Criminal Justice Legal Foundation

RETHINKING HABEAS CORPUS

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PREFACE

Review by the lower federal courts of capital sentences already affirmed by the state supreme courts has long been topic of fierce debate. That debate is reaching a fever pitch at the time of this writing. Both the Judicial Conference of the United States and the American Bar Association have named committees to study the problem. The Criminal Justice Legal Foundation has prepared this paper to explore the problems with the present system and to suggest ways to resolve those problems without shutting off relief for those who genuinely deserve it.

This paper is presented in three parts. The first part traces the development of various aspects of habeas corpus law from early times to its present state and suggests some possible directions for its future. The second part studies a group of habeas corpus cases from the federal Eleventh Circuit (Alabama, Florida and Georgia) to determine more precisely why federal courts are setting aside judgments affirmed by state supreme courts. The third part sets out some specific proposals for change in both the federal and state courts.

By presenting the issues from a point of view which is substantially different from the other recent, in-depth works on the subject, we hope to add a better perspective to the debate. With this goal in mind, we present our study and proposal.

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PART I
Background of Habeas Corpus Issues

A. The History and Mythology of the "Great Writ."

Suggesting that habeas corpus be limited, as I will below, invariably produces a vehement reaction. As Judge Friendly noted nearly twenty years ago, "[a]ny murmur of dissatisfaction with [collateral attack on convictions] provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant."[1]

The defenders of collateral attack generate as much heat and as little light today as they did then. They still invoke history in the belief that collateral attack on the final judgments of competent courts is a hallowed, centuries-old tradition.[2] They are very much mistaken. Before turning to the particular questions at hand, then, it may be best to clear out the historical and constitutional underbrush with a brief history of the "Great Writ."

1. The common law writ.

The writ of habeas corpus goes far back into the misty dawn of the common law.[3] The ancient writ, however, bore no resemblance to the procedure debated today. The first writs were similar to modern arrest warrants commanding the sheriff to bring a person to court in order to subject that person to the court's jurisdiction. In 1902, one historian announced "an embarrassing discovery" that the writ "was originally intended not to get people out of prison but to put them in it."[4]

The writ of habeas corpus ad subjiciendum achieved much of its reputation as a safeguard of liberty against oppression during the seventeenth century struggle between the Stuart monarchy and the Parliament. Tension between the courts and the Privy Council had been building for some time.[5] Then in 1627, King Charles I forced some of his subjects to give him loans, in order to finance his government without calling a Parliament. Sir Thomas Darnel and four other knights refused. They were imprisoned by special command of the king.[6] On habeas corpus the court held that the command of the king was sufficient and remanded the prisoners.[7] Parliament responded with the Petition of Right, abolishing the king's power to imprison without cause.[8] The king's evasion of the

1. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970).
2. *See, e.g.*, Raven, *A Matter of Life and Death*, 74 A.B.A. J. 12 (Dec. 1988).
3. This section is written only to refute the persistent myth that collateral attack via habeas corpus is somehow a vital part of our common-law heritage. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 399-405 (1963). Those readers who find English legal history of minimal relevance to contemporary American problems can safely skip this section. *See*, Wright, *Habeas Corpus: Its History and Future*, 81 MICH. L. REV. 802, 803 (1983).
4. Jenks, *The Story of Habeas Corpus*, 18 LAW Q. REV. 64, 65 (1902) (italics omitted). This conclusion is challenged by William Duker in his extensive work on the subject. W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 13 (1980). Duker does not disagree, however, with Jenks's general thesis that the ancient writ had no relation to its present function. *Id.* at 12.
5. *Id.* at 41-43.
6. *Id.* at 43-44.
7. Darnel's Case, 3 State Trials 1, 8 (1627). Duker maintains that this was a correct decision under the law of the time. Duker, *supra* note 4, at 44.
8. Duker, *supra* note 4, at 45; Proceedings in Parliament Relating to the Liberty of the Subject, 3 State Trials 59, 187 (1628); 3 W. BLACKSTONE, COMMENTARIES 134 (1768).

Petition of Right, among many other grievances, led to the "Grand Remonstrance."[9] After the overthrow of the monarchy, however, Cromwell showed no more respect for the law and the writ than had the deposed king.[10]

The monarchy was restored in 1660, and during the reign of King Charles II there occurred one of the most famous and misunderstood events in habeas corpus history: *Bushell's Case*.[11] William Penn and William Mead were tried in the Court of Sessions for "tumultuous assembly."[12] The jury repeatedly refused to return a verdict of guilty of anything other than "speaking in Gracechurch Street."[13] The judge fined the jurors forty marks each and imprisoned them until they paid.

The Court of Common Pleas, the principal court for the trial of civil matters,[14] issued a writ of habeas corpus. The return stated that the Court of Sessions had decided that the jurors had decided against manifest evidence.[15] The court held this insufficient, stating "our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs."[16]

It is not surprising that the advocates of unlimited collateral attack on criminal convictions would seize upon *Bushell's Case* as authority, and Justice Brennan did so with gusto in *Fay* v. *Noia*.[17] *Fay's* reliance on *Bushell*, however, has been the subject of devastating scholarly commentary.

