the prosecutor to introduce hearsay to prove an aggravating circumstance is probably error *after Crawford v. Washington* on Sixth Amendment grounds.[719] Prosecutors are unwise to insist on presenting hearsay evidence and judges are unwise to allow it unless the U.S. Supreme Court specifically rules that the Confrontation Clause does not apply to penalty phase proceedings. A review of hearsay as it applies in the Federal Death Penalty Act as well as caselaw leading up to *Crawford v. Washington* follows below.

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[713] *See Rhodes v. State*, 547 So.2d 1201 (Fla. 1989); *see also State v. Strickland*, 488 S.E.2d 194 (N.C. 1997).
[714] 776 N.E.2d 882 (Ill. App. Ct. 2002).
[715] *Id.* at 890.
[716] *Parker v. State*, 873 So.2d 270 (Fla. 2004); *Ex parte Dunaway*, 746 So.2d 1042 (Ala. 1999).
[717] *Ramirez v. State,* 739 So.2d 568 (Fla. 1999); *Franqui v. State*, 699 So.2d 1332 (Fla. 1997).
[718] *Parker*, 873 So.2d at 282.
[719] *Crawford v. Washington,* 541 U.S. 36 (2004).

The bottom line is that there is definitely a trend to allow the defense some relaxing of the rules of evidence when it comes to the introduction of mitigation evidence. Every judge should read GREEN need foot note and cite. It may be a very slippery slope to not provide some latitude to the defense on the evidence rules and mitigation.

[8.12] Federal Death Penalty Act (FDPA)

The Federal Death Penalty Act (FDPA)[720] is basically a Georgia-scheme statute. It provides that the prosecution must notify the defendant "a reasonable time before trial or before acceptance by the court of a plea of guilty" that it intends to seek the death penalty.[721] The notice must contain all aggravating factors the prosecution intends to prove to justify the death sentence.[722] The jury, in a separate sentencing hearing, must make three separate determinations.[723]

1. The jury must find beyond a reasonable doubt that the defendant acted with one of four mental culpability factors, ranging from an intentional killing to intentionally engaging in violence, "knowing that the act created a grave risk of death" with the victim's death as a direct result.[724]
2. The jury must consider whether the existence of at least one statutory aggravating factor has been proven beyond a reasonable doubt.[725]
3. The jury must consider whether all aggravating factors found to exist, both statutory and non-statutory, outweigh all mitigating factors beyond a reasonable doubt. The jury's finding must be unanimous.

Mitigating factors may be proven by a preponderance of the information and may be found by just one or more members of the jury. Information relevant to the sentence, including any mitigating or aggravating factors, "is admissible regardless of its admissibility under the rules governing admission of evidence at

[720] 18 U.S.C.A. § 3591 *et seq.* (1994).
[721] 18 U.S.C.A. § 3593 (1997).
[722] *Id.*
[723] 18 U.S.C.A. § 3592 (2006).
[724] *Id.*
[725] 18 U.S.C.A. § 3593 (1997).

criminal trials, except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."[726] Both the government and the defendant have an opportunity to rebut any information and present argument as to the sentence.[727]

[8.13] Evidence that Violates the Fourth and Fifth Amendments

The prosecutor generally cannot introduce evidence that violates a defendant's constitutional rights. Most statutes prohibit the introduction of any evidence seized in violation of the defendant's Fourth or Fifth Amendment rights. Further, the fact that a defendant belonged to a white racist group called the "Aryan Brotherhood" and had "Aryan Brotherhood" tattooed on his hand (and used the name "Abaddon") is inadmissible because its introduction would violate the defendant's First Amendment rights.[728]

In *Dawson v. Delaware*,[729] the U.S. Supreme Court suggested this information might have been admissible if it had related to some issue to be decided. For example, this information might have been admissible if the defendant had killed an African American because of his or her race and such a killing was an aggravating factor.

[8.14] Victim Impact Evidence

In *Booth v. Maryland*,[730] the U.S. Supreme Court held that the Eighth Amendment prohibited victim impact statements from being admitted in a capital sentencing procedure because such information is "irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."[731] In *South Carolina v. Gathers*,[732] the U.S. Supreme Court extended *Booth* to prohibit prosecutorial argument on the victim's personal characteristics. However, in

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[726] 18 U.S.C.A. § 3593(c) (1997).
[727] *Id.*
[728] *See Dawson v. Delaware*, 503 U.S. 159 (1992).
[729] *Id.*
[730] 482 U.S. 496 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).
[731] *Id.* at 503.
[732] 490 U.S. 805 (1989), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

1991, the U.S. Supreme Court overruled both of these cases in *Payne v. Tennessee*[733] and this kind of testimony and argument is now allowed because assessment of the harm caused by the defendant has long been an important factor in determining the appropriate punishment, and victim impact evidence is simply another method of informing the sentencing authority about such harm.

Payne does not affect *Booth's* holding that the Eighth Amendment bars admissions of opinions or characterizations by the victim's family about the crime, the defendant, and the appropriate penalty for the defendant. Case law in this area continues to evolve and as of this update, family members generally cannot be asked if they want the death penalty. State case law and statutes must be carefully followed on the issue of victim impact evidence during the sentencing phase.

Victim impact statements (if permitted by state law) can be disturbing to notions of due process and fairness. Victims often want vengeance instead of justice. There are times, however, when victims want a defendant who deserves the death penalty to be spared. Prosecutors should encourage members of the victim's family to limit their statements to establishing the victim's uniqueness in the community. Some judges require victim impact statements to be presented in writing prior to being submitted to the jury. This is a good idea.

Examples of statements that should *not* be allowed include:

- ✓ Statements designed to chastise or humiliate the accused;
- ✓ Statements that are for the purpose of advancing a political, social, or religious belief or cause;
- ✓ Statements that are more appropriate for a press conference or support group;
- ✓ Statements that contain speculation about future events such as pardon or parole;
- ✓ Statements that recommend or suggest a particular sentence;
- ✓ Photographs or other exhibits designed to elicit sympathy for the victim and prejudice the defendant; and

[733] 501 U.S. 808 (1991).

- ✓ Emotional outbursts.

The sentencing process in a capital case does not include allowing a member of the victim's family to shame or chastise the defendant or demand that the defendant be put to death.

The sentence to be imposed must be determined from the presentation of aggravating and mitigating circumstances and not from lay opinion. Additionally, the imposition of any sentence will have an impact upon public funds. Public officials (the prosecutor), and not members of the victim's family, have the responsibility to advocate for a particular sentence.
Victim impact evidence is an area in flux nationally. It is imperative that the judge review the latest jurisdiction specific law on the use of such evidence. This is not an area to venture into without adequate research.

[8.15] Preliminary Matters

Assuming the same jury tries both the trial (guilt) phase and the sentencing (penalty) phase, there may be little need for detailed preliminary instruction since penalty phase procedure was covered in the initial *voir dire*. However, it is advisable to begin the penalty phase with preliminary instructions similar to those used before any trial to inform the jury about what to expect in the penalty phase. Also, preliminary instructions should include advising the jury as to how they will use the matters presented during deliberations and, if not already done, advise them of the expected length of the proceeding and the hours court is expected to be in session. Other matters, such as sequestration and transportation, should also be discussed.

Usually, the same jury that tried the guilt phase will try the penalty phase. However, a new jury will have to be empaneled if the case was remanded for re-sentencing after the defendant's successful appeal, a successful post-conviction motion, a successful habeas corpus petition, or if other reasons prevent the use of the guilt phase jury. The new jury will be empaneled subject to the same unique problems inherent in selecting juries for death cases. The new jury must be told that guilt has already been decided and the role of the jury is to determine, or assist in determining, the penalty.

Jury instructions should be reviewed to be certain there is no minimization of the importance of the jury's decision. After *Ring v. Arizona*,[734] it is clear there is a constitutional right to a jury for the sentencing phase. Cases that state otherwise are no longer valid.[735]

The defendant's waiver to a sentencing-phase jury should be on the record and should establish that it is knowingly and voluntarily made.[736] Some states do not require the trial judge to accept the waiver.[737] However, there are several good reasons to consider allowing the waiver:

- ✓ The guilt phase jury will not have to be "death qualified" other than to inquire whether the jurors could return a guilty verdict knowing the death penalty is a possible penalty. This waiver will save time (sometimes days or weeks) on *voir dire* and eliminate many of the errors which occur during *voir dire* in death penalty cases.
- ✓ A jury recommendation to impose the death penalty is often an emotional response to the offense and the defendant and not founded upon sound legal principles. The possibility of an emotional verdict that will have to be either accepted as the sentence or given "great weight" is eliminated.
- ✓ The penalty phase can be scheduled at the convenience of the parties and court without concern about the jury being influenced by outside factors.
- ✓ In some states, the penalty phase can be bifurcated with the prosecutor first presenting aggravating circumstances. If no aggravating circumstances are presented, or if they are insufficient to support the death penalty, no further proceedings need to be scheduled.
- ✓ In states where the court has the ultimate sentencing decision, there is more opportunity for the judge to

[734] 536 U.S. 584 (2002).
[735] *See, e.g., People v. Dameron*, 751 N.E.2d 1111 (Ill. 2001).
[736] *See People v. Dameron*, 751 N.E.2d 1111 (Ill. 2001) (waiver of jury for sentencing phase not knowing and intelligent due to erroneous advice that defendant would not receive jury instruction to presume he would spend the rest of his life in prison if given a life sentence).
[737] *See Sireci v. State*, 587 So.2d 450 (Fla. 1991).

interact with the attorneys and witnesses when a jury is not involved.

- ✓ There is less chance of reversible error in a non-jury trial.
- ✓ Some mitigating circumstances sound like aggravation and may be better presented to the judge alone.
- ✓ The defendant cannot make an *Apprendi*[738] challenge if the jury has been waived.[739]

[8.16] Opening Statements

Opening statements should proceed as in any other trial unless the state statute or rule changes this procedure. For instance, in South Carolina, allowing opening statements is within the discretion of the trial judge.[740]

Generally, the prosecutor makes an opening statement prior to the introduction of any evidence or may waive making an opening statement. Waiving the opening statement is not unusual when the only aggravating circumstances involve the facts of the case which the jury has already heard.

The defense may make an opening statement prior to the introduction of any evidence, reserve making the statement until the prosecutor has rested, or waive the opening statement entirely. The trial judge should inquire before trial if defense counsel intends to waive an opening statement or concede any part of the evidence. If so, it is safer to make sure the defendant agrees to the waiver or concession.[741]

[8.17] Additional Case Law

Atkins v. Virginia (2002)[742] – Executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment

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[738] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[739] *See Lynch v. State,* 841 So.2d 362 (Fla. 2003).
[740] *State v. Southerland*, 447 S.E.2d 862 (S.C. 1994) (trial judge did not abuse his discretion in refusing to let defendant make opening statement at sentencing as it is not a statutory right), *overruled on other grounds by State v. Chapman*, 454 S.E.2d 317 (Fla. 1995).
[741] *See Nixon v. State*, 572 So.2d 1336 (Fla. 1990).
[742] 536 U.S. 304 (2002).

Roper v. Simmons (2005)[743] – The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

Kennedy v. Louisiana (2008)[744] – The Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death.

Baze v. Rees (2008)[745] – The use of a four-drug lethal injection process to carry out death sentences is not a violation of the Eighth Amendment ban on cruel and unusual punishment.

Glossip v. Gross (2015)[746] – Oklahoma's use of midazolam as the initial drug in the execution protocol does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

[8.18] Methods of Execution (Trending Hot Topic)

Lethal injection is currently the primary method of execution in all 29 states that have capital punishment. However, However, sixteen states also have a secondary method of execution authorized by statute. See case law in each state to determine the constitutionality of secondary methods.

[8.19] Conclusion & Further Information

These materials point out the various problems and many of the pitfalls that will be encountered by trial judges during the penalty phase of a capital trial. These materials are only a starting point and not a complete treatise on the subject. Death penalty law is continually evolving and may vary significantly from state to state and even from trial to trial. The death penalty is reserved for the most aggravated and least mitigated cases. Death penalty cases present an

[743] 543 U.S. 551 (2005).
[744] 544 U.S. 407 (2008).
[745] 553 U.S. 35 (2008).
[746] 576 U.S. ___ (2015).

opportunity for trial judges to prove that our system of justice can be administered fairly and impartially.

For additional information and chapters relating to sentencing, please refer to the 2009 iteration of this publication, available electronically through The National Judicial College.

POST-CONVICTION PROCEEDINGS IN CAPITAL CASES

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[9.1] In General

The term "post-conviction remedy" refers to any procedural device that may be used to raise a collateral challenge to the judgment or sentence in a criminal case. In a capital case, the claims that are raised in a post-conviction proceeding may be directed to the validity of the conviction, the validity of the sentence of death, or both. The essential feature of all claims in post-conviction proceedings is that it challenges the validity of the judgment or sentence on grounds other than those that were or could have been raised on direct appeal.

[9.2]Habeas Corpus

Most states have adopted post-conviction procedures or state habeas corpus procedures to allow challenges to the validity of the judgment or sentence. These procedures are typically characterized as civil remedies since they are designed to supplant the civil remedy of habeas corpus. They are generally filed into the criminal case number and return to the court that heard the trial of the case.

There are still some common uses of the remedy of habeas corpus even in those states that have a comprehensive rule or statute regarding post-conviction remedies. For example, habeas corpus is used in some states as a post-conviction remedy to raise a claim of ineffective assistance of appellate counsel.[747] Although other states have specific procedures to address that

[747] *See* Correll v. Dugger, 558 So.2d 422 (Fla. 1990).

claim.[748] Depending on the local procedure, it may also be proper to file a petition for writ of habeas corpus to raise a claim of ineffective assistance of counsel in a previous post-conviction motion.

[9.3] *Coram Nobis*

In the absence of a more specific procedure established by a post-conviction rule or statute, the proper method for a defendant to bring a factual error to the attention of the court is to file a petition for writ of error *coram nobis*. Under the common law, a defendant seeking a writ of error *coram nobis* was required to file the petition in the appellate court alleging that there are facts that were unknown at the time of the trial and that, if known, those facts would have changed the result of the case. If the appellate court granted the petition, the defendant would be given an opportunity to present the newly discovered facts in the trial court and the trial judge would then determine whether it is necessary to grant a new trial.

Some states continue to use the writ of error *coram nobis* under modernized versions of the common law procedure. In other states, it is now proper to raise claims of newly discovered evidence in a post-conviction motion.[749]

[9.4] Post-conviction Motions

Post-conviction claims are now raised by filing a motion in the trial court under procedures established by a rule or a statute. The American Bar Association Standards for Criminal Justice regarding post-conviction remedies provide that "[t]here should be one comprehensive remedy for post-conviction review of the validity of judgments of conviction, or of the legality of custody or supervision based upon a judgment of conviction. The remedy should encompass all claims whether factual or legal in nature and should take primacy over any existing procedure or process

[748] See, State v. Murnahan, 63 Ohio St.3d 60 (1992); Morgan v Eads, 104 Ohio St. 3d 142 (2004).
[749] *See* People v. Steidl, 568 N.E.2d 837 (Ill. 1991), *rev'd on other grounds*, 685 N.E.2d 1335 (Ill. 1997); Richardson v. State, 546 So.2d 1037 (Fla. 1989).

for determination of such claims."[750]

The procedures that apply to post-conviction motions in state courts are generally found in criminal statutes and rules of criminal procedures. However, the courts have often observed that post-conviction motions are civil in nature.[751] This is so because the extraordinary remedies of *habeas corpus* and *coram nobis*, from which post-conviction remedies are derived, were regarded as civil proceedings even when used in conjunction with a criminal case.

A post-conviction motion may only be used to raise a collateral challenge to the validity of the judgment or sentence. For this reason, it is improper to include in a post-conviction motion a claim that was or could have been raised on direct appeal. The courts have consistently held that post-conviction relief is not a substitute for an appeal.[752] The right to file a post-conviction motion was not intended as a second opportunity to argue alleged trial errors. Nor was it intended to provide a forum for reargument of the issue of guilt or innocence. These matters will have already been settled by the time the motion is filed. Rather, a post-conviction motion serves the limited purpose of providing the defendant with a remedy in the event there has been a substantive deprivation of federal or state constitutional rights in the proceeding that produced the judgment or sentence under attack.[753]

[9.5]Motion and Response

While the formal requirements for filing a post-conviction motion depend on the provisions of the rules or statutes in each jurisdiction, there are some general requirements that are almost always imposed. In most jurisdictions, the defendant must sign

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[750] A.B.A. STANDARDS CRIM. JUST. § 22-1.1 (1986).
[751] *See* State v. Bostwick, 443 N.W.2d 885 (Neb. 1989); State v. Skjonsby, 417 N.W.2d 818 (N.D. 1987); Ouimette v. Moran, 541 A.2d 855 (R.I. 1988); Peltier v. State, 808 P.2d 373 (Idaho 1991).
[752] *See* Andrews v. Utah Bd. of Pardons, 836 P.2d 790 (Utah 1992); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); State v. El-Tabech, 453 N.W.2d 91 (Neb. 1990); Cutbirth v. State, 751 P.2d 1257 (Wyo. 1988); Coplen v. State, 766 S.W.2d 612 (Ark. 1989); Combs v. State, 537 N.E.2d 1177 (Ind. 1989); Stephens v. State, 737 S.W.2d 147 (Ark. 1987).
[753] *See* People v. Enoch, 585 N.E.2d 115 (Ill. 1991).

the post-conviction motion even if it has been prepared by an attorney. Likewise, in most jurisdictions the factual allegations of the motion must be verified either by the defendant or by some other person. If the applicable rule or statute requires a signature and verification, a post-conviction motion that does not meet these formal requirements is insufficient and may be dismissed.[754]

[9.6] Contents of Motion

Generally, a post-conviction motion is subject to certain basic pleading requirements that are designed to enable the trial judge to quickly ascertain the proper method of disposition. While the specific requirements vary depending on the provisions of the rule or statute in effect in a particular jurisdiction, the applicable procedures typically require that a post-conviction petition must contain such information as:

1. The docket number and date of the judgment or sentence under attack and the court that rendered the judgment;
2. Whether there was an appeal from the judgment or sentence and the disposition of the appeal;
3. What issues were raised in the appeal;
4. Whether a previous post-conviction motion has been filed, what claims or issues were raised in that prior petition;
5. If a previous motion or motions have been filed, the reason or reasons why the claim or claims in the present motion were not raised in the former motion or motions;
6. The nature of the relief sought; and
7. A statement of the facts relied on in support of the motion.

Some states have adopted standard forms that must be used in preparing a post-conviction motion and most require that the

[754] *See* Kilgore v. State, 791 S.W.2d 393 (Mo. 1990)(containing a discussion of the signature and verification requirements for post-conviction motions in capital cases); Scott v. State, 464 So.2d 1171 (Fla. 1985), *clarified by* Gorham v. State, 494 So.2d 211 (Fla. 1986).

petitioner attach prior orders relevant to the petition. As is the case with federal *habeas corpus* petitions, the motion must follow the general format of an approved form even if the defendant is represented by a lawyer. Forms are widely used because post-conviction motions are often filed as *pro se* pleadings.