The most direct attack was by Professor Oaks, who pointed out numerous flaws in the *Fay* version of history.[18] The clearest and most obvious ground of distinction is found within *Bushell* itself. Chief Justice Vaughn explicitly considered the case of the person accused of treason or felony and found the cases "not alike."[19] The alleged felon had a remedy in the usual course of the common law.[20] If habeas did not lie to review contempt, on the other hand, the committing judge would be accuser, judge and jury, and the prisoner would be kept in jail indefinitely on the unreviewable decision of a single person.[21]

Additional grounds for distinction involve the failure of the return to specify that the acquittal was entered corruptly, without which the conduct was not contemptuous,[22] and the complexities of the seventeenth-century English concept of jurisdiction.[23]

9. Duker, *supra* note 4, at 47-48.
10. Duker, *supra* note 4, at 48-52.
11. 124 Eng. Rep. 1006 (C.P. 1670); Case of the Imprisonment of Edward Bushell for Alleged Misconduct as a Juryman, 6 State Trials 999 (1670).
12. The Trial of William Penn and William Mead, at the Old Bailey, for a Tumultuous Assembly, 6 State Trials 951 (1670).
13. *Id.* at 962.
14. *See* 3 W. BLACKSTONE, COMMENTARIES 40 (1768).
15. 124 Eng. Rep. at 1007.
16. *Ibid.*
17. 372 U.S. 391, 403-405 (1963).
18. Oaks, *Legal History in the High Court — Habeas Corpus*, 64 MICH. L. REV. 451, 461-468 (1966).
19. *Id.* at 466-467; 124 Eng. Rep. at 1009-1010.
20. 124 Eng. Rep. at 1010.
21. *Ibid.*
22. Oaks, *supra* note 18, at 467.
23. *See* Duker, *supra* note 4, at 226-228. Duker also agrees that the *Fay* history is erroneous, citing Oaks. *Id.* at 274 n. 20. For extensive notes on the distinction between superior and inferior courts in habeas contempt cases *see* 2 M. HALE, PLEAS OF THE CROWN 149k (Stokes and Ingersoll ed. 1847).

By the time of the American Revolution, the law was clear that habeas corpus was not available to collaterally attack a conviction of crime by a court of competent jurisdiction. Immediately after his famous praise of the "great and efficacious writ,"[24] Blackstone notes that if the petition showed that a prisoner was detained for crime by a competent court, the court would deny the writ summarily, "there appearing, upon [the prisoner's] own shewing, sufficient grounds to confine him."[25]

2. Federal habeas from 1789 to 1953.

The writ was brought to America and incorporated in our Constitution.[26] The first Congress expressly granted the federal courts power to issue the writ.[27] The common law limitation remained, however. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."[28]

The limitation recognized in *Watkins* remained unchanged and was generally understood to be in force in 1867. In that year, Congress extended jurisdiction to state prisoners held in violation of the "constitution, or of any treaty or law of the United States."[29] The legislative history of this measure has been furiously and voluminously debated.[30] This paper will not add to this debate except to add one observation. If Congress had intended to change the nature of the writ itself and overrule the principles stated in Blackstone and *Watkins*, as opposed to merely extending federal jurisdiction into an area formerly served only by state habeas, it seems very strange that it did not say so explicitly. The omission is particularly odd in light of the fact that section 2 of the very same act provided for an adequate remedy by writ of error to the Supreme Court upon a denial of a federal claim.[31]

After Congress extended the federal writ of habeas corpus to state prisoners in 1867, the question arose whether a court could and should issue the writ before the state courts have passed on the federal question. In *Ex parte Royall*,[32] the Supreme Court held that the federal courts have the power to issue pre-trial writs,[33] but should not do so until the state courts have considered the question.[34] The court also held that the federal courts could consider a habeas petition *after* the state courts had acted,[35] but *only* on the ground that the state courts lacked jurisdiction "and the

24. 3 W. BLACKSTONE, COMMENTARIES 131 (1768).
25. *Id.* at 132. In the writings of this period, discussions of the use of the writ to collaterally attack final convictions are conspicuous by their absence. Hale's entire discussion of habeas corpus is under the heading of pretrial bail, 2 Hale, *supra* note 25, at 140-149, with no mention of collateral attack on convictions.
26. U.S. Const. art. I, § 9, cl. 2.
27. Judiciary Act § 14, 1 Stat. 81 (1789).
28. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 203 (1830). *See* also *Ex parte* Kearney, 20 U.S. (7 Wheat.) 38 (1822).
29. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386.
30. *See* Bator, *Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV L. REV. 441, 474-77 (1963) (cited below as "Bator"); Fay v. Noia, *supra*, 372 U.S. at 415-18; *id.* at 452-53 (Harlan, J., dissenting).
31. 14 Stat. at 386-87.
32. 117 U.S. 241 (1886).
33. *Id.* at 250.
34. *Id.* at 252.
35. *Id.* at 253.

entire proceeding against him is a nullity."[36] Thus was born the "exhaustion doctrine," now codified in 28 U.S.C. § 2254(b).[37]

The relitigation of jurisdiction on habeas corpus anticipated by the *Royall* decision was no different than any other collateral attack. Relitigation of a *jurisdictional* issue already decided at trial and on appeal was not a special feature of habeas corpus but merely an application of the prevailing rule in the 1880's that jurisdiction could always be relitigated in any kind of case.[38]

The development of habeas corpus as a device to relitigate questions already decided by courts of competent jurisdiction was entirely a judicial invention. It began with the idea that the imposition of both fine and imprisonment, under a statute authorizing only one or the other, was beyond the "jurisdiction" of the court.[39] It was further expanded with the holding that a federal court has no jurisdiction to try an "infamous" crime without an indictment.[40] The outer limit of nineteenth century collateral attack was reached in *Ex parte Siebold*.[41] On the theory that an unconstitutional statute is absolutely void, it was held that constitutionality of the statute creating the offense could be reconsidered on habeas.[42] The rule was still in force, though, that nonjurisdictional errors of procedure could not be collaterally attacked, even if they rose to constitutional stature.[43]

In 1944, the Supreme Court summarized the effect of the prior state adjudication this way:

> "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, *a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. Salinger* v. *Loisel*, 265 U.S. 224, 230-32. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney* v. *Holohan*, *supra*, [294 U.S. 103,] 115, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. *Moore* v. *Dempsey*, 261 U.S. 86; *Ex parte Davis*, 318 U.S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless."[44]

Shortly afterward, the Supreme Court assured the states that the power of lower federal courts to upset state supreme court decisions had been used "sparingly" and "only in a negligible number of instances."[45] In *Darr* v. *Burford*,[46] the Supreme Court stated that a federal habeas corpus court "*may* decline to examine further into the merits because they have already been decided against the petitioner."[47]

36. *Id.* at 248.
37. *See* section E, *infra*, pp. 15-17.
38. *See* Kilbourn v. Thompson, 103 U.S. 168, 197-98 (1880). This is no longer the rule in civil cases, however. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n. 9 (1982).
39. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 176 (1873).
40. *Ex parte* Wilson, 114 U.S. 417, 429 (1885).
41. 100 U.S. 371 (1879).
42. *Id.* at 376-377.
43. *In re* Belt, 159 U.S. 95 (1895) (validity of jury waiver statute); *Matter of* Moran, 203 U.S. 96, 105 (1906) (allegedly forced self-incrimination not "jurisdictional").
44. *Ex parte* Hawk, 321 U.S. 114, 118 (1944) (italics added).
45. Wade v. Mayo, 334 U.S. 672, 681 (1948).
46. 339 U.S. 200 (1950).
47. *Id.* at 215 (italics added).

Then, in 1953, the Supreme Court decided *Brown* v. *Allen*.[48] Under the heading "*Effect of State Court Adjudications*," the majority opinion makes this statement:

> "The fact that no weight is to be given by the Federal District Court to our denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. *A fortiori*, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. [Citations.] Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue. [Citation.] In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*."[49]

These last two sentences are far too cryptic to be useful as guidance. What weight is the Court referring to? Justice Frankfurter wrote a long concurring opinion spelling out what he though the district court should do, stating that the "views of the Court on these questions may thus be drawn from the two opinions jointly."[50]

Justice Frankfurter had this to say about deference to state court rulings on federal legal questions:

> "Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts [citation], the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.
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> Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."[51]

This is *de novo* review, which Justice Frankfurter maintains is *commanded* by Congress. What happened to the judge's discretion to accept the prior state adjudication, which had been reaffirmed only three years earlier in *Darr*?[52] Congress had not spoken in the interim.

For better or worse, Justice Frankfurter's opinion has been followed by the federal courts. With the exception of search and seizure exclusionary rule claims,[53] federal courts *do* "ordinarily

48. 344 U.S. 443.
49. *Id.* at 457-58.
50. *Id.* at 497.
51. *Id.* at 507-508.
52. *See* note 46, *supra*, and accompanying text.
53. *See* Stone v. Powell, 428 U.S. 465 (1976).

re-examine upon writ of habeas corpus the questions [previously] adjudicated" in state court, exactly the opposite of the rule stated in *Hawk*.[54] Whether they *should* is open to serious question.

The point of this abbreviated history is that the use of habeas corpus as a device to relitigate questions which were raised or could have been raised in the original trial and appeal is entirely a creation of the Supreme Court. The decision in *Brown v. Allen* was not compelled by the common law, the Constitution or Congress, but only by the Supreme Court's deep distrust of the state courts. That distrust may have been justified at the time, particularly in racial matters. As that problem fades, though, so does the need for this massive intrusion on the finality of state judgments.[55] Like the Constitution itself, habeas corpus is not an object of worship to be mummified and preserved unchanged, but rather a flexible doctrine which has been and can continue to be expanded *and contracted* to meet the needs of a changing nation.[56]

B. The Bill of Rights and Fundamental Fairness.

1. Pre-incorporation federal questions.

The original Constitution contained two sets of limitations on government power. A long list, Article I, section 9, applied to the federal government. A shorter list, Article I, section 10, applied to the states. The latter list contained only two criminal procedure provisions: the bill of attainder and ex post facto clauses.

The opponents of the Constitution were dissatisfied with the lack of a full bill of rights restricting the new federal government, and the Federalists promised to remedy this deficiency by amendment. In *Barron* v. *Baltimore*,[57] the Supreme Court settled that the Bill of Rights did not apply to the states.