[9.7] Order to Show Cause

In most states, there is some procedural mechanism by which the court can order a response from the state before deciding whether to grant a hearing on the motion. Depending on the applicable procedure, the court may direct either the state attorney or the attorney general to file a response to the motion. In any event, it would be wise to obtain a response if the post-conviction motion is sufficient on its face, and if the available files and records do not readily show that the defendant's claims are unfounded. At the very least, the state has a right to be heard on the issue whether the motion can be summarily decided. The state may wish to argue that the court *is* required to grant an evidentiary hearing on certain issues.

[9.8] Response by the State

In most states, the attorney general has the responsibility to respond to a post-conviction motion when the court has issued an order to show cause or request for a response. The response may contain an argument that the motion is insufficient on its face or it may alert the court to parts of the record that conclusively show the defendant is not entitled to relief. The response should also assert any defenses the State may have, including procedural default.

The following matters should be considered in determining whether a post-conviction motion meets the formal sufficiency requirements:

- ✓ Whether the applicable rule or statute requires that a post-conviction motion be signed by the defendant or that the facts be verified.
- ✓ Whether the factual allegations are sufficient to

establish a prima facie case in support of the motion.

- ✓ Whether the allegations of the motion are sufficient to establish a ground upon which relief could be granted.
- ✓ Whether the Petitioner defaulted the claim.
- ✓ Whether a particular form is required, and if so, whether the motion has been submitted on the approved form.
- ✓ Whether an appendix is required and if so, whether the necessary documents are submitted as an appendix.
- ✓ Whether the allegations of the motion are refuted by the files and records in the previous criminal proceedings.

[9.10] Time Limitations

The passage of time can operate as a bar to the right to pursue a claim in a post-conviction proceeding. Generally, the state may place a time limit on the filing of a post-conviction motion without violating any constitutional right guaranteed to the defendant.[755] Some states also require that the state post-conviction proceeding go forward while the direct appeal is still pending. It has been said that the purpose of placing a time limit on post-conviction relief is to promote fairness and finality, and to avoid piecemeal litigation in post-conviction proceedings.[756]

Some states have placed fixed time limits on the filing of post-conviction motions while others resolve the issue of staleness by applying the equitable doctrine of laches. In recent years, there has been a trend toward the adoption of fixed time limits. Statutes or rules imposing time limits on post-conviction relief have come about primarily in response to criticism for the delays in capital cases. However, a capital defendant delays at his or her own peril. Federal Habeas Corpus statutes have a strict statute of limitations,[757] which can be tolled by the filing of a state post-conviction petition, but if the capital petitioner delays too long after his case becomes final, he or she will be barred from presenting the claims in federal court.

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[755] *See* State v. Rhoades, 820 P.2d 665 (Idaho 1991); State v. Ervin, 835 S.W.2d 905 (Mo. 1992).
[756] *See* Mathews v. Eldridge, 424 U.S. 319 (1976).
[757] See, Chapter 10, Section 10.12, infra., 28 U.S.C.§2244(d) (1996).

The recommendation in the A.B.A. Standards is that the right to obtain post-conviction relief should not be subject to a statute of limitations. The rationale for this view is based in part on the fact that there are no time limits on the comparable remedy afforded by a writ of habeas corpus, and in part on the fact that the courts retain the ultimate power to find that a post-conviction motion is an abuse of the process if the defendant has raised a claim that could have been raised at an earlier stage of the proceedings.[758]

However, many states have placed specific time limits on the filing of a post-conviction motion. Among those states with specific time limits are Alabama (one year);[759] Delaware (one year);[760] Florida (one year);[761] Illinois (three years);[762] Kentucky (three years);[763] Mississippi (three years);[764] Montana (one year);[765] New Jersey (five years);[766] Ohio (one year)[767]Oklahoma (90 days from filing the reply brief in the direct appeal);[768] Tennessee (one year).[769]

[9.11] Exceptions

Even in the states that impose a time limit on post-conviction relief, there may be exceptions for claims that could not be discovered within the applicable time period. For example, Alabama adds an additional six months for claims based on newly discovered facts[770] and Florida allows an exception for claims based on facts that could not have been discovered in time with the exercise of due diligence.[771]

Some states also recognize an exception to the time period for

[758] A.B.A. Standards Crim. Just. § 22-2.4 (1986).
[759] Ala. R. Crim. P. 32.2(c).
[760] Del. Super. Ct. Crim. R. 61(i)(1).
[761] Fla. R. Crim. P. 3.851(d)(1).
[762] 725 Ill. Comp. Stat. 5/122-1(c) (2004).
[763] Ky. R. Crim. P. 11.42(10)
[764] Miss. Code Ann. § 99-39-5(2) (2000).
[765] Mont. Code Ann. § 46-21-102 (1997).
[766] N.J. R. Crim. P. 3:22-12.
[767] Ohio Rev. Code, §2254(A)(2)
[768] Okla. Stat. Ann. tit. 22, §1089 (2006).
[769] Tenn. Code Ann. § 40-30-102 (1996).
[770] Ala. R. Crim. P. 32.2(c).
[771] Fla. R. Crim. P. 3.850.

claims that are based on a newly recognized principle of law. Under Delaware law, a post-conviction motion may be filed within three years of newly recognized right that can be applied retroactively.[772] Similarly, Mississippi recognizes an exception for claims based on an intervening decision of the state or U.S. Supreme Court.[773] This is discussed in greater detail at Section 9.33.

[9.12] Abbreviated Time Limits

Abbreviated time periods may apply to the filing of motion for post-conviction relief after a death warrant is signed. This procedure is designed to prevent the defendant from disrupting the process by filing an unmeritorious post-conviction motion immediately before the date of the execution. Generally, if an abbreviated time period applies to a post-conviction motion filed after a warrant, the time period will be subject to the same exceptions for newly discovered evidence and newly established constitutional rights. For example, in *Lightbourne v. Dugger,*[774] the Florida Supreme Court reversed the denial of an untimely post-conviction motion because the allegations of the motion demonstrated that the defendant could not have previously discovered the claim by the exercise of due diligence.

The following matters should be considered in determining whether a post-conviction motion is timely:

- ✓ Whether there is a statute or court rule that imposes a time limit for filing a post-conviction motion.
- ✓ Whether the statute or rule imposes a different time limit if the defendant has sought review in a state or federal appellate court.
- ✓ Whether there is an exception to the time limit for newly discovered evidence or newly recognized principles of law, and if so, whether the exception applies.
- ✓ Whether there is an abbreviated time period that applies to post-conviction motions filed after the issuance of a death warrant.

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[772] DEL. SUPER. CT. CRIM. R. 61(i)(1).
[773] MISS. CODE ANN. § 99-39-5(2) (2000) and MISS. CODE ANN. §99-39-23(6) (2000).
[774] 549 So.2d 1364 (Fla. 1989).

[9.13] Right to Counsel

There is no constitutional right to counsel in post-conviction proceedings.[775] However, this rule is usually qualified with an explanation that the circumstances of a particular case may require the appointment of counsel.[776] Moreover, the need for appointed counsel may rise to the level of a constitutional right if there is no statutory provision for the appointment of counsel in such proceedings. However, the states must give defendants in post-conviction proceedings "meaningful access" to the courts to press their claims, and states are given broad discretion to define the manner of providing such access.[777]

Some states provide appointed counsel to all indigent defendants in post-conviction proceedings in capital cases.[778] If there is no specific provision requiring the appointment of counsel, there may be a general rule or statutory provision that permits the appointment of counsel when necessary to protect the rights of the defendant. Finally, if there is no express authority permitting the appointment of counsel in a post-conviction proceeding, the trial judge has inherent authority to appoint an attorney and to require the state to pay the legal costs.

The need for appointed counsel in post-conviction litigation in a capital case is greater than in any other kind of criminal case. This is so because an error in preparing or presenting a post-conviction claim could easily go uncorrected before the execution of the sentence. Although a defendant has no absolute constitutional right to counsel in a post-conviction proceeding, as

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[775] *See* Coleman v. Thompson, 501 U.S. 722 (1991); Pennsylvania v. Finley, 481 U.S. 551 (1987); Ross v. Moffitt, 417 U.S. 600 (1974); McKague v. Whitley, 912 P.2d 255 (Nev. 1996).

[776] *See* Spalding v. Dugger, 526 So.2d 71 (Fla. 1988).

[777] Bounds v. Smith, 430 U.S. 817 (1977). *See* Murray v. Giarratano, 492 U.S. 1 (1989), (Kennedy, J., concurring).

[778] *See e.g.,* ARIZ. R. CRIM. P. 32.4(c) (the court is required to appoint counsel for a defendant sentenced to death); FLA. STAT. ANN. § 27.702 (2004) (creating capital collateral regional counsel, funded by the state, to represent defendants in capital post-conviction proceedings in state and federal courts); N.J. R. CRIM. P. 3:22-12 (the public defender is appointed on the first post-conviction motion); NEV. REV. STAT. §34.820(1)(a)(1991) (Nevada statute mandates appointment of counsel in post-conviction proceeding for a defendant under sentence of death); OKLA. STAT. ANN. TIT. 22, §1089 (2006) (the public defender must represent all indigent defendants in post-conviction proceedings in capital cases).

the court explained in *Murray v. Giarratano*,[779] a good argument could be made in nearly any capital case, that the circumstances demand the appointment of counsel as a matter of constitutional law. For this reason, it would be wise to provide counsel for every defendant who is seeking post-conviction relief from a judgment and sentence of death.

Trial judges are more likely to encounter lawyers from other states in the post-conviction stage of a capital case than any other stage of the case. Lawyers who specialize in handling such motions are not always confined to a particular state. Generally, if the attorney is not a member of the state bar association and has filed a motion to appear *pro hac vice* along with the post-conviction motion, the trial judge must rule on the motion to appear *pro hac vice* before striking the post-conviction motion on the ground that it was not filed by an attorney authorized to practice in the state.[780] The summary denial of the motion for leave to appear deprives the defendant of his right to due process of law.

[9.14] Grounds for Relief

A post-conviction motion may be based on any legal claim as long as it is the kind of claim that can be raised as a collateral challenge to the judgment or sentence. That is, a post-conviction motion may be based on any legal ground that could not have been raised on direct appeal, and any legal ground that affects the essential validity of the judgment or the sentence of death. The specific grounds that may be asserted in a post-conviction motion are usually listed in the applicable rule or statute governing post-conviction remedies. Many of the rules and statues in effect in the United States were patterned after the A.B.A. Standards, which contains a list of the grounds in support of a post-conviction motion. A.B.A. Criminal Justice Standards, Standard 22-2.1 states:

A post-conviction proceeding should be sufficiently broad to provide relief:

[779] 492 U.S. 1 (1989).
[780] *See* Huff v. State, 569 So.2d 1247 (Fla. 1990).

(a) for meritorious claims challenging judgments of conviction and sentence, including cognizable claims:

(i) that the conviction was obtained or sentence imposed in violation of the Constitution of the United States or the constitution or laws of the state in which the judgment was rendered;

(ii) that the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of the state in which judgment was rendered, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(iii) that the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(iv) that the sentence imposed exceeded the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law;

(v) that there exists evidence of material facts which were not, and in the exercise of due diligence could not have been, theretofore presented and heard in the proceedings leading to conviction and sentence, and that now require vacation of the conviction or sentence;

(vi) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence where sufficient reason exists to allow retroactive application of the

changed legal standard;

(b) for meritorious claims challenging the legality of custody or restraint based upon a judgment of conviction, including claims that a sentence has been fully served or that there has been unlawful revocation of parole or probation or conditional release.[781]

This list describes the general types of claims that may be raised in a post-conviction motion. Within each category on the list there are numerous specific claims that could be raised. Without attempting to catalog every possible claim, the legal issues that arise most often in post-conviction motions filed in death penalty cases are discussed in more detail below.

[9.15] Competency to Proceed

Competency to proceed and related issues are often litigated in post-conviction motions. Courts in many states will entertain a claim of incompetence to proceed even if the claim is made for the first time in the motion for post-conviction relief.[782] In such cases it is difficult for the state to argue that the defendant waived the right to argue the issue of incompetence by failing to raise the issue at trial or on direct appeal.

In *Ake v. Oklahoma*,[783] the U.S. Supreme Court held that a criminal defendant who makes a preliminary showing that his mental condition may be an issue in a death penalty case, either in the guilt phase or the penalty phase, is entitled to a court-appointed expert to assist in the investigation and presentation of the mental health issues. The decision in *Ake,* has given rise to a variety of issues relating to duty to appoint experts and the extent of the required psychiatric assistance. Many of these issues will be presented as post-conviction claims just as they are presented in trials and appeals.

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[781] A.B.A. STANDARDS CRIM. JUST. § 22-2.1 (1986).
[782] *See* People v. Eddmonds, 578 N.E.2d 952 (Ill. 1991); Mason v. State, 489 So.2d 734 (Fla. 1986).
[783] 470 U.S. 68 (1985).

[9.16] Ineffective Assistance of Counsel

The claim raised most frequently in post-conviction proceedings is that the defendant did not receive effective assistance of counsel. Challenges to the effectiveness of counsel are often raised in collateral proceedings because the record of the alleged errors and the effect of those errors are not easily developed until after the trial and the direct appeal.

[9.17] Ineffective Assistance of Counsel in Trial or Penalty Phase

An ineffective assistance of counsel claim can be raised at the penalty phase as well as the trial phase. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that he or she was prejudiced. With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[784]

[9.18] Categories of Ineffective Assistance of Counsel

There are two general categories of ineffective assistance of counsel claims and each is governed by a different standard. The first type of claim alleges that defense counsel rendered actual ineffective assistance and is based on specific actions or omissions by counsel which resulted in prejudice to the defendant. This is often referred to as "actual ineffective assistance" or a *Strickland* claim.[785]

The second (and much narrower) category applies to

[784] *Strickland v. Washington*, 466 U.S. 668, 669 (1984)
[785] Strickland v. Washington, 466 U.S. 668 (1984).

circumstances in which the defendant was constructively denied the assistance of counsel. Under these circumstances, prejudice is presumed and need not be established to be entitled to relief. This is often referred to as *per se* ineffective assistance or a *Cronic* claim.[786]

[9.19] Actual Ineffective Assistance

This first category of ineffective assistance of counsel is based entirely on the acts or omissions of the lawyer and requires assessing both the deficient conduct of counsel as well as the resulting prejudice to the defendant. These claims are premised on the argument that the defendant was deprived of his right to the effective assistance of counsel as a result of something the lawyer did or failed to do. The proper standard for resolving this type of ineffective assistance of counsel claim is outlined in *Strickland v. Washington, supra.*[787] The standard contains two prongs. To be entitled to relief, the defendant must establish *both* prongs:

Because a defendant must establish both prongs before she or he is entitled to relief, trial judges have the option to decide the second prong first; that is, a trial judge need not determine whether counsel's performance was deficient before examining whether the alleged deficiency was prejudicial. If the defendant fails to establish either of the two prongs, the defendant's claim must fail.[788] A state trial judge, in order to make the record for further review, should examine and rule on both prongs.

Two of the most common grounds asserted under *Strickland* are the failure to investigate and the failure to present evidence.

[9.20] Failure to Investigate

As a general rule, defense attorneys have an affirmative duty to investigate and uncover all reasonably available evidence in the

[786] U.S. v. Cronic, 466 U.S. 648 (1984).
[787] 466 U.S. 668 (1984).
[788] *See* In re Rice, 828 P.2d 1086 (Wash. 1992); Leisure v. State, 828 S.W.2d 872 (Mo. 1992); Elliott v. State, 465 N.E.2d 707 (Ind. 1984).

defense of their clients. Therefore, a failure to investigate or uncover evidence that would be relevant or helpful during the trial phase or the penalty phase may constitute ineffective assistance of counsel. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[789]

Nevertheless, the failure to uncover or investigate substantial (and reasonably available) mitigating evidence for sentencing cannot be justified as a tactical decision where counsel "had not fulfilled their obligation to conduct a thorough investigation of defendant's background."[790] Counsel's inaction was not objectively reasonable under the circumstances, and his failure to investigate could not fairly be characterized as strategic: "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on the investigation."[791] No reasonable basis existed in *Williams* to support the failure to investigate the defendant's background.

In determining the reasonableness of an attorney's decision not to investigate, or to limit an investigation, the court must consider the totality of the circumstances at the time, avoiding the use of hindsight and with a heavy measure of deference to counsel's judgments.[792] The trial court should consider the evidence which was reasonably available at the time, the scope and extent of the investigation actually conducted, and the reasons for counsel's limitation on the investigation. In *Wiggins v. Smith*,[793] the U.S. Supreme Court found defense counsel's actions constitutionally deficient where "counsel abandoned their investigation of defendants' background after having acquired only rudimentary knowledge of his history from a narrow set of sources."[794]

To establish a claim of ineffective assistance of counsel based on a failure to contact a witness, the defendant must show, among other things, that the witness would have been located through a

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[789] *Strickland*, 466 U.S. at 691, Wiggins v. Smith, 539 U.S. 510, 522 (2003)
[790] Williams v. Taylor, 529 U.S. 362, 396 (2000).
[791] *Strickland*, 466 U.S. at 690-91.
[792] *Strickland*, 466 U.S. at 690-91; Davi v. Class, 609 N.W.2d 107 (S.D. 2000).
[793] 539 U.S. 510 (2003).
[794] *Wiggins*, 539 U.S. at 524.

reasonable investigation, that he would have testified at trial, and that the witness' testimony would have provided a viable defense or otherwise affected the jury's decision.[795]

The U.S. Supreme Court recently addressed the parameters of defense counsel's duty to investigate, especially in the context of preparation for the penalty phase proceedings. In *Rompilla v. Beard*,[796] defense counsel was aware that the prosecution was relying on defendant's prior sexual battery conviction as an aggravating circumstance. The prosecutor advised counsel that he intended to read into evidence the testimony of the victim from that prior sexual battery trial. Defense counsel did not obtain the transcript of the testimony until the day before the penalty phase proceeding and did not review the transcript prior to the penalty phase proceeding. The U.S. Supreme Court held that defense counsel's actions constituted deficient performance under *Strickland*. The U.S. Supreme Court found defense counsel's actions were not justified by the fact that defendant and his family advised counsel that the victim's testimony would be neither helpful nor harmful in the penalty phase:

> It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecutor will cull for aggravating evidence. No reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family... whether they recalled anything helpful or damaging in the prior victim's testimony.[797]

The Court in *Rompilla* found that defense counsel's performance was deficient not only in his failure to review the transcript of the prior testimony, but in failing to review the court file related to that prior conviction. It is in this regard that the prejudice component of *Strickland* was established: Had counsel reviewed the court file of defendant's prior felony conviction, he would have discovered significant mitigation evidence (and information leading to even more mitigation evidence). This failure to review the prior court file (and the failure to discover the mitigation

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[795] *See* State v. Twenter, 818 S.W.2d 628 (Mo. 1991).
[796] 545 U.S. 374 (2005).
[797] *Rompilla*, 545 U.S. at 388 (emphasis supplied).

evidence) led the U.S. Supreme Court in *Rompilla* to conclude that defendant was entitled to a new penalty phase proceeding.

Rompilla suggests the need for counsel to do more than simply rely upon the defendant or his family as the single source of information regarding potential mitigation. The following general rules could fairly be said to flow from *Rompilla*:

1. Defense attorneys have a duty to obtain and review any evidence they know the state intends to introduce at the penalty phase proceeding.
2. If the state intends to introduce evidence of a prior conviction (or evidence related to that prior conviction), defense attorneys should review the entire court file of that prior conviction.
3. As a part of the investigation for the penalty phase, defense attorneys should attempt to obtain defendant's school, medical and prison records to the extent they are readily available.

In determining whether counsel has acted reasonably in obtaining (or not obtaining) files and records in the course of his or her investigation, a trial court should consider the following factors:

- ✓ The number of records or files involved
- ✓ The cost and time required to obtain and review the records
- ✓ Accessibility of the records
- ✓ Actual efforts made to obtain or review the records
- ✓ Certainty of the state's intent to use the records
- ✓ Timing of notice to defense attorney of the state's intent to use the records
- ✓ Potential impact of the records on the defense theory or argument

[9.21] Failure to Present Evidence

Failure to present evidence at the trial phase or penalty phase of a capital case does not necessarily compel a conclusion that the trial attorney's performance was deficient.[798] Such a conclusion depends on whether the decision not to present evidence was

[798] *See* Pollard v. State, 807 S.W.2d 498 (Mo. 1991); King v. State, 649 S.W.2d 42 (Tex. Crim. App. 1983).

an informed decision based on a reasonable investigation of the reasonably available evidence.

One of the most common claims raised in capital post-conviction motions is the failure to present mitigation evidence at the penalty phase of the trial. As in the trial phase, an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigation evidence in preparation for the penalty phase.

In analyzing the actions of trial counsel regarding the presentation of evidence, the focus is not on whether trial counsel could or should have taken a different course of action; the central question is whether the course of action taken was a reasonable one which resulted from an informed, professional judgment.[799]

If counsel's decision not to present mitigating evidence was made after a full investigation, the court is not likely to find ineffectiveness.[800] As the U.S. Supreme Court noted in *Strickland*: "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[801]

In contrast, the court is more likely to find ineffective assistance of counsel in a case in which the lawyer has not conducted any investigation of the potential mitigating evidence. For example, in *In re Marquez,*[802] the court granted relief in a case in which counsel had undertaken no investigation of the mitigating circumstances: "Unless a minimally adequate investigation is undertaken, it is impossible to make a tactical decision about whether to present or withhold mitigating evidence at the penalty phase."[803] Similarly, in *Stevens v. State*,[804] the court

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[799] Wiggins v. Smith, 539 U.S. 510 (2003).
[800] *See* In re Jackson, 835 P.2d 371 (Cal. 1992), *disapproved on other grounds* In re Sassounian, 887 P.2d 527 (Cal. 1995).
[801] *Strickland*, 466 U.S. at 690. *See* Darden v. Wainwright, 477 U.S. 168 (1986) (counsel's assistance not deficient where he conducted extensive investigation and thereafter made the decision that presenting a mitigation case would have resulted in the jury hearing evidence that defendant had been convicted of violent crimes and spent much of his life in jail).
[802] 822 P.2d 435 (Cal. 1992).
[803] *Id.* at 447.
[804] 552 So.2d 1082 (Fla. 1989).

found that defendant did not receive effective assistance of counsel and ordered a new sentencing where defense counsel did "virtually nothing" on the defendant's behalf and explained that the defense attorney's failure to investigate or present any mitigating evidence was a deficiency that may have affected the outcome of the sentencing hearing.[805]

In assessing whether defendant can establish *Strickland* prejudice as a result of counsel's failure to present sufficient mitigating evidence at the penalty phase of a capital murder trial, several factors are of significance: (1) the nature and extent of the mitigating evidence that was available but not presented; (2) whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; and (3) whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination.[806]

The reasonableness of an attorney's actions in deciding whether to present evidence may be substantially influenced by the defendant's own statements or actions. In *Cummings-El v. State*,[807] defendant could not complain about trial counsel's failure to call defendant's family members to testify at the penalty phase, when defendant told his counsel he was adamantly opposed to having his family testify and beg the jury for mercy.[808]

Defendant cannot complain where the limitations on the investigation or the failure to present evidence results from defendant's own lack of cooperation with counsel.[809] Further, counsel's failure to present evidence is not deficient where presenting such evidence would result in opening the door to other, more harmful, evidence.[810]

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[805] *See also* Hirning v. Dooley, 679 N.W.2d 771 (S.D. 2004).
[806] Nichols v. State, 90 S.W.3d 576 (Tenn. 2002); Abshier v. State, 28 P.3d 579 (Okla. Crim. App. 2001).
[807] 863 So.2d 246 (Fla. 2003).
[808] *See also* Brewer v. State, 496 N.E.2d 371 (Ind. 1986), *rev'd on other grounds sub nom.* Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Commonwealth v. Wilson, 861 A.2d 919 (Pa. 2004).
[809] Hodges v. State, 885 So.2d 338 (Fla. 2004).
[810] Gaskin v. State, 822 So.2d 1243 (Fla. 2002).

[9.22] *Per Se* Ineffective Assistance

U.S. v. Cronic[811] was a companion case to *Strickland*. While the *Strickland* standard is appropriate for the overwhelming majority of cases raising ineffective assistance claims, *Cronic* recognized that in rare circumstances the egregiousness of the conduct may warrant a finding of *per se* ineffective assistance of counsel. The U.S. Supreme Court reasoned that, in such instances, the conduct is so likely to prejudice the accused that the cost of litigating its effect in a particular case is unjustified; prejudice should be presumed. Absent circumstances of this magnitude, courts cannot find a violation of defendant's Sixth Amendment right without a showing of prejudice under *Strickland*.

Cronic delineated the narrow circumstances to which the *per se* rule would apply:

- State's actions
- Failure to subject case to meaningful adversarial testing
- Conflict of interest

[9.23] State Actions

If the state's actions result in an actual or constructive denial of assistance of counsel, prejudice may be presumed. In such a case, the argument focuses primarily on the actions of the state and does not involve a claim that the lawyer could have done something differently. For example, if the trial judge appoints an out of state lawyer to a high-profile capital case one day before trial, the defendant will prevail on a claim that the actions of the court constituted a *per se* deprivation of effective assistance of counsel.[812] Under these circumstances the result of the trial is deemed unreliable and the court need not engage in a determination of prejudice to the defendant. However, the late appearance of counsel in a case does not, by itself, automatically require application of the *per se* rule.[813] Denial of counsel at a

[811] 466 U.S. 648 (1984).
[812] *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932).
[813] Chambers v. Maroney, 399 U.S. 42 (1970) (refusing to "fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel"). *See also* State v. Sanders, 750 N.E.2d 90, 126-27 (Ohio 2001) (defendant had

critical stage of the proceeding may also warrant a presumption of prejudice.[814]

[9.24] Entire Failure to Subject Case to Meaningful Adversarial Testing

Another type of *per se* ineffective assistance occurs when defense counsel acts in such a way as to wholly abdicate his adversarial role in the trial process. Failing entirely to subject the state's case to meaningful adversarial testing will result in a presumption of prejudice and a *per se* violation of the right to counsel. This claim is often raised when counsel concedes defendant's guilt to the crime charged, during opening statement, and does so without the defendant's knowledge or consent. In *Nixon v. State*,[815] the Florida Supreme Court held this was the functional equivalent of a guilty plea at trial without defendant's knowledge or consent, thus denying defendant his or her Sixth Amendment right to counsel. The Florida Supreme Court reasoned, under *Cronic*, that by conceding guilt to the crime charged in opening statement, counsel failed to subject the state's case to meaningful adversary testing. Absent the defendant's express consent to such a strategy, the actions of defense counsel were presumptively prejudicial, requiring a new trial. The U.S. Supreme Court reviewed the decision and, in Florida v. Nixon[816] overturned the decision of the Florida Supreme Court, holding that the *per se* standard of *Cronic* was not applicable. Rather, the more appropriate measure of counsel's conduct is the standard announced in *Strickland*.[817]

Critical to the U.S. Supreme Court's decision was the fact that defense counsel had tried, on several occasions, to advise his client of the proposed strategy. The defendant refused to respond or provide input. He neither assented nor objected to the intended strategy. The U.S. Supreme Court held:

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two attorneys, one appointed only two months before trial; court held *Cronic* standard did not apply and prejudice would not be presumed).

[814] *See* Geders v. U.S., 425 U.S. 80 (1976) (defendant was denied effective assistance of counsel where judge prohibited criminal defendant from consulting with his attorney during overnight recess of trial; no assessment of prejudice required).

[815] 857 So.2d 172 (Fla. 2003).

[816] 543 U.S. 175 (2004).

[817] Strickland v. Washington, 466 U.S. 668 (1984).

> When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfied the Strickland standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.[818]

Most states follow the reasoning of *Nixon* and hold that if the client is informed of the strategy, conceding guilt is a decision to be analyzed under the *Strickland* standard.[819] Some states, however, have held that the proper standard is to be determined on a case-by-case basis.[820] Though not squarely reaching the issue, at least one state appears inclined to continue to apply the *Cronic* standard while acknowledging the holding in *Nixon*.[821] *Nixon* does not hold that *Cronic* can never apply where counsel concedes guilt to first degree murder in opening statement. The Florida Supreme Court's application of the *per se* standard may survive in those limited circumstances where defense counsel concedes guilt in opening statement, to the crime charged, without the knowledge of the defendant.[822]

[9.25] Conflict of Interest

The third category of *per se* ineffective assistance claims centers upon a conflict of interest involving defense counsel. For example, if the lawyer representing the defendant had an actual conflict of interest and if the conflict resulted in a deficiency in the lawyer's performance, the defendant would have a valid

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[818] *Nixon,* 543 U.S. at 177.
[819] *E.g.,* Commonwealth v. Cousin, 888 A.2d 710 (Pa. 2005); Pinnell v. Palmateer, 114 P.3d 515 (Or. Ct. App. 2005).
[820] *E.g.,* Nance v. Ozmint, 626 S.E.2d 878 (S.C. 2006); Siler v. State, 115 P.3d 14 (Wyo. 2005); People v. Johnson, 538 N.E.2d 1118 (Ill. 1989).
[821] *See* State v. Al-Bayyinah, 616 S.E.2d 500 (N.C. 2005).
[822] *See also* Bell v. Cone, 535 U.S. 685 (2002) (distinguishing between failure to advocate throughout the proceeding and failure to do so at specific points during the proceeding).

claim for post-conviction relief.[823]

The test announced in Cuyler requires defendant to establish:

1. Counsel actively represented conflicting interests; and
2. An actual conflict adversely affected counsel's performance.

If this showing is made, prejudice is presumed and defendant is entitled to relief without the need to establish any probability that the conflict affected the outcome of the trial itself.[824] To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests his or her interests were compromised. A possible, speculative or merely hypothetical conflict is insufficient to impugn a criminal conviction.[825] In *State v. Gleason*,[826] the Supreme Court of Kansas held that the fact that defense counsel served as an assistant county attorney in a neighboring county for the first two months of his representation of the defendant did not create an actual conflict of interest.

In *State v. Dhaliwal*,[827] the Supreme Court of Washington found defense counsel's prior or concurrent representation of various defense and prosecution witnesses (in unrelated matters) during his representation of defendant in his capital case created a *possibility* of conflict. However, such prior or concurrent representation did not warrant reversal in the absence of proof of an actual conflict; defendant failed to show how counsel's concurrent or prior representation affected counsel's performance at trial.

The fact that there were disciplinary proceedings against the attorney at the time of the trial does not require a finding that the attorney failed to provide effective assistance.[828] The rule in

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[823] *See* Cuyler v. Sullivan, 446 U.S. 335 (1980).
[824] Cuyler v. Sullivan, 446 U.S. 335 (1980); Mickens v. Taylor, 535 U.S. 162 (2002); State v. Gleason, 88 P.3d 218 (Kan. 2004); Wright v. State, 857 So.2d 861 (Fla. 2003).
[825] Mickens v. Taylor, 535 U.S. 162 (2002); Hunter v. State, 817 So.2d 786 (Fla. 2002).
[826] 88 P.3d 218 (Kan. 2004).
[827] 79 P.3d 432 (Wash. 2003).
[828] *See* O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989) (investigation into alcohol abuse alleged to affect attorney's ability to practice law).

Cuyler evolved from concurrent representation of multiple defendants in the same case, the high probability of a conflict of interest from such representation, and the difficulty inherent in proving actual prejudice.[829] The *Cuyler* rule does not necessarily apply in all instances of multiple representation. For example, the fact that defense counsel previously represented the co-defendant or a witness (in unrelated matters) does not raise a conflict issue measured under *Cuyler*. This is described as "successive representation" and prejudice will not be presumed under these circumstances; a defendant raising such an issue must meet the two-pronged standard of *Strickland* to be entitled to relief.[830]

It has been held that the acquisition of book rights by a defendant's attorney constitutes a conflict of interest which may so adversely affect the defendant as to warrant reversal of a conviction.[831] In *Corona* the defendant retained a private attorney who, in exchange for his services, obtained exclusive rights to the defendant's life story and a waiver of the attorney-client privilege. The income derived from publication was to go solely to the attorney. The California Court of Appeals in *Corona* held that reversal was warranted because the attorney deliberately decided not to develop viable incompetence, insanity, and irresponsibility defenses so as to insure that the publication rights would retain their value.[832]

Even in the absence of prejudice, courts have held the acquisition by an attorney of a financial stake in litigation directly adverse to that of his client is a *per se* conflict, which warrants reversal without further showing of its effect on the outcome of the trial.[833]

However, the mere fact that the defendant's attorney was offered, and refused to accept, a contract for publication rights does not constitute a "tie" sufficient to engender a *per se*

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[829] Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).
[830] Lordi v. Ishee, 384 F.3d 189 (6th Cir. 2004).
[831] *See* People v. Corona, 145 Cal.Rptr. 894 (Cal. Ct. App. 1978).
[832] *Cf.* Rudin v. State, 86 P.3d 572 (Nev. 2004) (finding trial counsel's attempts to acquire literary rights, while improper, were not proven to adversely affect counsel's performance at trial).
[833] *See, e.g.,* People v. Washington, 461 N.E.2d 393 (Ill. 1984).

conflict.[834]

[9.26] Filing of Motion Waives Attorney-Client Privilege

If a petitioner raises a claim of ineffective assistance of counsel against his or her attorney, it waives the privilege as it relates to the substance of the claim made, and necessarily waives the attorney-client privilege as to all communications relevant to that issue.[835] The rationale for the waiver of the attorney-client privilege in postconviction ineffective assistance of counsel claims is that it would be incongruous that a postconviction petitioner could accuse trial counsel of failing to provide adequate representation, yet invoke the privilege to bar any evidence from the source most likely to contradict that accusation. "Surely a client is not free to make various allegations of misconduct and incompetence while the attorney's lips are sealed by invocation of the attorney-client privilege."[836]

Therefore, the prosecutor may be able to conduct limited discovery relating to the ineffective assistance of counsel claim. It is then the judge's function to make evidentiary rulings determining whether lawyer-client communications are relevant to the specific ineffective assistance of counsel claims raised by

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[834] People v. Gacy, 530 N.E.2d 1340 (Ill. 1988); *see also* Brown v. State, 894 So.2d 137 (Fla. 2004) (the fact that defense counsel attempted to acquire defendant's property rights in the defendant's life story, songs and poems, did not create an actual conflict of interest where the agreement between the defendant and his counsel was entered into after defendant's sentencing).

[835] Allen v. LeMaster, 267 P.3d 806 (N.M. 2011). *See, e.g., In re Gray,* 123 Cal.App.3d 614, 176 Cal.Rptr. 721 (1981) (stating there is no attorney-client privilege in a habeas corpus proceeding); *State v. Kruchten,* 101 Ariz. 186, 417 P.2d 510 (Ariz.1966) (finding that a party waived his privilege by asserting in a postconviction proceeding that his counsel was incompetent); *Everett v. Everett,* 319 Mich. 475, 29 N.W.2d 919 (Mich.1947) (finding the former attorney's affidavit disclosing certain confidential communications to be admissible following the client's motion for new trial on the ground that plaintiff's former counsel was incompetent); *Ex parte Lewis,* 36 So.3d 72 (Ala.Crim.App.2008) (finding a claim of ineffective assistance of counsel in the postconviction proceeding waived the attorney-client privilege as to matters relevant to his allegations of ineffective assistance of trial counsel); *State v. Walen,* 563 N.W.2d 742 (Minn.1997) (finding that a defendant who claims ineffective assistance of counsel necessarily waives the attorney-client privilege as to all communications relevant to that issue).

[836] Tasby v. United States, 504 F2d 332, 336 (8th Cir. 1974)

the petitioner and thereby subject to the exception. Any communications between a petitioner and his trial counsel that are relevant to petitioner's specific ineffectiveness claims are excepted from the attorney-client privilege, and those that are not relevant are neither excepted nor waived simply because petitioner filed a petition for writ of habeas corpus.[837]

[9.27] Ineffective Assistance Resulting in a Guilty Plea

The involuntariness of the defendant's plea of guilty to a capital offense can be raised in a post-conviction motion.[838] There is a critical difference, however, between a claim that the plea was involuntary and a claim of ineffective assistance of counsel resulting in the entry of a plea. The latter claim is governed by a variation of the two-part standard set out in *Strickland*.[839] When presenting a claim of ineffective assistance of counsel in connection with the entry of a guilty plea the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[840]

Likewise, the failure to convey a plea (for example, a plea which would have resulted in a life sentence) may constitute ineffective assistance if defendant can satisfy the deficient performance and prejudice prongs of *Strickland*.

In a pair of decisions handed down in 2012, *Lafler v. Cooper,*[841] and *Missouri v. Frye,*[842] the Supreme Court extended the holding in *Strickland* to cover ineffective assistance by defense counsel in the plea-bargaining phase. Recognizing that pleas account for ninety-five percent of all criminal convictions, the court stated that "the negotiation of a plea bargain . . . is almost always the critical point for a defendant" and "defense counsel have responsibilities in the plea bargain process, responsibilities that

[837] Allen v LeMaster, 267 P.3d 806, 815 (N.M. 2011)
[838] See State v. Herred, 964 S.W. 2d 391 (Ark. 1998); State v. Ysea, 956 P.2d 499 (Ariz. 1998); Wilson v. State, 813 S.W.2d 833 (Mo. 1991).
[839] *See* Hill v. Lockhart, 474 U.S. 52 (1985).
[840] Strickland v. Washington, 466 U.S. 668 (1984); *see* Hill, 474 U.S. at 59.
[841] 132 S.Ct. 1376 (2012).
[842] 132 S.Ct. 1399 (2012).

must be met to render the adequate assistance of counsel that the Sixth Amendment requires."[843] "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel *in considering whether to accept it.*" [844]

In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.[845] In *Lafler*, the Court addressed the question of how to apply *Strickland's* prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial. The Court stated: "[i]n contrast to *Hill,* here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.,* that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."[846]

[9.28] Newly Discovered Evidence

Before the widespread use of comprehensive post-conviction rules, claims of newly discovered evidence could be raised only by petition for writ of error *coram nobis*. At common law, this cumbersome procedure required a defendant to ask the appellate court for permission to present new evidence in the trial court. The defendant also had a heavy burden to show conclusively that the newly-discovered evidence would have

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[843] *Frye*, at 1407.
[844] *Lafler v. Cooper,* 132 S.Ct. 1376, 1387 (2012). (emphasis added).
[845] See *Frye,* at 1388 – 1389, 132 S.Ct. 1399 (noting that *Strickland*'s inquiry, as applied to advice with respect to plea bargains, turns on "whether 'the result of the proceeding would have been different' " (quoting *Strickland, supra,* at 694, 104 S.Ct. 2052)); see also *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) ("The ... 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process").
[846] *Lafler*, at 1385.

changed the outcome of the case. A few states continue to rely on *coram nobis*, in some form, as the principal method of securing relief when the defendant has filed a post-conviction claim based on newly discovered evidence.