The Fourteenth Amendment was ratified seventy-seven years later. The justices who saw it adopted had no doubt that it did not incorporate the Bill of Rights and make it apply to the states.[58] As of the date of the Supreme Court decision in *Brown* v. *Allen*,[59] the Fourteenth Amendment was still deemed to incorporate only those guarantees "implicit in the concept of ordered liberty."[60]

At the time *Brown* was decided, then, there were very few federal constitutional limitations on criminal procedure. The equal protection clause prohibited intentional racial discrimination in jury selection.[61] The due process clause protected against such fundamentally unfair procedures as the use of coerced confessions,[62] judgment by a fact-finder with a financial interest in conviction[63] and trials dominated by a mob.[64] The specific provisions of the Bill of Rights which relate to neither

54. *See* note 44, *supra*, and accompanying text.
55. Bator, *supra* note 30, at 523-24.
56. *See* Wright, *Habeas Corpus: Its History and Its Future* (Book Review), 81 MICH. L. REV. 802, 810 (1983); Book Note, 95 HARV. L. REV. 1186, 1188-89 (1982) (reviewing Duker, *supra* note 4).
57. 32 U.S. (7 Pet.) 243 (1883).
58. Slaughterhouse Cases, 77 U.S. 273 (1869).
59. *See* note 48 and accompanying text, *supra*.
60. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
61. Strauder v. West Virginia, 100 U.S. 303 (1880).
62. Brown v. Mississippi, 297 U.S. 278 (1936).
63. Tumey v. Ohio, 273 U.S. 510 (1927).
64. Moore v. Dempsey, 261 U.S. 86 (1923).

racial discrimination nor fundamental fairness, however, remained inapplicable. These included grand jury indictment,[65] the self-incrimination privilege,[66] double jeopardy[67] and even trial by jury.[68] "Constitutional error" and "fundamental error" were synonymous. There were no "harmless error" cases involving state convictions in the federal courts because, by definition, federal questions always went either to the fundamental fairness of the trial or to the scourge of racism.

2. The "detailed code of criminal procedure."

During the 1960s, the scope of "federal questions" exploded. One by one, the criminal procedure provisions of the Bill of Rights were found to be "incorporated" in the due process clause of the Fourteenth Amendment.[69] Only the grand jury indictment clause remains unincorporated today.

The incorporation of the specific guarantees of the Bill of Rights was quickly followed by the promulgation of rules which vastly expanded those guarantees. "The Bill of Rights ... has become a detailed Code of Criminal Procedure, to which a new chapter is added every year."[70]

Many of these rules are far from fundamental.[71] The exclusionary rule of *Mapp* v. *Ohio*[72] is an extreme case serving a purely external purpose and actually detracting from the fairness and accuracy of the trial.[73] The prophylactic rule of *Miranda* v. *Arizona*[74] is subject to similar criticism in those cases where the state clearly establishes that a confession was, in fact, voluntary.[75]

The "no comment" rule of *Griffin* v. *California*[76] is a prime example of a rule on the fringe. Nothing can be more obvious to a jury than the defendant's failure to take the stand and contradict the evidence against him. Whether comment on that failure is fair is a question on which reasonable people can and do differ.[77] The Supreme Court decided in *Chapman* v. *California*[78] that "*Griffin* error" was subject to harmless error analysis. Such an error was found to be harmless beyond a reasonable doubt in *United States* v. *Hasting*.[79]

If a given type of error is so far removed from the fundamental fairness of a trial that it may be harmless beyond a reasonable doubt, should that type of error be subject to relitigation *de novo* on habeas corpus? That question did not exist for "due process" errors at the time of *Brown*, because only fundamentally unfair procedures constituted due process violations.[80] "*Griffin* error" is a far

65. Hurtado v. California, 110 U.S. 516 (1984).
66. Twining v. New Jersey, 211 U.S. 78 (1908).
67. Palko, *supra* note 60.
68. *See id.* at 425.
69. *See* P. LEWIS, CRIMINAL PROCEDURE: THE SUPREME COURT'S VIEW-CASES 49 (1979).
70. Friendly, *supra* note 1, at 155-156.
71. *Id.* at 156-57.
72. 367 U.S. 643 (1961).
73. *See* Stone v. Powell, 428 U.S. 465, 490 (1976).
74. 384 U.S. 436 (1966).
75. *See* Duckworth v. Eagan, 109 S.Ct. 2875, 2884 (1989) (O'Connor, J., concurring); Friendly, *supra* note 1, at 163.
76. 380 U.S. 609 (1965).
77. The comment in *Griffin* was expressly authorized by the state constitution. Cal. Const. art. I, former § 13, repealed 1974, quoted in part in Griffin, *supra*, 380 U.S. at 610 n. 2.
78. 386 U.S. 18 (1967).
79. 461 U.S. 499 (1983).
80. *See* Rose v. Lundy, 455 U.S. 509, 548 n. 18 (1982) (Stevens, J., dissenting).

cry from thumbscrew confessions and lynch mob trials. So are many other irregularities which are today deemed constitutional issues, including the right *not* to have counsel,[81] the right to have a six-member jury rather than five[82] and the right of a male defendant to have women in the venire from which his jury is selected.[83]

The argument that failure to follow a particular rule does not justify collateral attack does not imply disagreement with the rule itself. Rather, it is a recognition that at some point the cure becomes worse than the disease.