In most states, however, the remedy of *coram nobis* is now included within the relief that can be sought by a motion for post-conviction relief. Since a claim of newly discovered evidence is a form of "collateral attack" such a claim is generally treated as a claim that is cognizable in a post-conviction motion.[847] The remedies afforded by the post-conviction rules were intended to supplant the remedies previously afforded only by extraordinary writs such as a writ of error *coram nobis*.

While there may be slight differences among the jurisdictions, a claim of newly discovered evidence will generally be granted if the defendant can establish the following:

1. The evidence was not known to defendant prior to the trial;
2. The evidence could not have been discovered prior to the trial in the exercise of due diligence;
3. The newly discovered evidence would probably produce a different result at trial;
4. The evidence is material;
5. The evidence is not cumulative; and
6. The evidence is not merely impeaching.[848]

Some jurisdictions incorporate the last three requirements (material, not cumulative, not merely impeaching) into an analysis of the third requirement (that the newly discovered evidence would probably produce a different result at trial).[849]

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[847] *See* Richardson v. State, 546 So.2d 1037 (Fla. 1989); People v. Steidl, 568 N.E.2d 837 (Ill. 1991).
[848] Drake v. State, 287 S.E.2d 180 (Ga. 1982); State v. Wilson, 554 P.2d 636 (Or. Ct. App. 1976); State v. Ieng, 942 P.2d 1091 (Wash. Ct. App. 1997); State v. Bell, 679 N.E.2d 44 (Ohio Ct. App. 1996); State v. Spann, 513 S.E.2d 98 (S.C. 1999); People v. Johnson, 545 N.W. 2d 637 (Mich. 1996); Commonwealth v. Fiore, 780 A.2d 704 (Pa. Super. Ct. 2001).
[849] *See, e.g.,* State v. Wilson, 554 P.2d 636 (Or. Ct. App. 1976).

[9.29] Recantation of Testimony

When a material witness recants his or her trial testimony, a defendant will often raise this as a form of newly discovered evidence. Such a claim requires the trial court to make factual and credibility determinations; this will usually necessitate an evidentiary hearing to assess the reliability of the recantation.[850] However, courts must be cautious before granting relief based on recanted testimony.

In addition to the general requirements for newly discovered evidence, a defendant seeking a new trial based upon recanted testimony must establish that the original testimony is false (or, conversely, that the recantation is true) and the witness' testimony will change to such an extent as to render probable a different verdict.[851]

[9.30] Failure to Disclose Exculpatory Evidence

Failure to disclose exculpatory evidence is a ground that may be asserted in a post-conviction motion. Furthermore, such a claim can be raised after the time limit for filing a post-conviction motion if the failure to disclose could not reasonably have been discovered in time. These claims are sometimes referred to as *Brady* claims after the decision in *Brady v. Maryland*.[852]

The Brady Test

To successfully assert a *Brady* claim, the defendant must establish the following:

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[850] State v. Ieng, 942 P.2d 1091 (Wash. Ct. App. 1997), see also Teleguz v. Pearson, 689 F.3d 322 (4th Cir. 2012) (In support of his Schlup argument, petitioner presented affidavits from both of the corroborating witnesses in which they recanted their testimony, as well as other pieces of evidence refuting various factual claims made in the witnesses' trial testimony. The district court denied relief without holding an evidentiary hearing. This necessitated a remand to the district court.

[851] State v. Ieng, 942 P.2d 1091 (Wash. Ct. App. 1997); Armstrong v. State, 642 So.2d 730 (Fla. 1994); Drake v. State, 287 S.E.2d 180 (Ga. 1982); State v. Doisey, 532 S.E.2d 240 (N.C. Ct. App. 2000); Curtis v. Commonwealth, 474 S.W.2d 394 (Ky. Ct. App. 1971).

[852] 373 U.S. 83 (1963).

1. The evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching;
2. The defendant did not possess the evidence because it was withheld or suppressed by the state, either willfully or inadvertently; and
3. The undisclosed evidence was "material," and the state's failure to disclose the evidence was thus prejudicial. The undisclosed evidence is considered "material" if there is a reasonable probability that, had the evidence been disclosed, the outcome of the proceeding would have been different.[853]

Some courts also require that the defendants establish that they could not have obtained the evidence in the exercise of due diligence.[854] However, there is no due diligence requirement contained in the U.S. Supreme Court's most recent formulation of the *Brady* test.[855] A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. [856]

Even in the absence of a due diligence requirement, the defendant cannot establish a *Brady* violation if the defense was aware of its existence and had the ability to obtain it. Under such circumstances, the evidence cannot be said to have been "suppressed" by the state.[857]

Evidence may qualify as *Brady* even if it is not in the actual possession of the state. Possession will be imputed to the state if it is in the possession of a law enforcement agency involved in the investigation or prosecution. Prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[858]

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[853] *Id.*
[854] *See, e.g.,* Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); Pinson v. State, 596 S.E.2d 734 (Ga. Ct. App. 2004).
[855] *See* Strickler v. Greene, 527 U.S. 263 (1999). *See also* Occhicone v. State, 768 So.2d 1037 (Fla. 2000); Anderson v. Leeke, 248 S.E.2d 120 (S.C. 1978).
[856] *Banks v. Dretke*, 540 U.S. 668, 696, 124 S. Ct. 1256, 1275, 157 L. Ed. 2d 1166 (2004).
[857] Sanders v. Commonwealth, 89 S.W. 3d 380 (Ky. 2002).
[858] Kyles v. Whitley, 514 U.S. 419 (1995); Riley v. State, 531 S.E.2d 138 (Ga. Ct. App. 2000); State v. Sanders, 750 N.E.2d 90 (Ohio 2001).

To prevail on a *Brady* claim, it is not necessary that the defendant show the prosecution had actual knowledge of the undisclosed favorable evidence. Because prosecutors have an affirmative duty to learn of favorable evidence, any failure to uncover *Brady* information will be measured under a standard of objective reasonableness. The question is whether the state knew or should have known about the testimony. Further, the prosecutor's duty to disclose is applicable even if there had been no request made by the defendant.[859]

The *Brady* requirement applies not only to evidence relating to guilt, but also evidence that could affect the sentence.[860] Even if undisclosed evidence was not material to the issue of guilt or innocence it is a violation of the rule for the state to suppress evidence that is material to the penalty phase of the trial.[861]

Brady claims are most often rejected on the ground that the evidence was not material,[862] or on the ground that the failure to provide the evidence was harmless. The materiality prong of a *Brady* violation requires the court to determine "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[863] The Court's touchstone on materiality is *Kyles v. Whitley,*[864] *Kyles* instructed that the materiality standard for *Brady* claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[865];

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[859] U.S. v. Agurs, 427 U.S. 97 (1976).
[860] *Brady*, 373 U.S. at 87 (1963) ("evidence is material either to guilt or punishment"). Cone v. Bell, 556 U.S. 449, 475 (2009) (Because the evidence suppressed at Cone's trial may well have been material to the jury's assessment of the proper punishment in this case, we conclude that a full review of the suppressed evidence and its effect is warranted.
[861] *See* Garcia v. State, 622 So.2d 1325 (Fla. 1993); Commonwealth v. Marinelli, 810 A.2d 1257 (Pa. 2002).
[862] *See* Boyd v. State, 910 So.2d 167 (Fla. 2005); U.S. v. Agurs, 427 U.S. 97, 109-110 (1976) ("the mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense").
[863] Strickler v. Greene, 527 U.S. 263, 290 (1999), *quoting* Kyles v. Whitley, 514 U.S. 419, 435 (1995).
[864] 514 U.S. 419 (1995).
[865] 514 U.S., at 435. See also *id.,* at 434–435 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."),

Withheld information, even if it is inadmissible at trial, may qualify as material under *Brady* if its disclosure could lead to the discovery of admissible substantive or impeachment evidence.[866]

Failure to disclose exculpatory evidence is the kind of claim that will most likely require an evidentiary hearing. The defendant had alleged that the state suppressed the names of other persons who confessed to the crime, and the state was unable to refute this claim without a hearing. Moreover, claims that the prosecution failed to disclose exculpatory evidence are often allowed after the expiration of the time limit for filing Post-conviction motions. In many of these claims the nondisclosure gives the defendant a built-in argument that the factual basis for the claim was not known, and could not have been known, within a certain period of time.

Courts must assess the cumulative effect of all of the suppressed evidence. In other words, not only must the court consider the impact of the evidence withheld, but also how the withheld evidence adversely affected the defendant's ability to investigate or present other aspects of the case.[867]

[9.31] Knowing Use of False or Misleading Testimony

The deliberate use of false or misleading testimony is a claim that can be raised in a Post-conviction motion. These claims are sometimes referred to as *Giglio* claims, after the decision in *Giglio v. U.S.*[868]

The Giglio Test

To be entitled to relief, the defendant must establish the following:

1. The testimony was false;

Banks v. Dretke, 540 U.S. 668, 698–99, 124 S. Ct. 1256, 1276, 157 L. Ed. 2d 1166 (2004).

[866] Rogers v. State, 782 So.2d 373 (Fla. 2001); Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980).

[867] U.S. v. Bagley, 473 U.S. 667 (1985).

[868] 405 U.S. 150 (1972).

2. The prosecutor knew the testimony was false; and
3. The testimony was material.[869]

A *Giglio* violation can also occur if, after presenting the testimony, the prosecutor learns of its falsity and fails to correct it.[870]

False testimony is "material" for *Giglio* purposes if there is any reasonable likelihood that it could have affected the verdict.[871] This is a lower standard than the prejudice prong required in *Brady* and *Strickland* claims, reflecting a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is knowingly used to convict a defendant.

Once a defendant establishes that the prosecutor knowingly presented false testimony at trial, the burden shifts to the state to show that the false evidence was not material. The state must establish that the error was harmless beyond a reasonable doubt.[872]

In some circumstances, knowledge of the falsity of the testimony may be imputed to the individual prosecutor even in the absence of actual knowledge. For example, where such knowledge is possessed by individuals comprising the "prosecution team"-- which includes police officers as well as other investigative and prosecutorial personnel-- it will be imputed to the attorney prosecuting the case.[873] Some courts have held that a *Giglio* violation can be established even if the prosecutor was not aware that the testimony was false.[874] This appears to be the minority view.[875]

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[869] *Id.;* U.S. v. Agurs, 427 U.S. 97 (1976).
[870] Napue v. Illinois, 360 U.S. 264 (1959).
[871] *Agurs*, 427 U.S. at 103; State v. Iacona, 752 N.E.2d 937 (Ohio 2001); Ventura v. State, 794 So.2d 553 (Fla. 2001); Williams v. State, 298 S.E.2d 492 (Ga. 1983).
[872] U.S. v. Bagley, 473 U.S. 667 (1985).
[873] *Giglio*, 405 U.S. at 154.
[874] *See, e.g.,* Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999) (holding that the integrity of the judicial process is the overriding concern and may supersede the relative good faith with which the government presented the testimony).
[875] *See, e.g.,* Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988) (affirming *Giglio's* requirement that defendant demonstrate the prosecutor knowingly used false testimony); Burks v. Egeler, 512 F.2d 221 (6th Cir. 1975) (same); Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984) (same); Marcella v. U.S., 344 F.2d 876 (9th Cir. 1965) (same); Wild v. Oklahoma, 187 F.2d 409 (10th Cir. 1951) (same); People v. Jimerson, 652 N.E.2d 278 (Ill. 1995) (same).

[9.32] Sentencing Errors

Since the imposition of an illegal sentence is "fundamental error," a claim that the defendant's sentence of death is illegal is the kind of claim that can be raised for the first time in a Post-conviction motion. However, if the sentencing issue presents a substantive or procedural error that does not affect the legality of the sentence itself, then it must be presented on direct appeal and not in a Post-conviction motion.

Generally, the trial courts may consider a Post-conviction claim that the sentence is in excess of the maximum allowed by law, that the sentence was imposed in violation of the state or federal constitution, or that the sentence is otherwise subject to collateral attack. Within these general categories there are many specific sentencing issues that could be raised.

Many sentencing issues are presented in Post-conviction motions as alleged violations of newly established constitutional principles. For example, the decision of the U.S. Supreme Court in *Hitchcock v. Dugger*[876] that the sentencing jury must be informed of its right to consider nonstatutory mitigating factors, required state courts to consider new Post-conviction claims in old cases. Likewise, defense lawyers attempted to use the decision of the U.S. Supreme Court in *Caldwell v. Mississippi*,[877] that the trial court cannot minimize the role of the jury in the sentencing process, as a basis for raising new Post-conviction claims. Ultimately, the U.S. Supreme Court held that *Caldwell* did not announce a new principle of law and that it was not therefore "cause" for excusing a procedural default.[878]

[9.33] Retroactive Application of Newly Announced Constitutional Right [879]

Under certain circumstances, a significant change in substantive or procedural law may excuse the failure to raise an issue on direct appeal or in a prior Post-conviction motion. To be entitled

[876] 481 U.S. 393 (1987).
[877] 472 U.S. 320 (1985).
[878] Dugger v. Adams, 489 U.S. 401 (1989).
[879] Retroactivity is also discussed in Section 10.17.

to seek relief under this principle, the defendant must generally allege:

1. The fundamental constitutional right asserted was not established within the period provided for in the rule; and
2. The fundamental constitutional right has been held to apply retroactively.

For example, the courts allowed claims under *Hitchcock v. Dugger*[880] that the jury was not informed of its right to consider nonstatutory mitigating factors to be raised for the first time in Post-conviction motions, as this was found to be a constitutional right which did not exist during the relevant time period for filing, and the constitutional right was determined to be retroactive in application.[881] However, this is only an example of the principle. Because the principle of law announced in *Hitchcock* is now well-established, new Post-conviction claims on this issue would have to be raised within the time limit of the rule or would otherwise be time-barred.[882]

While a significant change in the law may excuse the failure to timely raise a claim on direct appeal or in a Post-conviction motion, a mere evolutionary refinement of the law will not provide the same excuse.[883] For example, in *Rogers v. State*,[884] the Florida Supreme Court limited the scope of the aggravating circumstance for murders that are "cold, calculated and premeditated." The court held in a subsequent case that the *Rogers* decision was merely a refinement of existing law and not a new point of law.[885] Thus, such claims must be raised in a timely fashion or are procedurally barred.

The Florida Supreme Court has held that a claim under *Caldwell v. Mississippi*[886] -- that the trial judge improperly minimized the role of the jury in the sentencing process -- can be procedurally

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[880] 481 U.S. 393 (1987).
[881] *See* Hall v. State, 541 So.2d 1125 (Fla. 1989); Ford v. State, 522 So.2d 345 (Fla. 1988).
[882] *See* Davis v. State, 589 So.2d 896 (Fla. 1991).
[883] Carter v. Johnson, 599 S.E.2d 170 (Ga. 2004); Ferguson v. Singletary, 632 So.2d 53 (Fla. 1993).
[884] 511 So.2d 526 (Fla. 1987).
[885] *See* Harich v. State, 542 So.2d 980 (Fla. 1989).
[886] 472 U.S. 320 (1985).

barred because *Caldwell* did not announce a new rule of law.[887] The U.S. Supreme Court has agreed that the *Caldwell* decision is not "cause" for excusing a procedural default.[888] As a general proposition, new rules of substantive criminal law are presumed to apply retroactively, and new rules of procedure are presumed not to apply retroactively. There is an exception to the non-retroactivity of a new procedural rule. A new procedural rule will be applied retroactively if the change involves:

1. A decision which removes from the state the authority or power to regulate certain conduct or impose certain penalties; or
2. A decision which announces a new watershed rule of criminal procedure that alters our understanding of bedrock procedural elements essential to the fairness of a particular conviction.[889]

The *Teague* analysis is generally followed by the state courts.[890]

Although the exact parameters of this "watershed" exception are often difficult to discern, courts usually cite *Gideon v. Wainwright*[891] to illustrate the type of watershed rule that would support retroactive application.[892] It is fair to say that such watershed rules are rare. In the 30 years since *Teague* was decided, the U.S. Supreme Court has never found that any rule falls within the "watershed" exception, despite many opportunities to do so. However, state courts have found circumstances where newly announced constitutional rules should be applied retroactively to cases on post-conviction review.[893] Below are a list of issues often raised in capital post-

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[887] *See* Cave v. State, 529 So.2d 293 (Fla. 1988); Ford v. State, 522 So.2d 345 (Fla. 1988).
[888] *See* Dugger v. Adams, 489 U.S. 401 (1989).
[889] Teague v. Lane, 489 U.S. 288 (1989).
[890] *See, e.g.,* State v. Zuniga, 444 S.E.2d 443 (N.C.1994); Head v. Hill, 587 S.E.2d 613 (Ga. 2003); Daniels v. State, 561 N.E.2d 487 (Ind.1990); Brewer v. State, 444 N.W.2d 77 (Iowa 1989); State *ex rel.* Taylor v. Whitley, 606 So.2d 1292 (La.1992); Avery v. State, 129 P.3d 664 (Nev. 2006).
[891] 372 U.S. 335 (1963) (holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses).
[892] Saffle v. Parks, 494 U.S. 484, 495 (1990).
[893] *See, e.g.*, State v. Zuniga, 444 S.E.2d 443 (N.C.1994) (the U.S. Supreme Court's decision in McKoy v. North Carolina, 494 U.S. 433 (1990), that capital sentencing jury cannot be required to find unanimously that mitigating circumstances existed before mitigating circumstances can be considered for

convictions proceeds where the *Teague* analysis is applied.

[9.34] *Ring* Issues

The U.S. Supreme Court held that the rule announced in *Ring v. Arizona*[894] is procedural and does not apply retroactively to cases whose convictions are already final.[895] State courts have generally followed this holding.[896]

[9.35] Murder Committed as a Juvenile

In *Roper v. Simmons*,[897] the U.S. Supreme Court held that the execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth Amendment. Defendants who meet this criterion will be able to raise this claim by way of Post-conviction relief, even if the claim would otherwise be time barred. *Roper* announces a rule of substantive law and as such is presumed to apply retroactively.

[9.36] Mental Retardation

In *Atkins v. Virginia*,[898] the U.S. Supreme Court held that the eighth amendment prohibits the execution of a mentally retarded person. It has since been held that this is new rule meets the first exception to *Teague's* rule of non-retroactivity, and may be raised by defendants in post-conviction proceedings.[899]

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purposes of sentencing, should be applied retroactively to final cases on state post-conviction review).
[894] 536 U.S. 584 (2002).
[895] Schriro v. Summerlin, 542 U.S. 348 (2004).
[896] *See, e.g.,* Head v. Hill, 587 S.E.2d 613 (Ga.2003).
[897] 543 U.S. 551 (2005).
[898] 536 U.S. 304 (2002)
[899] In re Holladay, 331 F.3d 1169 (11th Cir. 2003); In re Morris, 328 F.3d 739 (5th Cir. 2003); Hill v. Anderson, 300 F.3d 679 (6th Cir. 2002).

[9.37] *Crawford v. Washington*

In *Crawford v. Washington*,[900] the U.S. Supreme Court created a bright line rule regarding the admissibility of testimonial statements made by a non-testifying declarant. *Crawford* held that the Sixth Amendment's Confrontation Clause prohibits the introduction of testimonial statements of a non-testifying declarant (e.g., a co-defendant at a joint trial), unless:

1. The declarant is unavailable; and
2. Defendant has had a prior opportunity to cross-examine the declarant concerning the testimonial statement.

In announcing its ruling, the U.S. Supreme Court did not address the retroactive application of this rule. However, the U.S. Supreme Court subsequently held that *Crawford* is not retroactively applicable to cases which are final on direct appeal.[901] Virtually every state court that has considered the issue has held that the principle announced in *Crawford* should not be given retroactive effect.[902]

[9.38] Impeachment of Jury Verdict

In *Pena-Rodriguez v. Colorado*[903] The Court, held that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Since then, in *Tharpe v. Sellers*,[904] a summary disposition by the Court on a procedural issue, the dissent

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[900] 541 U.S. 36 (2004).
[901] Whorton v. Bockting, 549 U.S. 406 (2007).
[902] Newsome v. Comm'r of Correction, 951 A.2d 582 (Conn. 2008); Ex parte Lave, 257 S.W.3d 235 (Tex. Crim. App. 2008); Edwards v. People, 129 P.3d 977 (Colo. 2006); Drach v. Bruce, 136 P.3d 390 (Kan. 2006); In re Markel, 111 P.3d 249 (Wash. 2005); Bynum v. State, 929 So.2d 324 (Miss. Ct. App.2005); Commonwealth v. Brooks, 875 A.2d 1141 (Pa. Super. Ct. 2005); State v. Williams, 695 N.W.2d 23 (Iowa 2005); Chandler v. Crosby, 916 So.2d 728 (Fla. 2005);. *But see* People v. Watson, 827 N.Y.S.2d 822 (N.Y.Sup. 2007) (applied retroactively).
[903] 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017)
[904] 138 S.Ct. 545, 551-551 (2018).

opined that no reasonable jurist could argue that *Pena–Rodriguez* applies retroactively on collateral review. *Pena–Rodriguez* established a new rule: The opinion states that it is answering a question "left open" by this Court's earlier precedents. 580 U.S., at ——, 137 S.Ct., at 867. A new rule does not apply retroactively unless it is substantive or a "watershed rul[e] of criminal procedure."[905] Since *Pena–Rodriguez* permits a trial court "to consider [certain] evidence,"[906] and does not "alte[r] the range of conduct or the class of persons that the law punishes,"[907], it cannot be a substantive rule.

[9.39] Life Without Parole Sentence for Juveniles

In *Miller v. Alabama,*[908], the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing. In *Montgomery v. Louisiana*[909] the Court applied Miller retroactively, finding courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[910] Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, the Court has recognized that substantive rules "are more accurately characterized as ... not subject to the bar."[911].

[905] *Teague v. Lane,* 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion).
[906] 580 U.S., at ––––, 137 S.Ct., at 869–70,
[907] *Schriro v. Summerlin,* 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004)
[908] 567 U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)
[909] 136 S. Ct. 718, 728, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016)
[910] See, *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)
[911] *Schriro v. Summerlin,* 542 U.S. 348, 352, n. 4, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004)

[9.40] Grounds for Denial of Relief

There are several reasons why there may be grounds for denial of relief. Most likely to be those grounds are already litigated matters, issues that could have been raised on direct appeal and harmless error. Each of these is discussed below.

[9.41] *Res Judicata*

An issue that has been presented and decided on direct appeal cannot be litigated again in a post-conviction motion. The decision on appeal operates as a bar to further consideration of the issue under the doctrine of *res judicata*.[912] For the same reason, an issue that was decided in a post-conviction motion cannot be considered again in a subsequent post-conviction motion.

[9.42] Waiver

Issues that could have been raised on direct appeal are waived and may not be considered in a post-conviction motion.[913] In this context, the waiver resulting from the defendant's failure to present the claim in an earlier proceeding is sometimes referred to as a "procedural default."

An issue is also waived if it could have been presented in a prior post-conviction motion.[914] For example, in *Resnover v. State*,[915] the Indiana Supreme Court declined to consider a claim of ineffective assistance of trial counsel because the claim was presented in a second post-conviction motion and available at the time the defendant filed his first motion.

The defendant cannot overcome a procedural default merely by

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[912] *See* People v. Neal, 568 N.E.2d 808 (Ill. 1990).
[913] *See* People v. Enoch, 585 N.E.2d 115 (Ill. 1991); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); Johnson v. State, 593 So.2dSo.2d 206 (Fla. 1992); Flamer v. State, 585 A.2d 736 (Del. 1990).
[914] *See* People v. Stewart, 565 N.E.2d 968 (Ill. 1990); Hendrix v. State, 557 N.E.2d 1012 (Ind. 1990); Commonwealth v. Hagood, 532 A.2d 424 (Pa. 1987); Adams v. State, 543 So.2d 1244 (Fla. 1989); Bolder v. State, 769 S.W.2d 84 (Mo. 1989); State v. Otey, 464 N.W.2d 352 (Neb. 1991).
[915] 547 N.E.2d 814 (Ind. 1989).

using a different argument to relitigate an issue that has been decided on appeal or in a previous post-conviction motion.[916] Nor can the defendant overcome a procedural default by recasting the argument as a claim for ineffective assistance of counsel.[917] If the issue is one that was or could have been made in a direct appeal or a previous post-conviction motion, then it is barred.

As discussed in Section 9.33., a significant change in the law will excuse the failure to raise an issue on direct appeal or in a prior post-conviction motion.[918] For example, in *Selvage v. Collins*,[919] the Texas Court of Criminal Appeals held that the decision of the U.S. Supreme Court in *Penry v. Lynaugh*[920] holding that the Texas death penalty statute, as applied, precludes consideration of mitigating circumstances was a new point of law. Therefore, the Texas Court of Criminal Appeals held that the defendant's failure to raise a claim under the principles announced in *Penry* was excused.

As discussed earlier, the U.S. Supreme Court announced a new principle of law in *Hitchcock v. Dugger*,[921] when it decided that the jury must be informed of its right to consider nonstatutory mitigating factors. It was held that a claim under *Hitchcock* could be raised in a post-conviction motion even if it had not been raised earlier on direct appeal or in a previous post-conviction motion. However, the right to present a claim based on a new point of law does not exist forever. Many claims that could have been made previously under *Hitchcock* are now time-barred under local procedures. The defendant must raise a new constitutional claim at the first opportunity when it becomes available. If there is a time limit on post-conviction claims, the time for raising a claim based on a new point of law generally begins to run when the new point of law is announced.[922]

A modification or interpretation of an existing law does not

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[916] *See* Medina v. State, 573 So.2d 293 (Fla. 1990); Quince v. State, 477 So.2d 535 (Fla. 1985).
[917] *See* Roberts v. State, 775 S.W.2d 92 (Mo. 1989); Kight v. Dugger, 574 So.2d 1066 (Fla. 1990).
[918] *See* State v. Slemmer, 823 P.2d 41 (Ariz. 1991).
[919] 816 S.W.2d 390 (Tex. Crim. App. 1991).
[920] 492 U.S. 302 (1989).
[921] 481 U.S. 393 (1987).
[922] *See* Hall v. State, 541 So.2d 1125 (Fla. 1989); Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989).

amount to a "new" principle and, therefore, does not serve as a reason to excuse a procedural default. The natural development of the law through precedents is not necessarily a change in the law. In this regard, the courts have observed that an "evolutionary refinement" of the law will not excuse the failure to raise a claim in a previous direct appeal or post-conviction motion.[923] As the U.S. Supreme Court described it in *Teague*: "To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[924]

[9.43] Harmless Error

A post-conviction motion may also be denied on the ground that the error at trial was harmless, and this is one instance in which it would be appropriate for a trial judge to apply the harmless error rule.[925] For example a claim that the prosecution failed to disclose exculpatory information might be resolved on the ground that the information would not have changed the result. A claim of ineffective assistance of counsel might be resolved on the ground that the acts of omissions of the lawyer did not affect the outcome of the proceeding. *See* Section 9.30.

[9.44] Evidentiary Hearing

There is no absolute right to an evidentiary hearing on a post-conviction motion.[926] An evidentiary hearing is not required if the post-conviction motion is legally insufficient on its face or if the files and records show that the defendant is not entitled to relief.[927] However, if the post-conviction motion is sufficient on its face to establish a *prima facie* ground for relief and if the claim raised in the motion is not conclusively refuted by the files and records in the case, the trial judge must grant an evidentiary hearing on the motion.

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[923] *See* Harich v. State, 542 So.2d 980 (Fla. 1989) (a previous decision of the court was merely a refinement of existing law and not a new point of law).
[924] Teague v. Lane, 489 U.S. 288, 301 (1989).
[925] *See* Brecht v Abrahamson, 507 U.S. 619 (1993)
[926] *See* People v. Titone, 600 N.E.2d 1160 (Ill. 1992).
[927] *See* State v. Otey, 464 N.W.2d 352 (Neb. 1991); State v. Rehbein, 455 N.W.2d 821 (Neb. 1990). Holland v. State, 503 So.2d 1250 (Fla. 1987).

Claims that are dependent on facts not determined at the time of trial will often require an evidentiary hearing. For example, a defendant who has raised a *prima facie* case of ineffective assistance of trial counsel is likely to obtain an evidentiary hearing because it will be difficult for the court to resolve the claim on the existing record.[928] Likewise, a defendant who has raised a claim that the prosecution failed to disclose favorable evidence is likely to obtain an evidentiary hearing. In most cases the issues relating to knowledge and materiality of the alleged favorable evidence are not discovered until after the trial and the facts cannot be resolved without a hearing.

Any doubt about the need for an evidentiary hearing should be resolved in favor of granting a hearing. While the denial of a hearing may save some time, it only opens the door to an argument in federal court that the defendant is entitled to an evidentiary hearing on a federal *habeas corpus* petition because he was denied a full and fair hearing in state court. If the federal court agrees, then the denial of an evidentiary hearing in state court will serve to delay, not expedite, a resolution of the case.

Generally, a successive motion for post-conviction relief is less likely to require an evidentiary hearing.[929] This is not to say that every successive motion can be resolved without an evidentiary hearing. A successive motion may involve a factual issue that could not have been raised in an earlier proceeding and, in that event, the court should grant an evidentiary hearing to properly resolve the claim.

[9.45] Presence of the Defendant

Generally, the defendant must be present in court if there is an evidentiary hearing on a post-conviction motion.[930] The defendant's presence is not absolutely required if the motion for post-conviction relief is denied without a hearing, or if the defendant is represented by counsel and the hearing is limited to issues of law. For hearings such as an initial hearing to determine

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[928] *See* Neal v. State, 525 So.2d 1279 (Miss. 1987); Foster v. State, 395 N.W.2d 637 (Iowa 1986).
[929] *See* Bolder v. State, 769 S.W.2d 84 (Mo. 1989).
[930] *See* A.B.A. STANDARDS CRIM. JUST. § 22-4.6(a) (1986); Clark v. State, 491 So.2d 545 (Fla. 1986).

which claims if any will be addressed in an evidentiary hearing, it may not be necessary to arrange to have the defendant present. However, it would be wise to have the defendant available for the final hearing on the motion even if the hearing does not involve the taking of testimony.

[9.46] Scheduling and Conducting Hearing

The trial judge should allow a reasonable time for a full and fair evidentiary hearing. Consideration should be given to the scheduling needs of counsel for the parties as well as the scheduling needs of the court. If a stay of execution is required to accommodate these interests, then the court should grant a stay. Haste in resolving a post-conviction claim that truly requires an evidentiary hearing will, ultimately, result only in additional delay.

The hearing is similar to any other evidentiary hearing in a criminal case. The defendant is entitled to present evidence on any issue that has not been summarily decided and the state is entitled to present evidence in response. The trial judge acts as the trier of fact and resolves conflicts in the evidence and all issues of fact including credibility and weight to be given the testimony of the witnesses. The trial court will prepare and file findings of fact and conclusions of law relating to the claims presented. Generally, the trial court's findings of fact will be upheld unless they are clearly erroneous.[931]

[9.47] Practical Considerations

Post-conviction motions in capital cases should take priority over all other matters pending before the court. Trial judges should be aware of the fact that if a warrant has been signed, the state appellate courts and the federal courts will all have to work within the time remaining under the warrant. If the warrant sets the date of execution in three months and if the trial judge uses two full months to decide the state post-conviction motions, the other state and federal courts will be left with little time to perform their functions. An excessive delay in the trial court will

[931] *See* State v. El-Tabech, 453 N.W.2d 91 (Neb. 1990).

only increase the likelihood that a higher court will grant a stay of execution. These and other problems of managing time in capital post-conviction proceedings are discussed in *Glock v. Dugger*.[932]

The need to proceed expeditiously may also require the trial judge to make special arrangements with the clerk and the court reporter. The available time for preparing a record on appeal from a post-conviction motion when there is a pending warrant is obviously not the same as the time that is available when the defendant is filing a direct appeal from the judgment and sentence.

[9.48] Summary Disposition

A post-conviction motion may be summarily denied if the motion is facially insufficient or if the files and records of the proceeding show that the defendant is not entitled to relief.[933] Appellate review of the sufficiency of a post-conviction motion is analogous to the review of a civil defendant's motion to dismiss for failure to state a cause of action.[934] A post-conviction motion is properly dismissed if it fails to establish a *prima facie* ground upon which relief could be granted.

[9.49] Legal Sufficiency

A post-conviction motion that is legally insufficient may be summarily denied. In this context the term "legal sufficiency" actually includes several distinct concepts. A post-conviction motion must meet all of the procedural requirements of the rule or statute, that is, it must be timely filed, and it must be prepared in the proper form. If the rule or statute requires a defendant to verify the facts alleged in a post-conviction motion, then an unverified motion would be legally insufficient, and it would be subject to summary denial.[935]

Another concept that is included within the general meaning of the term legal sufficiency is that the motion must allege facts

[932] 537 So.2d 99 (Fla. 1989).
[933] *See* State v. Otey, 464 N.W.2d 352 (Neb. 1991).
[934] *See* Billiot v. State, 515 So.2d 1234 (Miss. 1987).
[935] Kilgore v. State, 791 S.W.2d 393 (Mo. 1990).

that would establish a right to relief. A timely post-conviction motion that is otherwise procedurally correct in all respects may be denied on the ground that it fails to allege any facts that would give rise to a claim for relief.[936]

If the motion is untimely or procedurally defective in some other respect or if it simply fails to allege a basis for relief, the trial judge may summarily deny the motion without requesting a response from the state. This is so because these are all defects that are apparent from the motion itself. Even if it is possible to deny a post-conviction motion on its face, however, the better practice would be to request a response from the state. The state will have to defend the summary denial on appeal and should be given an opportunity to address the court on the motion, even if that is not a matter of right.

[9.50] Non-meritorious Claims

One final kind of post-conviction motion that could be characterized as "legally insufficient" is a claim that is sufficient on its face but refuted by evidence in the record. In some states, a post-conviction motion that raises a facially sufficient yet frivolous claim may be summarily denied as long as the portions of the record that conclusively refute the claim are attached to the order denying the motion. For example, if the defendant claims that he or she was not informed that he or she could be sentenced to death when the plea was entered, and if that is not true, the motion could be denied by an order that has the plea transcript attached.

If the deficiency in the post-conviction motion is that the facts alleged are refuted by the record, it is advisable to request a response from the state before summarily denying the motion. Counsel for the state may believe that the allegation cannot be refuted by the record or that it could be refuted more effectively by evidence that was not previously presented. As a practical

[936] *See* Stuart v. State, 801 P.2d 1283 (Idaho 1990) (the new evidence was insufficient to warrant an evidentiary hearing because it would not have changed the conviction or sentence in any event); Pollard v. State, 807 S.W.2d 498 (Mo. 1991) (the motion contained only conclusory allegations); In re Rice, 828 P.2d 1086 (Wash. 1992) (the allegations must be based on more than speculation, conjecture, or inadmissible hearsay).

matter, the opportunity to attach parts of the record exists only in the trial court. The state will not be able to provide any evidence to the appellate court, so the decision to grant an evidentiary hearing or to summarily deny the motion by attaching parts of the trial record is one that should be made carefully. As with other issues, a doubt regarding the need for an evidentiary hearing should be resolved in favor of granting the hearing.

[9.51] Findings and Conclusions

The final order of a post-conviction motion should state whether the disposition was made summarily, or whether it was made after an evidentiary hearing. Depending on the nature of the disposition, the order should contain findings of fact, conclusions of law, or both. If the motion is summarily denied on the ground that it is not legally sufficient on its face, then the order of denial should contain conclusions of law explaining why the defendant is not entitled to relief. If the motion is summarily denied on the ground that the files and records conclusively show that the defendant is not entitled to relief, the trial judge should attach the portions of the record necessary to support that conclusion. Finally, if the motion is granted or denied after an evidentiary hearing, the order should contain both findings of fact and conclusions of law supporting the decision.

The importance of including specific findings in the order on a Post-conviction motion is that it will avoid the possibility the case will be reversed by the state appellate court because the court could not ascertain the basis of the ruling. There are other good reasons for making express findings of fact and conclusions of law. As explained below, express findings of fact may preclude relitigation of the facts in federal court. Moreover, as to some issues express conclusions of law will preclude relitigation of certain issues of law in federal court.

[9.52] Finality of Factual Decisions

The existence of specific findings of fact may preclude the possibility that the defendant will be granted another evidentiary hearing in federal court. Title 28 of the United States Code §

2254(d) sets out a list of circumstances under which a U.S. district court is required to grant an evidentiary hearing on a federal *habeas corpus* petition. For the most part, these reasons deal with the adequacy of the state court hearing procedure, and the hearing itself in the state court. [937]

In the adjudication of federal *habeas corpus* petitions, the federal courts are required to presume that factual findings made by state courts are correct.[938] In contrast, a conclusion of law with respect to a federal constitutional issue is not entitled to any deference in a subsequent post-conviction proceeding in federal court.[939]

[9.53] Issue Preclusion

If a federal constitutional claim is denied on the ground that it was barred by a state procedural default, then that ground and only that ground should be assigned as a reason for denying the claim. The rule in federal court is that if a state court disposes of an issue on the basis of a procedural default, that fact must plainly appear from the ruling of the state court.[940] Otherwise, the federal court may assume that the state court addressed the issue on the merits and that, in turn, will be cause for the federal court to assume that the issue has been exhausted in state court and subject to review on the merits in the federal *habeas corpus* proceeding. This rule plainly shows the danger in assigning alternative reasons for the denial of a post-conviction claim. If the trial judge holds that a federal constitutional claim is barred by a state procedural default, and then for good measure adds that the claim was without merit in any event, the issue will be reviewable in federal court. In contrast, the federal court will have no authority to review the issue if the trial judge has plainly denied the claim on the basis of a state procedural default.