Not every error warrants reversal on appeal. All jurisdictions have "harmless error" rules of some sort.[84] Some errors are reversible *per se*,[85] others are reversible unless harmless beyond a reasonable doubt,[86] while others warrant reversal only if they affect the substantial rights of the parties.[87] Because reversal of a judgment is a more drastic remedy than sustaining an objection at trial, it extends to fewer errors.

Restriction of habeas corpus to fewer errors than those which merit reversal on direct appeal is merely an extension of the same principle. The remedy is more drastic, so it should be more sparingly invoked. While many would claim that all constitutional errors are necessarily fundamental and justify collateral attack, this contention ignores the vast breadth of constitutional criminal procedure jurisprudence. Justice Stevens, who is not a law-and-order hard-liner by any stretch of the imagination, recognized this in his dissent in *Rose* v. *Lundy*:[88]

> "I recognize the apparent incongruity in suggesting that there is a class of constitutional error — not constitutionally harmless — that does not render a criminal proceeding fundamentally unfair. It may be argued, with considerable force, that a rule of procedure that is not necessary to ensure fundamental fairness is not worthy of constitutional status. The fact that such a category of constitutional error exists, however, is demonstrated by the jurisprudence of this Court concerning the retroactive application of newly recognized constitutional rights.
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> Whatever the correct explanation of these decisions may be, they demonstrate that the Court's constitutional jurisprudence has expanded beyond the concept of ensuring fundamental fairness to the accused. My point here is simply that this expansion need not, and should not, be applied to collateral attacks on final judgments."

81. Faretta v. California, 422 U.S. 806 (1975).
82. Ballew v. Georgia, 435 U.S. 223 (1978).
83. Taylor v. Louisiana, 419 U.S. 522 (1975).
84. *See* Chapman v. California, 386 U.S. 18, 22 (1967).
85. *Id.* at 23.
86. *Id.* at 24.
87. 28 U.S.C. § 2111.
88. 455 U.S. 509, 543-44 n. 8 (1982).

C. Finality.

1. The need for finality.

In *Sanders* v. *United States*,[89] Justice Brennan wrote for the Court "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Judge Henry Friendly fired back in his famous law review article. "Why do they have *no* place? ... '[T]he policy against incarcerating or executing an innocent man ... should far outweigh the desired termination of litigation.' But this shows only that 'conventional notions of finality' should not have *as much* place in criminal as civil litigation, not that they should have *none*."[90]

There are a number of reasons why finality is important in criminal cases generally and capital cases in particular. Keeping a judgment open to attack imposes a heavy burden and requires a compelling justification.

First and foremost is the impact of nonfinality on innocent people. Although a criminal case is formally designated as the people or the state against the defendant, it deeply involves others. The victim, the family of the victim and the witnesses must be considered.

In homicide cases the pendency of the case hangs like a menacing thundercloud over the lives of the family and the witnesses. "Will justice ever be done? Will I have to endure testifying and cross-examination again? Will this monster ever be paroled or escape? Will he take revenge on me for testifying? Will he have me killed to prevent my testimony on retrial."[91] These questions haunt the daily lives of the witnesses and the families of the victims.

A few years back Justice Powell gave a speech decrying the sluggishness of the system. Professor Anthony Amsterdam objected that "he nowhere tells us why it makes the least earthly difference to anybody but the condemned inmate whether the death sentence, if finally held valid, is executed three or four years rather than, say, two years after imposition."[92] It is not perfectly obvious? Has Professor Amsterdam *ever* spoken to the families of the victims of any of the murderers he has represented? Apparently not. If he had, he would immediately know precisely why it makes "the least earthly difference."[93]

Society also has an interest in reasonably prompt execution of judgment, aside from the interests of the victims and the witnesses. These interests are bound up with the reasons why we have capital punishment to begin with. Professor LaFave has identified six theories of punishment.[94] Three of

89. 373 U.S. 1, 8 (1963).
90. Friendly, *supra* note 1, 149-50 (italics in original).
91. Incarceration is not sufficient to prevent such murders. *See* People v. Allen, 42 Cal.3d 1222, 729 P.2d 115 (1986).
92. Amsterdam, *The Supreme Court and Capital Punishment*, 14 Human Rights 14, 52 (Winter 1987).
93. In addition, Professor Amsterdam's assumption that collateral review only involves a one or two year delay is ludicrous. *See* Table 2, p. 36, *infra*.
94. 1 LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5, 30-36 (1986).

these are relevant to the present discussion.

Incapacitation may be the most important societal interest for the worst of our criminals. When a person has committed a murder even more heinous than the "usual" murder, the overriding imperative is to make absolutely certain that he never does it again. The fact that the murderer "is securely housed in a maximum security facility"[95] is no guarantee. Inmates commit murder all the time. In the 42-month period ending July 1, 1985, prison inmates killed 372 people *within* prisons.[96] Nor are those on the inside the only ones in danger. In 1984, 847 prisoners escaped from medium and maximum security facilities.[97] In the *Knight* case discussed in part II of this paper, the defendant committed and was convicted of a second murder while on collateral review.[98] There are no cases in the post-*Furman* era of anyone being executed and subsequently proven innocent.[99] There is at least one case of an innocent person being killed *because* of collateral review.