The following matters should be considered in drafting an order on a post-conviction motion in a capital case.

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[937] 28 U.S.C. 2254(d) (1996).
[938] *See* Wainwright v. Witt, 469 U.S. 412 (1985); Sumner v. Mata, 449 U.S. 539 (1981).
[939] The standard of review applied in a federal habeas proceeding is set out in Sections 10.20-10.21.
[940] *See* Harris v. Reed, 489 U.S. 255 (1989).

- ✓ If the motion is summarily denied on the ground that it is facially insufficient, the order should contain a legal conclusion regarding the insufficiency of the allegations.
- ✓ If the motion is summarily denied on the ground that the files and records conclusively show the defendant is not entitled to relief, the order should specifically identify the parts of the record that refute the defendant's claim. Depending on the applicable procedure, the order should also contain an appendix including copies of the files and records that refute the defendant's claim.
- ✓ If the order was entered after an evidentiary hearing, it should contain findings of fact and conclusions of law.
- ✓ If the decision can be based either on a state procedural ground or on the merits of the defendant's claim, the trial judge should consider whether it is necessary to discuss the merits at all. A decision on the merits may undercut the effect of the decision on state procedural grounds.

[9.54] Stay of Execution

In some jurisdictions, the authority to grant a stay of execution pending disposition of a post-conviction motion may be expressly provided by law.[941] Even in the absence of a rule or statute on the subject, however, trial judges have inherent authority to grant a stay of execution pending post-conviction proceedings in the trial court.[942]

[9.55] Criteria for Granting a Stay of Execution

The prospect of irreparable injury is apparent in death penalty cases. Therefore, whether it is appropriate to grant a stay of execution is an issue that usually deals more with the likelihood

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[941] *See* ARIZ. R. CRIM. P. 32.4(d); Tenn.Code Ann. § 40-30-109 (1995).
[942] *See* Spalding v. Dugger, 526 So.2d 71 (Fla. 1988); Zant v. Dick, 294 S.E.2d 508 (Ga. 1982). *But see* State v. Steffen, 639 N.E.2d 67 (Ohio 1994) (state supreme court has sole authority to grant stay of execution pending post-conviction proceedings).

of success on the merits of the case. The resolution of this issue is, for the most part, left to the discretion of the trial judge. Given the broad range of circumstances that might exist from case to case, there is no practical way to establish a formula for determining whether a trial judge should exercise discretion to grant or deny a motion for stay. There are some factors that have a bearing on the decision, and these are discussed below.

If a death warrant has been signed, the trial judge should consider the date that a stay was requested in relation to the date the warrant was signed. A motion for stay of execution that is filed near the end of the time, when it could have been filed earlier, is more likely to be an abuse of the process. For example, in *Osborn v. Shillinger*,[943] the Supreme Court of Wyoming denied a motion for stay of execution in part because the defendant had waited more than three months after the warrant had been signed.[944] However the trial court should examine the reason for the delay before denying a stay of execution. A death row inmate should not be subject to execution without being able to avail himself or herself of the avenues of relief available.

The trial judge should consider the sufficiency of the allegations in the motion for stay of execution or in the post-conviction motion. If the claims are based on conclusory assertions that are not supported by specific factual allegations, then there is a greater likelihood the post-conviction motion will be denied without an evidentiary hearing. Ordinarily, the need for a stay of execution in such a case is not as great as it would be in a case requiring an evidentiary hearing.

Another matter the trial judge should consider is the relative merit of the allegations in the motion for stay of execution in light of the record. If the motion for stay of execution alleges a facially sufficient ground for relief, but if the facts supporting that ground are conclusively refuted by the files and records of the proceeding, the motion is likely to be denied without a

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[943] 705 P.2d 1246 (Wyo. 1985).

[944] The trial court should note that after the Wyoming Supreme Court denied the stay of execution, the inmate filed a petition for writ of habeas corpus in the federal court, where a stay was granted, the death sentence reversed and he was allowed to withdraw his guilty plea. *Osborn v. Schillinger,* 639 F.Supp. 610 (D.Wyo.1986). This decision was affirmed by the Tenth Circuit in *Osborn v. Shillinger,* 861 F.2d 612 (10th Cir.1988).

hearing. Again, in this situation there may not be a need to stay the execution. However, if there is some doubt about the merits of the defendant's claim, the court should grant a stay so that the claim can be resolved in a full and fair hearing. Generally, it is proper to grant a stay of execution if the motion reveals that the defendant "might be" entitled to post-conviction relief[945] or if the files and records do not readily establish the lack of merit in the defendant's post-conviction claim.[946]

The propriety of granting a stay of execution depends to some extent on whether the motion before the court is the first post-conviction motion or whether it is a successive motion. Major collateral challenges, such as ineffective assistance of trial counsel and failure to disclose favorable evidence are often raised in the first motion. These claims typically involve disputed issues of fact that must be resolved in an evidentiary hearing. If the post-conviction motion is the first one the defendant has filed and if the motion raises fact-based claims that will require an evidentiary hearing, a stay will almost always be required. In contrast, if the post-conviction motion before the court is the second or third motion the defendant has filed and if the claims are legal issues that could be quickly decided, there may be no need to grant a stay of execution. Generally, a motion for stay of execution should be denied if the post-conviction motion alleges grounds that were previously presented on direct appeal or in a prior post-conviction motion.[947]

The following matters should be considered in determining whether to grant a stay of execution.

- ✓ Whether there was a delay in filing a motion for stay of execution and if so whether the delay can be excused.
- ✓ Whether the motion for stay of execution or the post-conviction motion contains allegations that are sufficient to establish a *prima facie* ground supporting the claim for relief.
- ✓ Whether the allegations of the motion for stay of execution or the post-conviction motion are

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[945] *See* State ex rel. Russell v. Schaeffer, 467 So.2d 698 (Fla. 1985).
[946] *See* Zant v. Dick, 294 S.E.2d 508 (Ga. 1982); State v. Sireci, 502 So.2d 1221 (Fla. 1987).
[947] *See* Johnson v. State, 508 So.2d 1126 (Miss. 1987); Darden v. State, 521 So.2d 1103 (Fla. 1988).

conclusively refuted by the files and records of the proceedings.

- ✓ Whether the post-conviction motion will require an evidentiary hearing and if so whether the scheduling needs of the court and counsel will require a stay of execution.
- ✓ Whether the post-conviction motion is the first motion or a successive motion.

[9.57] Appeals

Post-conviction remedies are generally characterized as civil remedies even though they are often made part of the state criminal procedure by a rule or statute.[948] For this reason, the state has a right to appeal an order granting a post-conviction motion in the same way that the defendant has a right to appeal an order denying such a motion.[949]

[9.58] Successive Motions[950]

A second or successive motion for post-conviction relief can be summarily denied if there is no reason for failing to raise the issues in the previous motion.[951] Likewise, the court is not required to entertain a post-conviction claim that could have been raised in a previous petition for writ of *habeas corpus*.[952] A claim that is not asserted in a previous collateral challenge to the conviction may waived.[953] Presentation of a new claim in a successive motion is sometimes referred to as an "abuse of process,"[954] or an "abuse of the writ."[955]

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[948] *See* State v. Bostwick, 443 N.W.2d 885 (Neb. 1989); State v. Skjonsby, 417 N.W.2d 818 (N.D. 1987); Ouimette v. Moran, 541 A.2d 855 (R.I. 1988); Peltier v. State, 808 P.2d 373 (Idaho 1991).

[949] *See* State v. Thomas, 599 A.2d 1171 (Md. 1992); Commonwealth v. Francis, 583 N.E.2d 849 (Mass. 1992); State v. Twenter, 818 S.W.2d 628 (Mo. 1991); State v. Sireci, 502 So.2d 1221 (Fla. 1987).

[950] The federal standard for consideration of a successive habeas petition is set out in Section 10.30.

[951] *See* Bolder v. State, 769 S.W.2d 84 (Mo. 1989); State v. Otey, 464 N.W.2d 352 (Neb. 1991).

[952] *See* Hurst v. Cook, 777 P.2d 1029 (Utah 1989).

[953] *See* People v. Stewart, 565 N.E.2d 968 (Ill. 1990); Hendrix v. State, 557 N.E.2d 1012 (Ind. 1990); Commonwealth v. Hagood, 532 A.2d 424 (Pa. 1987).

[954] *See* Eutzy v. State, 541 So.2d 1143 (Fla. 1989).

[955] In re Rice, 828 P.2d 1086 (Wash. 1992).

There are some circumstances that justify a failure to present a claim in an earlier post-conviction motion. When a successive motion is filed, however, the defendant has the burden of establishing a justification for the failure to present the claim in an earlier proceeding before the court. One reason that is often given for presenting a new claim in a successive post-conviction motion is that the facts were not known, and could not have been known, at the time the original post-conviction motion was filed. Another is that the claim is based on a principle of constitutional law that was not announced until after the disposition of the first motion.[956]

The state may claim an "abuse of process" not only as to those issues that could have been raised in a prior post-conviction motion but also as to those issues that were actually presented and decided. If the court has adjudicated a claim on the merits, then the decision is binding on the parties and the claim cannot be raised again in a subsequent petition. Of course, if the motion was summarily denied on the ground that it failed to allege a basis for relief, then the defendant would not be precluded from raising the issues once again in a subsequent post-conviction motion. In this situation, the denial is not a decision on the merits and has no binding effect on the parties.

[9.59] Executive Clemency

Clemency is an exclusive function of the executive branch of government. Therefore, the courts lack jurisdiction to interfere with the proper exercise of discretion to grant a petition for executive clemency. Judicial power over executive clemency is limited to claims that the clemency statute is unconstitutional on its face or that the executive officers failed to apply the statute according to state and federal constitutional requirements. Assuming the clemency statute is valid and that the defendant's constitutional rights have not been violated in the manner in which the statute has been applied, the final decision to grant or deny clemency is not subject to review in court.

Trial judges are not usually involved in the clemency process

[956] *See* Stuart v. State, 801 P.2d 1283 (Idaho 1990).

except to the extent that a particular state procedure may allow a judge to make a recommendation regarding clemency. Trial judges may also have some indirect involvement in the process under state laws requiring them to appoint counsel and to resolve potential disputes regarding the compensation of counsel.

[9.60] Conclusion

Although each state has its own set of rules and statutes governing post-conviction proceedings in capital cases, all are intended to ensure a defendant a full and fair opportunity to collaterally challenge the constitutionality of his or her conviction and sentence. However, a post-conviction proceeding is not a substitute for direct appeal; nor is it intended to provide an opportunity to review those issues which were or could have been raised on direct appeal. A trial court analyzing post-conviction claims should ensure that the defendant has followed the pleading requirements provided by state rule or law, should hold an evidentiary hearing when necessary to resolve any disputed issues of fact, and should explain, in a written order, the basis for its rulings on each claim so that the trial court's decisions will withstand appellate scrutiny.

FEDERAL HABEAS CORPUS

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[10.1] Introduction

The writ of *habeas corpus* is a writ or order directing the person with custody of another to produce the "body" to the court so that the court can determine the legal sufficiency of the detention. The writ has noble and historic roots and is protected by the United States Constitution[957] and federal law. The U.S. Supreme Court has referred to the writ as "a vital instrument [for securing] freedom from unlawful restraint" and has emphasized that the "privilege of *habeas corpus* was one of the few safeguards of liberty" provided for directly in the Constitution.[958] Notwithstanding these descriptions, the vitality of the writ has been reduced significantly by judicial interpretations and by the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Despite the many barriers to relief, those sentenced to death will almost always apply to a federal court for *habeas corpus* relief.

[10.2] Federal *Habeas Corpus* Proceedings

Although the writ of *habeas* is referred to as the "Great Writ of Liberty" and is protected against suspension by the United States Constitution, [959] the substantive and procedural requirements are provided for by statutes and rules, as well as the many federal decisions that interpret the statutory provisions. Originally, the writ extended only to those in federal custody,[960] but with the passage of a new judiciary act in 1867, the writ was

[957] U.S. Const., art. I, § 9 provides that the "privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."
[958] Boumediene v. Bush, 128 S.Ct. 2229, 2244 (2008).
[959] LaFave & Israel, CRIMINAL PROCEDURE 1178 (2d ed. 1992); U.S. Const. art I., §9, cl. 2.
[960] Ex parte Dorr, 44 U.S. (3 How.) 103 (1845).

extended to "state prisoners in custody in violation of Constitution or laws of the United States."[961]

[10.3] Purpose

A *habeas corpus* proceeding is a civil proceeding brought by a prisoner against the government official responsible for the prisoner's custody. Although civil in nature, the availability of the writ provides a check on the fairness of the criminal process. Thus, the purpose of a petition for *habeas corpus* is to provide a means by which a prisoner may challenge the legality of his or her detention. The habeas prisoner contests the process by which liberty has been restrained. The proceeding does not revisit the issue of guilt or innocence[962], but rather addresses issues of procedural correctness. The proceeding is separate and distinct from the criminal trial, the direct appeal, and the state post-conviction proceeding, but it is very much affected by all three.

[10.4] Applicable Law

Federal *habeas corpus* proceedings are governed by federal law. The two primary statutes, 28 U.S.C. §2254 and §2255 were significantly changed in 1996 when Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) which was designed to curtail and expedite federal habeas review. The various federal courts' interpretations of these federal statutes create a very substantial body of *habeas* case law and makes federal *habeas corpus* practice one of the most complex and challenging areas of the law.

[10.5] Procedure

Procedure in federal *habeas corpus* proceedings is governed not only by the federal statutes, but by the Federal Rules of Civil Procedure, special procedural rules promulgated solely for

[961] 28 U.S.C. § 2254(a).
[962] However, see Section 10.31., which discusses actual innocence.

habeas corpus proceedings, local rules of court, and, as referenced above, a very substantial body of case law.

[10.6] Application, Contents, and Filing

A prisoner in state custody[963] is authorized by federal statute, 28 U.S.C. §2254, to file an "application" for a writ of *habeas corpus* on the ground that the custody is "in violation of the Constitution or laws or treaties of the United States."[964] The party sued is the person responsible for the custody of the applicant, which may be the prison warden or administrator or the commissioner of corrections for the state.

The written application must be "signed and verified by the person for whose relief it is intended or by someone acting in his behalf."[965] The verification requires a statement that the application is signed under the penalty of perjury.

The application must include "the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claims or authority, if known."[966] A form similar to that annexed to the federal *habeas corpus* rules must also be filed.[967] The application may be amended or supplemented as provided in the Federal Rules of Civil Procedure.[968]

In practice, the application is generally far more detailed than the statute suggests. It usually describes (1) the prisoner's custodial status, including the specifics of the judgment and sentence that are being challenged; (2) the method by which the prisoner has exhausted the claims raised in the application; (3) the legal and factual basis for all claims asserted; (4) the basis for entitlement

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[963] This chapter concentrates only on the procedure used to challenge state sentences and does not discuss the separate and somewhat different statutory proceeding for challenging federal sentences, immigration detention, and military convictions. *See* 28 U.S.C. §§ 2241, 2255.
[964] 28 U.S.C § 2254(a). The statute uses the word "application" but many practitioners and the rules governing proceeding refer to the application as a "petition."
[965] 28 U.S.C. § 2242.
[966] *Id.*
[967] Rule 2(d), Rules Governing Section 2254 Cases in the United States District Court.
[968] 28 U.S.C. § 2242.

to relief on each claim; and (5) a prayer for relief. The application must contain *all* colorable claims for relief since only one application is ordinarily allowed. If previous applications have been filed, a description of those applications is required along with an explanation as to why the present claims were not asserted therein.

A memorandum of law supporting the legal claims in the application and refuting likely defenses may be filed with the application or at a later time subject to the court's scheduling order. An application must be accompanied by either the appropriate filing fee or an affidavit of indigency and a request to proceed *in forma pauperis*.

[10.7] Stays and Motions

The federal statute authorizes the federal court to "stay any proceeding against the person detained" in any state.[969] Often, a motion for a stay of execution is filed with the application for the writ of *habeas corpus*. When a *pro se* capital defendant files an application and requests appointment of counsel, the federal court has jurisdiction to enter a stay of execution "where necessary" to give effect to the statutory right to counsel.[970]

In addition, motions necessary to allow an applicant to develop the facts upon which the claims are based will likely be filed with the application or at a later time. These include motions for for discovery (as provided in Rule 6 of the Rules) and for an evidentiary hearing (as provided in Rule 8 of the Rules Governing Section 2254 Cases in the United States District Court (hereinafter in this chapter referred to as "Rules")).

[10.8] Jurisdiction and Venue

Federal courts in the state where the applicant's custodian resides have personal jurisdiction over the parties regardless of the place of detention. The district court in the jurisdiction where the applicant is incarcerated and the district court containing the

[969] 28 U.S.C. § 2251.
[970] McFarland v. Scott, 512 U.S. 849, 859 (1994).

state court that convicted and sentenced the applicant have concurrent jurisdiction over the application.[971] An application may be filed originally in the U.S. Supreme Court or in a United States Court of Appeals but, in all but the most exceptional case, the application will be transferred to a district court.

The most important aspect of federal *habeas* jurisdiction is one of the most recent procedural limitations added by the Antiterrorism and Effective Death Penalty Act.[972] Under the AEDPA, the statute of limitations for federal habeas actions is one year. This one-year statute of limitations is jurisdictional. The date from which the statute begins to run is discussed in Section 10.12.

[10.9] Prerequisites to Relief

Federal statutes and case decisions create nine prerequisites to federal habeas relief, discussed more fully in the sections below. Generally speaking, the petitioner must first be in custody and, second, raise a cognizable claim. Third, the application must be filed within the applicable statute of limitations. Fourth, the claims raised must have been exhausted in state court; and, fifth, the claims must not be procedurally defaulted. Sixth, the claims must be based on violations of the Constitution, federal law, or treaties. Seventh, if the constitutional right upon which the violation is based is newly recognized, issues of retroactivity must be considered. Eighth, if the constitutional right is not new, it will form the basis for relief only if the state court decision was contrary to or an unreasonable application of clearly established law. Finally, the error must have had a substantial and injurious effect or influence on the jury's verdict.

[10.10] "In Custody"

[971] 28 U.S.C. § 2241(d) (courts with concurrent jurisdiction may transfer the application); *see generally* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973) (broadly construing § 2241 phrase "district courts . . . within their respective jurisdictions" to allow Alabama prisoner to seek habeas relief in Kentucky district court).

[972] AEDPA became effective April 24, 1996, and applies to petitions filed after that date. Lindh v. Murphy, 521 U.S. 320 (1997).

Courts may entertain habeas applications only if a person is "in custody" in violation of the Constitution, laws, or treaties of the United States.[973] The "custody" requirement is satisfied so long as the person is "subject to restraints not 'shared by the public generally.'"[974]

[10.11] Cognizable Claims

An application for *habeas corpus* must allege violations of federal law.[975] Claims may be based upon a violation of the United States Constitution, federal laws, or treaties.[976] The most frequently litigated habeas claims arise under constitutional provisions, including the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments,[977] but these are not exclusive. A claim based on a statutory violation exists if the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice' and 'present[s] exception circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.'"[978] Claims based on violations of international treaties have become more frequent in applications brought on behalf of alien residents.[979]

Issues that are cognizable in a *habeas corpus* case may arise out of any stage of the case. For example, in the investigative stage, a claim may be based on issues related to arrest, searches, warrants, confessions, pretrial identifications, and the right to counsel. In the pretrial stage, relief may be based on issues

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[973] 28 U.S.C. § 2241(c)(3).
[974] Hensley v. Municipal Court, 411 U.S. 345, 351 (1973) (quoting Jones v. Cunningham, 371 U.S. 236, 240 (1963)); *see* Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984) (petitioner was in "custody" even though his conviction was vacated when he applied for trial *de novo* and he had been released on personal recognizance).
[975] 28 U.S.C. § 2254(a).
[976] *Id.*
[977] For an exhaustive summary of the variety of claims cognizable under these amendments, *see* 2 J. Liebman, Federal *Habeas corpus* Practice and Procedure, Appendix C, 709-728 (1988). Habeas relief is limited for Fourth Amendment claims. *See* Stone v. Powell, 428 U.S. 465, 494 (1976).
[978] Hill v United States, 368 U.S. 424, 428 (1962) (quoting *Bowen v. Johnston*, 306 U.S. 19, 27 (1939)).
[979] *See e.g.,* Medellin v. Texas, 128 S.Ct. 1346 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006); Breard v. Greene, 523 U.S. 371(1998);Cuero v. McFadden, 154 Fed. Appx. 755 (11th Cir. Ga. 2005), *cert. denied*, 547 U.S. 1138 (2005); Reid v. Apker, 150 Fed. Appx. (3d Cir. 2005).

related to the charging document, discovery, *Brady* information, double jeopardy, and preliminary proceedings. Trial issues related to jury selection, pretrial publicity, constitutional evidentiary issues at both the guilt and penalty phases, including confrontation violations, prosecutorial misconduct, discovery violations, and jury instructions at both the guilt and penalty phases may form the basis for habeas relief. At the appellate and post-conviction stage, claims may relate to newly discovered evidence or ineffective assistance of counsel. Claims of actual innocence may also be raised on federal *habeas corpus*.

[10.12] Statute of Limitations

Under AEDPA, an application for federal habeas relief must be filed within one year of the latest of four dates. The four dates are: (1) the date on which the judgment became final by the conclusion of direct appellate review or the expiration of time for seeking such review; (2) the date on which any impediment to filing caused by illegal government action was removed; (3) the date on which any new constitutional right was recognized and made retroactively applicable by the U.S. Supreme Court; or (4) the date on which facts supporting the claim could have been discovered through due diligence.[980]

The date which most often triggers the limitation period is the first – "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[981] However, because the time period during which a properly filed petition for state post-conviction or other collateral review is pending is excluded, the statute of limitations generally begins to run when the state court decides or declines to hear an appeal from the denial of state post-conviction relief.

[10.13] Procedural Prerequisites

In addition to complying with the one-year statute of limitations, a habeas petitioner must establish that state-court remedies

[980] 28 U.S.C. § 2244(d).
[981] 28 U.S.C. § 2244(d).

have been exhausted and that the habeas claims were raised in the state courts before the merits of the petition will be considered. Each of these procedural prerequisites is considered below.

[10.14] Exhaustion of State Court Remedies

Another demanding prerequisite to habeas claims is the exhaustion of state court remedies.[982] The exhaustion rule is based on concerns of comity which are satisfied when a state has a full and fair opportunity to address and resolve claims in state courts.[983] The *habeas* statute requires exhaustion of available state court remedies unless "there is an absence of available [s]tate corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant."[984] While these exceptions to the exhaustion requirement exist, they are rarely applied.

The exhaustion requirement means that the applicant must have first presented the claims in state court.[985] In order to exhaust a claim, the applicant must have presented both the factual and theoretical bases of the claim in the state court. The applicant may not rely on different factual grounds in federal court that fundamentally alter the claim.[986] As a result, it is very important that state courts conclusively adjudicate all claims raised at trial and on state post conviction. State courts should aim to issue clear and unambiguous findings of fact and conclusions of law adjudicating all federal constitutional issues raised in state court proceedings.

A claim is exhausted when the highest state court has had a fair opportunity to rule on it, either on direct appeal or through the

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[982] 28 U.S.C. § 2254 (b).
[983] Keeney v. Tamayo-Reyes, 504 U.S. 1, 9-10 (1992). "In a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." Coleman v. Thompson, 501 U.S. 722, 731 (1991). "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Rose v. Lundy, 455 U.S. 509, 518 (1982).
[984] 28 U.S.C. § 2254 (b)(1)(B)(i), (ii).
[985] 28 U.S.C. § 2254 (c).
[986] *See* Vasquez v. Hillery, 474 U.S. 254, 257-60 (1986). Supplementation and clarification of the factual record in federal court is allowed and does not defeat exhaustion.

post-conviction process.[987] The U.S. Supreme Court holds that a claim is not exhausted unless it has been pursued and adjudicated through the highest state court with jurisdiction, including courts with jurisdiction to conduct a discretionary review.[988] A claim may be exhausted when a state court considers it *sua sponte.*

Applications based on unexhausted claims must be dismissed. Applications that contain both unexhausted and exhausted claims, often referred to as "mixed petitions," may be dismissed without prejudice upon request or held in abeyance until exhaustion is completed.[989] After exhaustion, the application may be reinstated. Alternatively, the court may require counsel to file an amended petition that includes only exhausted claims.

The exhaustion requirement may be waived by the State but only by express waiver.[990] If an unexhausted claim is unmeritorious, the State may choose to waive exhaustion nonetheless in order to secure a dismissal on the merits.

[10.15] Absence of Procedural Default

Another hurdle to successful habeas claims is procedural default, a judicially created doctrine that bars federal claims that were not raised in state court as required by state law.[991] In order for procedural default to apply, the state court's rulings must be based on an adequate and independent state law ground rather than on federal law.[992] When applicable, state courts should

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[987] Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 302 (1984).
[988] O'Sullivan v. Boerckel, 526 U.S. 842, 847 (1999) ("state prisoners [are required] to file petitions for discretionary review when that review is part of the ordinary appellate procedure in the State").
[989] Rhines v Weber, 554 U.S. 269 (2005) ("a district court has discretion to stay a mixed petition to allow a petitioner to present his unexhausted claims to the state court in the first instance and then to return to federal court for review of his perfected petition.")
[990] 28 U.S.C. § 2254 (b)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.").
[991] Wainwright v. Sykes, 433 U.S. 72 (1977).
[992] In the *habeas* context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in *habeas* what this Court could not do on direct review; *habeas* would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the

resolve issues on state law grounds and issue findings and conclusions that make the court's reliance on state law abundantly clear.

To support a defense of procedural default, the state procedural rule (1) must be in effect at the time of the alleged default; [993] (2) must be clear and regularly followed;[994] (3) must serve a state interest and not merely frustrate asserted federal rights;[995] and, (4) must not violate due process or result in a waiver of a fundamental right. Default is inappropriate when the state rule is discretionary or when compliance with the rule has been lacking in some highly technical sense.[996] When a state court relies on a state procedural rule, the court should recite in its order the effective date of the rule, the purposes for the rule, and the regularity of enforcement of the rule.

Federal courts presume the absence of an independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law."[997] Thus if the state decision relies upon a "firmly established and regularly followed state practice" as an independent state grounds for the decision, it should cite to the state rule only and should not include parallel citations to federal authority.[998]

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limits of this Court's jurisdiction and a means to undermine the state's interest in enforcing its laws.
Coleman v. Thompson, 501 U.S. 722, 730-31 (1991).

[993] Reed v. Ross, 468 U.S. 1, 16-17 (1984).

[994] *See e.g.,* Johnson v. Mississippi, 486 U.S. 578, 587-89 (1988) (state court denial of post-conviction relief based on waiver was inadequate because state court previously allowed similar challenge despite omission); James v. Kentucky, 466 U.S. 341, 348-49 (1984) (state court denial of relief disallowed when based on distinction that is not clear or closely hewn); County Court of Ulster County v. Allen, 442 U.S. 140, 150-51 (1979) (default defense rejected because state had no clear contemporaneous-objection rule in force).

[995] James v. Kentucky, 466 U.S. 341, 348-49 (1984)

[996] *Id.* at 351.

[997] Harris v. Reed, 489 U.S. 255, 266 (1989). In Coleman, the U.S. Supreme Court declined to require specific language in state court opinions to reflect reliance on independent state grounds. "We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim – every state appeal, every denial of state collateral review – in order that federal courts might not be bothered with reviewing state law and the record in the case." Coleman v. Thompson, 501 U.S. 722, 739 (1991).

[998] Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

Procedural default is waived unless timely and specifically asserted by the State as a defense. Moreover, procedural default is inappropriate in circumstances in which state courts have not enforced a state procedural rule.[999] Thus procedural default is arguably waived when the state courts consider the claim on the merits despite the procedural failure.

If procedural default is established, an applicant can only avoid default by demonstrating one of two exceptions: the "cause and prejudice" exception or the "miscarriage of justice" exception.[1000]

The "cause and prejudice" test requires that the applicant show cause for and prejudice resulting from the default.[1001] Generally, cause exists if an objective factor external to the defense excuses counsel's failure to comply with the state procedural rule.[1002] Examples of cause include the existence of novel constitutional claims that were not reasonably available to counsel;[1003] the discovery of factual predicates that were unknown and undiscoverable by the use of due diligence;[1004] the presence of circumstances in which the procedural context in which default occurred made it difficult for counsel to perceive the need to raise the claim[1005] or in which official interference made compliance with the procedural rule impractical;[1006] and

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[999] *See* Rice v. Marshall, 816 F.2d 1126, 1129 (6th Cir. 1987) (citing McBee v. Grant, 763 F.2d 811, 813 (6th Cir.1985)("The cause and prejudice standard is not applied, however, when the state court overlooks the procedural default and instead disposes of the issue on the merits.")); Raper v. Mintzes, 706 F.2d 161, 163 (6th Cir.1983) ("In such a case, the rationale of *Sykes* is inapplicable since the state itself has chosen not to apply its procedural rules so as to bar the claim and the state has had the first opportunity to address the constitutional question."); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir.1980), *cert. denied,* 450 U.S. 933 (1981) ("the failure to comply with a state's contemporaneous objection requirement cannot be deferred to as a separate and independent procedural ground precluding federal review if the state itself did not preclude review on the basis of that requirement.").

[1000] Coleman v. Thompson, 501 U.S. 722 (1991).

[1001] Wainwright v. Sykes, 433 U.S. 72, 77 (1987); *see also* Engle v. Isaac, 456 U.S. 107, 135 (1982); Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

[1002] *See generally* Coleman v. Thompson, 501 U.S. 722, 749-750 (1991).

[1003] Reed v. Ross, 468 U.S. 1, 16 (1984). But Teague casts doubt on the viability of a claim that meets this standard. If a claim is *so* novel that its legal basis was not reasonably available, it is probably based on a "new rule" which, under Teague, affords no retroactive relief; if the claim is not based on a "new rule," then it probably was not *so* novel that its legal basis was not reasonably available.

[1004] Amadeo v. Zant, 486 U.S. 214, 223-24 (1988).

[1005] *See* Wainwright v. Sykes, 433 U.S. 72, 95 - 96 (1997) (Stevens, J., concurring).

[1006] Brown v. Allen, 344 U.S. 443, 486 (1953).

the presence of circumstances in which counsel rendered ineffective assistance by failing to comply with the procedural rule.[1007] The denial of counsel or the denial of the effective assistance of counsel can serve as "cause" in a "cause and prejudice" analysis to excuse any default in raising or developing the claim in state court.[1008]

To demonstrate prejudice, the applicant must show that the constitutional violation "worked to his [or her] actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions."[1009] To establish prejudice, the applicant will have to establish that but for the error, the outcome would have likely been different.[1010]

The second exception to procedural default, the "miscarriage of justice" exception, requires a court to excuse default if the failure to consider the claims will result in a fundamental miscarriage of justice.[1011] Claims of actual innocence fall under the miscarriage of justice exception to procedural default. An applicant may raise a claim of actual innocence based on innocence of the crime or based on ineligibility for the death penalty. Both may be grounds for avoiding procedural default on miscarriage of justice grounds but different standards apply.

When an applicant raises a claim of actual innocence of the crime to avoid a procedural bar under the miscarriage of justice exception, the applicant must show that the "constitutional violation has probably resulted in the conviction of one who is actually innocent."[1012] When the application is based on the

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[1007] Edwards v. Carpenter, 529 U.S. 446, 451 (2000)(but also recognizing that an ineffective assistance of counsel claim used to satisfy the cause and prejudice standard can also be procedurally defaulted).
[1008] Martinez v. Ryan, 566 U.S. 1 17 (2012)
[1009] U.S. v. Frady, 456 U.S. 152, 170 (1982).
[1010] *Cf.* Brecht v. Abrahamson, 507 U.S. 619, 622 (1993) (defining habeas standard for relief as requiring a showing of a "substantial and injurious effect or influence in determining the jury's verdict").
[1011] Keeney v. Tamayo-Reyes, 504 U.S. 1, 11 (1992) ("A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."); Murray v. Carrier, 477 U.S. 478, 496 (1986).
[1012] Schlup v. Delo, 513 U.S. 298, 326 (1995) (applying standard in Murray v. Carrier, 477 U.S. 478 (1986) requiring petitioner to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent rather than standard in Sawyer v. Whitley, 505 U.S. 333 (1992), when actual

discovery of new evidence of innocence of the crime, the applicant must show that it is "more likely than not that no juror viewing the record as a whole would lack reasonable doubt" in light of the new evidence.[1013]

If instead, the applicant claims innocence of, or ineligibility for, the death penalty, as a mean of establishing a miscarriage of justice exception to the procedural default rule, the applicable standard is higher. The applicant must establish innocence of the death penalty by clear and convincing evidence. "[T]o show 'actual innocence' [of the death penalty] one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[1014]

[10.16] Constitutional Violations, Retroactivity, and *Stone v. Powell*

Habeas petitioners who raise claims based upon new constitutional rules must also meet the standard of *Teague v. Lane* [1015] which governs retroactivity. Petitioners whose habeas claims are based on Fourth Amendment grounds must scale the formidable hurdle of *Stone v. Powell*.[1016] Both *Teague* and *Powell* are discussed below.

[10.17] *Teague v. Lane* and "New" Constitutional Claims

In *Teague v. Lane*, the U.S. Supreme Court held that new constitutional rules of criminal procedure generally should not be applied retroactively to cases on collateral review.[1017] Under

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innocence claim is raised to avoid procedural bar to consideration of the merits of a constitutional claim)).

[1013] House v. Bell, 547 U.S. 518 (2006).

[1014] Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

[1015] Teague v. Lane, 489 U.S. 288 (1989).

[1016] Stone v. Powell, 428 U.S. 465 (1976).

[1017] Teague v. Lane, 489 U.S. 288 (1989). The interest in leaving concluded litigation in a state of repose . . . may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed. . . . Given the "broad

Teague, an old constitutional rule or interpretation applies on both direct and collateral review, but a new rule or interpretation generally applies only to cases on direct review. As a result, *Teague* requires a three-step inquiry to determine whether a constitutional rule of criminal procedure applies to a habeas application.

First, the U.S. Supreme Court must determine when the applicant's conviction became final. Next, the court must consider whether, under the "legal landscape" existing at that time, the Constitution required the rule relied upon by the applicant.[1018] If the rule was not required at the time of the conviction, it is considered a "new rule" of criminal procedure, which will not be applied retroactively unless an exception to the general rule of non-retroactivity applies.

Only two exceptions to the general rule of non-retroactivity are recognized. The first exception applies to substantive rules forbidding punishment of "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or prohibiting a certain category of punishment for a class of defendants because of their status or offense.[1019] The second exception is for rules that require observance of the principles implicit in the concept or ordered liberty – so-called "watershed" rules of criminal procedure implicate the "fundamental fairness and accuracy of the criminal proceeding."[1020]

A rule is a watershed rule of criminal procedure if it is necessary to prevent "an impermissibly large risk" of inaccurate convictions and if it "alter[s] our understanding of the bedrock procedural

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scope of constitutional issues cognizable on habeas,". . . it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." . . . "[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceeding took place." 489 U.S. at 306 (citations omitted).

[1018] Graham v. Collins, 506 U.S. 461, 468 (1993).

[1019] Teague v. Lane, 489 U.S. 288, 311-15(1989).

[1020] Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)).

elements essential to the fairness of the proceeding."[1021] The U.S. Supreme Court emphasized that the risk of accuracy must be to criminal proceedings in general, not to the specific case at issue.[1022] Such watershed rules are extremely narrow – so narrow that the U.S. Supreme Court has never fully recognized one.[1023]

The unlikelihood that either of the two exceptions to non-retroactivity will be found to apply leads habeas applicants to argue that the rule relied upon is not a new rule of constitutional criminal procedure and thus is not subject to the *Teague* limitation. A "new rule" is one that "breaks new ground or imposes a new obligation on the state or federal government."[1024] A case announces a new rule if the result was not dictated by precedent existing at the time the applicant's conviction became final. A result is not dictated by precedent if the outcome was "susceptible to debate among reasonable minds."[1025] Once a federal court concludes that a constitutional rule is a new rule, the rule is not applied retroactively under *Teague*.[1026] Thus, only constitutional rules that existed when the

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[1021] Schiro v. Summerlin, 542 U.S. 348, 356 (2004).
[1022] Whorton v. Bockting, 549 U.S. 406, 417-18 (2007).
[1023] "[I]t should come as no surprise that we have yet to find a new rule that falls under the second Teague exception.
. . . In providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of Gideon v. Wainwright." Beard v. Banks, 542 U.S. 406, 417 (2004).
[1024] Penry v. Lynaugh, 492 U.S. 302, 314 (1989).
[1025] Butler v. McKellar, 494 U.S. 407, 415 (1990).
[1026] *See e.g.,* Whorton v. Bockting,549 U.S. 406, 417 (2007) (rule of Crawford v. Washington, 541 U.S. 36 (2004) establishing new analysis for confrontation violation is a new rule); Beard v. Banks, 542 U.S. 406, 408 (2004) (rule in Mills v. Maryland, 486 U.S. 367 (1988) invalidating capital sentencing scheme that required juries to disregard mitigating circumstances not found unanimously is a new rule); Schiro v. Summerlin, 542 U.S. 348, 352 (2004) (rule of Ring v. Arizona, 536 U.S. 584 (2002) that invalidated judicial findings of aggravating circumstances necessary for imposition of death penalty is a new rule); O'Dell v. Netherland, 521 U.S. 151, 153 (1997) (rule of Simmons v. South Carolina, 512 U.S. 154(1994) that allowed evidence of accurate information regarding parole eligibility when prosecutor argues future dangerousness is a new rule); Saffle v. Parks, 494 U.S. 484, 489 (1990) (rule that Eighth Amendment prohibits jury instruction in penalty phase requiring jury to avoid influence of sympathy is a new rule): Butler v. McKellar, 494 U.S. 407, 415 (1990)(holding in Arizona v. Roberson, 486 U.S. 675 (1988) that Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation is a new rule); Hill v. Black, 920 F.2d 249, 250 (5th Cir. 1990) (holding in Clemons v. Mississippi, 494 U.S. 738 (1990) that a rule in a weighing state that automatically affirms death sentence when one or more valid aggravating circumstances remain after appellate review is a new rule); McDougall v. Dixon, 921 F.2d 518, 539 (4th Cir. 1990) (rule announced in McKoy

applicant's conviction became final will provide a basis for *habeas* relief.