The second reason for capital punishment is general deterrence, the idea that the threat of punishment will deter people from committing crimes. Belief in the deterrent value of capital punishment is a common-sense belief, subscribed to by two-thirds of the American people.[100] That same common sense dictates that a sentence executed while public memory of the crime is reasonably fresh would have more deterrent effect than one executed ten years after the fact.

The final theory applicable to capital punishment is one that has enjoyed a curious rebirth among liberals: retribution.[101] Promptness is less important here than with the other two reasons, but even with retribution, the benefit to society is enhanced by avoiding undue delay.[102]

2. The function of relitigation.

Weighed against finality is the possibility that an injustice may be done. This consideration is clearly of greatest weight when the defendant is actually innocent. It is of least weight when the rule allegedly violated is one for enforcement of a collateral policy and irrelevant to the justice of the case.

Relitigation can prevent an erroneous judgment where the facts were, for some reason, not properly presented at the first hearing. Congress has carefully specified the circumstances for relitigation of factual questions,[103] and there seems to be little controversy on this point.

Another function of relitigation is to insure that state courts properly obey the precedents established by the United States Supreme Court. Habeas relief is no doubt proper when a state court simply refuses to follow binding precedent in flagrant defiance of stare decisis.

95. Amsterdam, *supra* note 92, at 52.
96. U.S. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1986*, 427.
97. *Id.* at 425.
98. *See* Appendix C, page C-22, *infra*.
99. The one innocent person *sentenced* to death obtained relief on direct review, Adams v. Texas, 448 U.S. 38 (1980).
100. *Sourcebook*, *supra* note 96, at 104.
101. *See* Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 WEST. ST. L. REV. 95, 99-100 (1987).
102. *See* generally LAFAVE, *supra* note 94, at 35-36.
103. 28 U.S.C § 2254(d).

For non-factual claims which are not clearly meritorious, relitigation *de novo* serves two functions. First, it gives the defendant two bites at the apple. If he can convince *either* of two sets of judges, he wins. Because many issues are nebulous and because judges differ widely in their attitudes, especially in capital cases, the more chances a defendant gets, the greater his likelihood of success. Suppose, for example, a defendant has a marginal claim which only thirty percent of courts in either system would consider meritorious. With only one final review, his chances are simply thirty percent, but if he need win only in either of two separate reviews, his chances jump to fifty-one percent, better than even.[104]

The second function of dual review is delay and expense. Delay for its own sake may very well be a goal of many capital habeas petitioners.[105] Expense for its own sake may be the goal of the anti-death-penalty bar. The claim is frequently made that capital punishment is costing more than it is worth and we should therefore scrap it.[106] The counter argument is that it is costing far more than it needs to cost.

The finality question must be answered by balancing the need for finality against the legitimate functions of relitigation. The present rules of habeas corpus do not strike the correct balance but instead open the door to the illegitimate functions of relitigation.

D. New Claims Raised After Trial.

The general rule in most jurisdictions is that a defendant cannot raise on appeal an objection that he could have made but did not make at trial.[107] An exception to this rule permits reversal for " 'particularly egregious errors,' ... those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' "[108] Most jurisdictions also have rules to the effect that a claim which could have been raised on appeal but was not may not be raised on habeas corpus,[109] though this is often subject to exceptions.

When a state convict seeks federal habeas corpus on an objection not raised at the proper time in state court, the state may assert the "procedural bar" of failure to raise the claim. The Supreme Court's treatment of state procedural bars has shifted radically through the years.

1. Development of the Sykes rule.

In *Brown* v. *Allen*,[110] the Court stated in absolute terms that "failure to use a state's available remedy, in the absence of some interference or incapacity, . . ., *bars* federal habeas corpus. The statute *requires* that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to *empower* the Federal District Court to issue the writ."[111] Words can hardly state more clearly that this rule is a limit on the power to issue the writ, not discretion on whether to issue it.

104. The state wins only if it wins in both courts. Thus, the state's chances are 0.7 * 0.7 = 0.49.
105. Godbold, *Pro Bono Representation of Death-Sentenced Inmates*, 42 REC. A.B. CITY N.Y. 859, 867 (1987).
106. *See Justice Stevens blasts court overload at conference*, The (Sacramento) Daily Recorder, July 13, 1989 at 3, col. 1.
107. *See* United States v. Young, 470 U.S. 1, 16 n. 13 (1985).
108. *Id.* at 15 (citations omitted).
109. *See, e.g., In re* Shipp, 62 Cal.2d 547, 399 P.2d 571 (1965).
110. 344 U.S. 443 (1953).
111. *Id.* at 487 (italics added).