[10.18] *Stone v. Powell* and Fourth Amendment Claims

Most claims based on Fourth Amendment violations are not cognizable in *habeas corpus* actions because of the rule set forth in *Stone v. Powell*.[1027] In that case, the U.S. Supreme Court barred applicants from pursuing relief based on Fourth Amendment claims in habeas proceedings when the applicant was represented by competent counsel and had a "full and fair opportunity" to litigate the claim in state court. The rationale behind *Stone* is that the purpose of the Fourth Amendment's exclusionary rule – primarily the deterrence of future unlawful police conduct – would not be furthered by applying the rule on collateral review of cases in which full and fair consideration of the claim had already been given by the state courts. In determining whether an applicant had a full and fair opportunity to litigate Fourth Amendment claims in state court, the federal courts have applied a variety of different tests.[1028]

[10.19] Substantive Standards – Basis for Relief

Habeas applicants who satisfy the many procedural prerequisites previously discussed are entitled to relief only when their convictions are based upon state court decisions that are

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v. North Carolina , 494 U.S. 433 (1990) prohibiting jury instruction requiring unanimity on mitigation circumstances is a new rule); Bassette v. Thompson, 915 F.2d 932, 938 (4th Cir. 1990) (holding in Ake v. Oklahoma, 470 U.S. 68 (1985) is a new rule).

[1027] Stone v. Powell, 428 U.S. 465 (1976).

[1028] *See e.g.,* Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980) (opportunity for full and fair litigation occurs if "the processes provided by a state to fully and fairly litigate fourth amendment claims are routinely or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on the merits"); Gamble v. Oklahoma, 583 F.2d 1161, 1165 (10th Cir. 1978) (standard requires a determination that state court made "at least [a] colorable application of the correct Fourth Amendment constitutional standards"); Boyd v. Mintz, 631 F.2d 247, 250 (3rd Cir. 1980) (unfair adjudication of claims when "state provides the process but in fact the defendant is precluded from utilizing it by reason of an unconscionable breakdown in that process").

contrary to, or that unreasonably apply, clearly established federal law *and* when they demonstrate actual prejudice.[1029]

[10.20] Violation of the Constitution, Laws, or Treaties

Habeas relief is available only in those cases in which the state court decision was "contrary to, or involved an unreasonable application of clearly established Federal law" *or* "resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented."[1030] In order to secure habeas relief, an applicant must establish not only a constitutional or statutory bases, but must also establish a particular kind of legal error or factual error, both of which, in turn, are subject to further limitations and a highly deferential standard of review. To avoid creating a basis for federal habeas relief, state courts must methodically, carefully, and correctly apply federal law in state criminal cases.

[10.21] Relief Based on State Court Application of Law – "Contrary to" or "Unreasonable Application" of Clearly Established Federal Law

If an application includes a claim that has been "adjudicated on the merits in State court proceedings," § 2254(d), an additional restriction applies. Under § 2254(d), that application "shall not be granted with respect to [such a] claim … unless the adjudication of the claim"[1031] is either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[1032] The "contrary to" and "unreasonable

[1029] Brecht v. Abrahamson, 507 U.S. 619 (1993).
[1030] 28 U.S.C. § 2254 (d)(1) & (2).
[1031] Cullen v. Pinholster, 563 U.S. 170, 181 (2011)
[1032] 28 U.S.C. § 2254 (d)(1); Williams v. Taylor, 529 U.S. 362 (2000), (the Supreme Court found that a Virginia decision violated both prongs. The Virginia court applied the wrong test for prejudice on an ineffective assistance of counsel claim, requiring overall fundamental unfairness. Thus, the decision was

application" clauses have separate and independent meanings but both require that the state court decision involve federal law that is not just established, but clearly established.[1033] "Clearly established Federal law" for purposes of the federal habeas statute includes only the holdings, as opposed to the dicta, of the Supreme Court's decisions,[1034] and must be "clearly established at the time of the state court adjudication.[1035] In addition, review is limited to the record that was before the state court that adjudicated the claim on the merits.[1036]

A state court decision is "contrary to" U.S. Supreme Court precedent if the state court "applies a rule that contradicts the governing law set forth in [U.S. Supreme Court] cases" or if the state court "confronts a set of facts that are materially indistinguishable from a decision of the [U.S. Supreme] Court and nevertheless arrives at a result different from precedent."[1037]

A state court's decision involves an "unreasonable application of clearly established Federal law" when its application is objectively unreasonable. For example, an unreasonable application occurs when a state court correctly identifies the applicable legal principle but unreasonably applies the legal principle to the facts. A federal court may grant relief when a state court has misapplied a "governing legal principle" to "a set of facts different from those of the case in which the principle was announced."[1038]

Unreasonable is not synonymous with incorrect. "A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously

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contrary to clearly established federal law. In addition, the Court held that even if the legal standard used was correct, the decision involved an unreasonable application of clearly established law by adding an additional requirement. *Id.* at 393-97.)

[1033] *See e.g.,* Yarborough v. Alvarado, 541 U.S. 652, 665 (2004); Lockeyer v. Andrade, 538 U.S. 63, 74 (2003).

[1034] Howes v. Fields, 565 U.S. ---, ---, 132 S.Ct. 1181, 1187 (2012).

[1035] Williams v Taylor, 529 U.S. 362, 402-409 (2000).

[1036] Cullen v. Pinholster, 563 U.S. 170, 181-182 (2011).

[1037] Williams v. Taylor, 529 U.S. 362, 406 (2000).

[1038] Lockyer v. Andrade, 538 U.S. 63, 76 (2003).

or incorrectly. Rather, that application must also be unreasonable."[1039]

[10.22] Relief Based on State Court's "Unreasonable Determination" of the Facts

Under AEDPA, a federal court may also grant relief based on a state court's "unreasonable determination of the facts in light of the evidence presented in the State court proceedings."[1040] In *Wiggins v. Smith*, the U.S. Supreme Court found that a state court had both unreasonably applied clearly established federal law and unreasonably determined facts in the state court proceedings.[1041] The claim in *Wiggins* was an ineffective assistance of counsel claim based upon counsel's failure to conduct an adequate investigation before deciding whether to put on mitigating evidence. While counsel had reviewed certain records pertaining to the defendant's background, those records did not reveal evidence of defendant's abusive background. In supporting its conclusion that counsel was not ineffective, the state court found that the defense counsel had reviewed records containing evidence of the abuse. Because the information was not contained in the records that counsel reviewed, the U.S. Supreme Court held that the state court decision was an unreasonable determination of the facts.[1042] The Court's cases have "made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it."[1043]

State courts should carefully review the evidence in the case making certain that the evidence clearly supports the factual findings. When the record contains contradictory evidence, state courts should articulate why certain evidence is more reliable and credible than other evidence.

[1039] *Id.* at 75-76. *See* Prince v. Vincent, 538 U.S. 634 (2003) (though lower court finding was incorrect, it was not objectively unreasonable given that other courts reached similar conclusions).
[1040] 28 U.S.C. §2254(d)(2).
[1041] 539 U.S. 510 (2003).
[1042] *Id.* at 532.
[1043] Holland v. Jackson, 542 U.S. 649, 652 (2004)(per curium)

[10.23] Proof of Prejudice

An applicant must specifically plead and prove the specific violations that form the bases for the claim to habeas relief.[1044] In addition to pleading and proving the elements of each violation, for most violations the applicant must also plead and prove prejudice in order to prevail.[1045] Proof of the violation without proof that the violation harmed or prejudiced the applicant or proceeding is insufficient to warrant relief.[1046]

To further complicate the pleading and proof requirement, different constitutional violations require varying levels, or standards, of proof of prejudice. The various standards range from presumed prejudice, the most lenient standard, to a standard that requires proof that "but for" the violation, the result of the proceeding would have been different. In addition, in some circumstances, identical facts may support allegations of more than one violation.

[10.24] Relief Based on State Court Factual Determinations – Presumption of Correction

Under AEDPA, a federal court may only grant relief based on a state court's determination of facts if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[1047] Moreover, state court factual determinations are presumed to be correct,[1048] and may be rebutted only by clear and convincing evidence. The presumption of correction applies only to state court factual determinations.[1049] The presumption does not apply, for

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[1044] Rules Governing § 2254 Cases, Rule 2(pleading requirement); Brecht v. Abrahamson, 507 U.S. 619 (1993)(proof requirement).
[1045] Brecht v. Abrahamson, 507 U.S. 619 (1993).
[1046] *Id.*; but see 507 U.S. at 638 n.9(acknowledging possibility in "egregious" situation that relief would be granted without proof of prejudice).
[1047] 28 U.S.C. § 2254 (d)(2). *See* Wiggins v. Smith, 539 U.S. 510 (2003).
[1048] 28 U.S.C. § 2254(e)(1).
[1049] Townsend v. Sain, 372 U.S. 293 (1963); *see also* Miller v. Fenton, 474 U.S. 104 (1985); Sumner v. Mata, 449 U.S. 539 (1981); Lavelle v. Della Rose, 410 U.S. 690 (1973).

example, when the state court fails to resolve the factual issues or to provide for a full and fair hearing. Thus, state courts should make meticulous factual findings on every issue raised.

[10.25] Relief Based on State Court Legal Determinations

The presumption of correctness does not apply to a state court's resolution of questions of law or mixed questions of fact and law.[1050] To determine which kind of question is at issue, courts look to see whether the hearing judge is better positioned to decide the issue than the appellate panel.[1051] Issues involving witness credibility, for example, are treated as questions of fact, because the hearing judge actually observes the witnesses' demeanor.[1052] State judges should articulate the basis for their determinations, particularly when they relate to observations that the trial judge is uniquely positioned to make.

[10.26] Establishing the Claim

If the *habeas* petition is not dismissed on procedural grounds, the next inquiry is whether the petition raises issues that are ripe for review and remedy. It is important to note that neither discovery nor an evidentiary hearing is automatic in a habeas proceeding. Petitioner may seek permission to conduct discovery and may request an evidentiary hearing, but summary dismissal of the petition on the merits, without either discovery or a hearing, remains a likely disposition.

[10.27] Discovery

[1050] Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963).
[1051] Miller v. Fenton, 474 U.S. 104, 113-14 (1985) ("the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis;" "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question").
[1052] Maggio v. Fulford, 462 U.S. 111 (1983).

The federal court must authorize discovery before it can be conducted. Rule 6(a) provides that a "judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery."[1053] In order to request permission to engage in discovery, the rule requires a party to "provide reasons for the request" and to "include any proposed interrogatories and requests for admission, and must specify any requested documents."[1054]

[10.28] Evidentiary Hearings

Many, perhaps most, *habeas* claims are resolved without an evidentiary hearing based on the procedural and substantive bars discussed previously.
The rules require dismissal without a hearing in certain circumstances.[1055] The statute prohibits an evidentiary hearing in other circumstances.[1056] A hearing is generally allowed when the applicant's efforts to develop a record in state court were thwarted. As a result, state courts should strive to assure that state court petitioners are given the opportunity to make a complete record in state post-conviction cases. If a hearing is granted, the applicant has a right to be present and to have counsel.[1057]

If the application is not dismissed, the rules require the court to review the pleadings, transcript of the record, and expanded record to determine whether a hearing will be conducted.[1058] An evidentiary hearing is required only when there are factual disputes and when the applicant did not receive a full and fair

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[1053] Rule 6 (a), Rules Governing Section 2254 Cases in the United States District Court.
[1054] *Id.* at (b), and Bracy v. Gramley, 520 U.S. 899, 901 (1997).
[1055] *See* Rule 4, Rules Governing Section 2254 Cases in the United States District Court. A dismissal occurs under Rule 4 before an Answer has been filed; an application might also be dismissed pursuant to a motion filed by the State, after an Answer has been filed and considered; or after consideration of the pleadings and the record.
[1056] 28 U.S.C. § 2254(e)(2). *Cf.* Cullen v. Pinholster, 563 U.S. 170, 181-182 (2011).
[1057] 28 U.S.C. § 2243 ("the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained"); Rule 8(c), Rules Governing Section 2254 Cases in the United States District Court.
[1058] *See* 28 U.S.C.§ 2254(f) & (g); Rule 7, Rules Governing Section 2254 Cases in the United States District Court (provisions related to producing and expanding the state court record).

evidentiary hearing in state court either at trial or in the collateral, post-conviction proceeding.[1059] In other circumstances, in which material facts are disputed, the judge may allow an evidentiary hearing.[1060] The statute provides that "evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit."[1061]

The U.S. Supreme Court has further elaborated on the right to a hearing in federal habeas proceedings. In *Williams v. Taylor*, the U.S. Supreme Court held that an applicant is precluded from having an evidentiary hearing when the applicant failed to develop a factual basis for the claim in state court.[1062] The U.S. Supreme Court interpreted a failure to develop to mean a lack of diligence. Thus, an applicant is entitled to a hearing when the state court made no determination on a factual question through no fault of the applicant. But when the absence of factual determination is the fault of the applicant, the applicant is only entitled to a hearing if the claim is based on a new, retroactive constitutional rule or factual predicate that could not have been previously discovered *and* if the applicant satisfies a rigorous cause-and-prejudice standard.[1063] An applicant is also entitled to a hearing if the state court's determination is not supported by the record or was made following an unfair procedure. The decision in *Williams v. Taylor* highlights the need for state trial courts to make explicit unambiguous factual findings on each and every issue raised in the state courts.

[1059]Rule 8, Rules Governing Section 2254 Cases in the United States District Court; *see*Townsend v. Sain, 372 U.S. 293, 312 (1963)("The appropriate standard is this: Where the facts are in dispute, the federal court in *habeas corpus* must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.").

[1060] Rule 8, Rules Governing Section 2254 Cases in the United States District Court.

[1061] 28 U.S.C. § 2246. If affidavits are admitted, "any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits." *Id.*

[1062] Williams v. Taylor, 529 U.S. 420 (2000); *see also* Townsend v. Sain, 372 U.S. 293 (1963), *overruled in part by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

[1063] 28 U.S.C. §2254(e)(2). The cause-and-prejudice standard requires that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." *Id.* at (e)(2)(B).

[10.29] Appeals

An appeal from the denial of a *habeas corpus* application is not an appeal as of right. Instead, the applicant must seek permission to appeal by seeking a certificate of appealability from either the district court or the court of appeals.[1064] A judge may only issue a certificate of appealability if "the applicant has made a substantial showing of the denial of a constitutional right."[1065] This requirement includes a "showing that reasonable jurists could debate [whether] the [application] should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[1066]

[10.30] Successor Applications

Second or "successor" applications for habeas relief are strictly limited.[1067] The rigid limitations on successive applications make filing a comprehensive, detailed initial application extremely important.

Claims that were raised and disposed of on the merits in prior petitions must be dismissed.[1068] If the claim was dismissed for other reasons, such as to allow return to state court to satisfy exhaustion requirements, the claim is not considered "successive" [1069] and is not subject to summary dismissal, but the claim will nonetheless be dismissed absent compliance with strict statutory requirements. In order to survive dismissal on a successive application, the applicant must show either that the claim is based on a new, previously unavailable rule of constitutional law or that its factual predicate "could not have been discovered previously through the exercise of due

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[1064] 28 U.S.C. § 2253(c)(1).
[1065] *Id.* at (c)(2).
[1066] Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)
"In requiring . . . a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.") (citations omitted).
[1067] 28 U.S.C. § 2244(b).
[1068] 28 U.S.C. § 2244 (b)(1).
[1069] Slack v. McDaniel, 529 U.S. 473 (2000).

diligence." In addition, if the application relies on the second ground, the "facts underlying the claim, if proven and viewed in light of the evidence as a whole, [must] be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."[1070]

Prior to filing a successive application, the applicant must seek an order authorizing the filing from the court of appeals. The three-judge panel may authorize the filing "only if it determines that the application makes a prima facie showing that the application satisfies the [statutory] requirements."[1071]

[10.31] Innocence and *Habeas Corpus* Claims

Claims of innocence arise in federal *habeas corpus* cases in two discrete ways. The first arises when an applicant claims innocence but does not claim a constitutional violation. The claims are referred to as freestanding claims of innocence. An applicant asserting a freestanding claim of innocence asks a court to review the evidence of guilt or innocence in the case but does not allege that the trial included errors of a constitutional magnitude. As a result, reviewing courts give great deference to the previous findings. In order to prevail, the applicant must make a "truly persuasive" showing of innocence.[1072]

While the U.S. Supreme Court had stated that proof of innocence must be "extraordinarily high,"[1073] a specific standard of proof has not been adopted. In *House v. Bell*[1074] the U.S. Supreme Court indicated that the standard was significantly higher than the standard applied to innocence claims that were coupled with allegations of constitutional error.
When an applicant alleges actual innocence as a means at attempting to avoid procedural default, through the miscarriage of justice exception, the innocence claim is referred to as a

[1070] 28 U.S.C. § 2244(b)(2)(B)(i) & (ii).
[1071] *Id.* at (b)(3)(A), (B), & (C).
[1072] Herrera v. Collins, 506 U.S. 390, 417 (1993).
[1073] Herrera v. Collins, 506 U.S. 390, 429 (1993) (White, J., concurring).
[1074] House v. Bell, 547 U.S. 518 (2006).

"gateway claim." The showing of innocence necessary to be granted a hearing on the alleged constitutional error is less demanding than the showing required on freestanding claims. When an applicant claims both actual innocence and constitutional error, the applicant must show that it is more likely than not that no reasonable juror would have found the defendant guilty beyond a reasonable doubt.[1075]

[10.32] Conclusion

Federal *habeas corpus* review is sought by virtually every defendant sentenced to death by a state court. Although these *habeas corpus* petitions are filed in federal courts and determined by federal judges applying federal law, the habeas proceedings and dispositions are affected by many aspects of the state petitioner's trial, direct appeal, and state post-conviction proceeding. It is incumbent upon state court judges to allow capital defendant to raise and fully and fairly litigate all claims arising under the treaties, laws and Constitution of the United States and to rule clearly and definitively on all issues raised.

[1075] Schlup v. Delo, 513 U.S. 298 (1995).

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As the U.S. Supreme Court enunciated over 40 years ago, the death penalty is "qualitatively different from a sentence of imprisonment, however long." Because of that qualitative difference, judges who preside over death penalty cases have a responsibility to assure that all phases of the trial satisfy a higher level of due process and scrutiny than that of non-capital cases. The judge-authors of these chapters not only have expertise presiding over numerous death penalty trials, they also have a breadth of experience from teaching The National Judicial College course on capital cases in partnership with states from coast-to-coast and to individual judges from across the country at the Reno-based course.

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