This holding of *Brown* was effectively overruled by a Court pretending to follow precedent in *Fay* v. *Noia*.[112] After tracing the history of habeas corpus over 32 pages and 37 footnotes, Justice Brennan wrote "Our survey discloses nothing to suggest that the Federal District Court lacked the *power* to order Noia discharged because of a procedural forfeiture he may have incurred under state law. On the contrary, ... the course of decisions in the Supreme Court extending over nearly a century are wholly irreconcilable with such a limitation."[113] The Ministry of Truth in Orwell's *1984* could scarcely have done a better job. The majority's historical duplicity did not escape the notice of the dissenting justices.[114] *Fay* v. *Noia* replaced the *Brown* rule with the rule that a state procedural bar would not preclude federal habeas unless it amounted to a deliberate bypass of state remedies by the defendant.[115]

The "sweeping language" of *Fay* v. *Noia* was rejected as dicta by the Supreme Court in *Wainwright* v. *Sykes*.[116] The *Sykes* rule is somewhere between *Fay* and *Brown*. A claim barred in state court will not be considered on federal habeas unless the defendant had cause for the default and suffered prejudice as a result.[117]

The core purpose of the procedural bar rule is to require the defendant to put forward all of his challenges to his trial at the earliest possible time. If the objection has merit, early recognition of the claim will permit correction at the earliest possible time and avoid the waste of scarce judicial resources. Retrial, if necessary, can proceed promptly while witnesses' memories are still reasonably fresh.[118]

2. The actual innocence exception.

An additional exception to procedural bars was created in *Murray* v. *Carrier*,[119] "that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[120] This salutary rule is part of a general evolution of habeas corpus toward a recognition that innocence *is* relevant. While erecting barriers to relitigation by guilty defendants, as in *Sykes* and *Stone* v. *Powell*,[121] the Court has lowered them for that very rare defendant who is actually innocent.[122] Even a petitioner who failed the very liberal "deliberate bypass" test of *Fay* v. *Noia* could obtain relief under *Murray* v. *Carrier* if he could show a probability of innocence.

Carrier also recognized another aspect of the procedural bar rule that moves habeas corpus away from technical defects in the trial and toward the fundamental fairness of the proceedings. The

112. 372 U.S. 391 (1963).
113. *Id.* at 426 (italics in original).
114. *Id.* at 448 (Clark, J., dissenting); *id.* at 462 (Harlan, J., dissenting).
115. *Id.* at 438.
116. 433 U.S. 72, 87-88 (1977).
117. *Id.* at 87.
118. *See id.* at 88; Reed v. Ross, 468 U.S. 1, 10-11 (1984).
119. 477 U.S. 478 (1986).
120. *Id.* at 496.
121. 428 U.S. 465 (1976).
122. In his first eleven years of judicial experience, Judge Friendly had real doubt of the guilt of only a half dozen defendants. Friendly, *supra* note 1, at 160 n. 94.

defendant has a right to the effective assistance of counsel. If a particular action of the trial judge or prosecutor renders a trial fundamentally unfair, an effective attorney will surely object. If the attorney does not object to such an egregious error, the defendant will have an ineffective assistance claim. "The ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremedied manifest injustices."[123]

Those claims that are not raised by an effective attorney are necessarily the marginal claims which do not go to the fundamental fairness of the trial. An error does not "reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment ... if the probable significance of the claim is belied by the fact that otherwise competent defense counsel did not raise a timely objection."[124]

Thus the *Sykes/Carrier* rule is part of a general movement in habeas corpus law away from overturning final convictions for minor defects, reserving this drastic remedy for cases which were either fundamentally unfair or which reached unjust results.[125]

On the same day that the Supreme Court created the "actual innocence" exception, it acknowledged that the concept "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense."[126] The Court's answer was unsatisfactory, merely stating that the alleged error "did not serve to pervert the jury's deliberations."[127] This statement provides no guidance at all to lower courts.

To apply the *Carrier* exception, we need to back up one step. Its purpose is to implement "the imperative of correcting a fundamentally unjust incarceration."[128] The question then, is not the process-based question of perversion of jury deliberations, but rather the result-based question of when a death sentence for a guilty defendant is or is not "fundamentally unjust."

The opponents of capital punishment believe that all death sentences are fundamentally unjust and therefore advocate the abandonment of the *Sykes* standard in capital cases.[129] The American people overwhelmingly disagree,[130] however, and the abandonment of *Sykes* does not merit serious consideration.

Upon review of the past 17 years of capital punishment law, it appears that the Supreme Court has devoted a great deal of effort and thought to this question, and the answers to the question of the fundamental justice of a death sentence are readily at hand. First, with regard to crimes against individuals, the crime must be murder.[131] Second, the state must have prescribed some narrowing process. Some statutorily-prescribed aggravating circumstance must be present to make the crime even more despicable than "ordinary" murder.[132] Even if the crime is murder and a statutory aggravating circumstance is present, the Supreme Court will not permit a death sentence unless the

123. *Id.* at 496.
124. Rose v. Lundy, 455 U.S. 509, 543 n. 9 (1982) (Stevens, J., dissenting).
125. *See ibid.* *See* also notes 84-88 and accompanying text, *supra*.
126. Smith v. Murray, 477 U.S. 527, 537 (1986).
127. *Id.* at 538.
128. Carrier, 477 U.S. at 495, quoting Engle v. Isaac, 456 U.S. 107, 135 (1982).
129. *See* Robbins, *Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions in Capital Cases*, 89 (1989) (background and issues paper for ABA Task Force).
130. Sourcebook, *supra* note 96, at 100-101; *Crime in America*, NATIONAL L.J. S19 (Aug. 7, 1989).
131. *See* Coker v. Georgia, 433 U.S. 584 (1977). Crimes against sovereignty, such as treason, may warrant a different analysis.
132. *See* Gregg v. Georgia, 428 U.S. 153, 196-97 (1976) (plurality).

defendant personally killed or intended to kill.[133] The Supreme Court has also prohibited the execution of the insane,[134] and, for all practical purposes, persons under 16 at the time of the offense.[135] The Court declined to prohibit execution of the moderately retarded in *Penry* v. *Lynaugh*,[136] but indicated that the profoundly and severely retarded would qualify for the insanity exemption under *Ford*.[137]

If a defendant is in fact guilty of murder with aggravating circumstances and none of the mandatory exceptions applies, is it possible that the sentence can nonetheless be "fundamentally unjust?" There may be cases where justice *should* be tempered with mercy, but that does not make the failure to extend mercy fundamentally unjust.

In the hundreds of death penalty cases I have read, there has not been a one single case where the defendant was guilty of the crime and did not qualify for any of the above exemptions and where I nonetheless felt that the penalty was fundamentally unjust. At worst, the cases are like Penry's, where even though the sentence constitutes "just deserts" for the crime, the extension of mercy would be appropriate.

But the extension of post-judgment mercy is not vested in the judicial branch. The clemency power is executive. It may be argued that the political climate renders executive clemency inadequate, but that climate is a direct result of judicial obstruction of the death penalty.[138] If justice were done with reasonable promptness in that vast majority of cases where the penalty is richly deserved, clemency in proper cases would once again be politically feasible and would again become a vital part of the system.

The answer to the *Carrier* question in penalty phase review, then, is that a death sentence is fundamentally unjust if it was not within the discretion of the sentencer to impose, that is, if the defendant is not guilty of a capital offense as defined by the combination of the statute and the restrictions imposed by the Supreme Court. Otherwise, a claim not raised at the appropriate time without cause should be barred, bearing in mind that failure to object to a fundamentally unfair procedure creates a separate ineffective assistance claim. This rule insures that neither a fundamental injustice nor a fundamentally unfair sentencing proceeding will escape scrutiny under *Sykes*. Appeals to mercy, on the other hand, should be addressed to the governor.[139]

133. Enmund v. Florida, 458 U.S. 782 (1982).
134. Ford v. Wainwright, 477 U.S. 399 (1986).
135. *See* Thompson v. Oklahoma, 108 S.Ct. 2687, 101 L.Ed.2d 702, (1988); Stanford v. Kentucky, 109 S.Ct. 2969 (1989).
136. 109 S.Ct. 2934 (1989).
137. *Id.* at 2956.
138. The margin of the number of Americans favoring capital punishment over those opposing it shot up sixteen percent between March 1972 (pre-*Furman*) and November 1972 (post-*Furman*), by far the most dramatic shift in the fifty years Gallup has been asking the question. *See* Scheidegger, *supra* note 101, at 97.
139. In a previous proposal, I suggested that a case where *any* reasonable person properly applying the law would *have* to conclude that the mitigating circumstances did outweigh the aggravating would also qualify. After reviewing the appalling mishandling of harmless error in the Eleventh Circuit, p. 40, *infra*, I regretfully conclude that the federal courts cannot be trusted with such an open-ended standard.

E. The Exhaustion Doctrine.

As noted earlier,[140] federal habeas corpus law requires that the defendant first exhaust available state remedies. He must present a claim on appeal, if possible, or in a state collateral proceeding before he can present it to a federal court.

1. Relitigation.

When the exhaustion rule was laid down in *Royall*, the burden of relitigation was minor because it was limited to jurisdictional issues. When Congress codified the exhaustion doctrine in 1948,[141] it did so with explicit reference to *Ex parte Hawk*,[142] which indicated that issues litigated on direct appeal would ordinarily not be relitigated.[143] Exhaustion is very different today.

The exhaustion rule continues to make sense where the historical facts constitute the core of the dispute. The federal courts are required, at least in theory, to defer to the state court determination absent unusual circumstances.[144] The state court proceedings therefore serve a useful function.

The exhaustion rule also makes sense where the rule of law is clearly in favor of the petitioner and he is highly likely to be granted relief by the state court. It is better to let the state overturn its own erroneous judgment than have the federal government interfere.[145]

Unfortunately the bulk of habeas claims fit neither of these descriptions. Most claims are questions of law or mixed questions. Most are either without merit or close questions. The exhaustion rule requires that these claims be presented first to the state courts and, if defendant is unsuccessful, presented again to a federal court which completely disregards the prior decision. Why?

It is said that the exhaustion rule furthers comity between courts and minimizes friction between the systems.[146] This claim is difficult to swallow under a system of *de novo* review. How does it minimize friction for one court to say to another "Go ahead and make your decision, but if you decide against the defendant we will completely disregard your decision and redecide the case ourselves."

Few would argue against requiring that a claim that can be presented on direct appeal be presented there. Appeal, not habeas corpus, is the normal and preferred method for correcting trial errors, and defendants will virtually always have state issues that require an appellate proceeding. Does it make any sense, though, for a state to conduct a collateral proceeding for the sole purpose of reviewing a question of federal law which will be only reviewed *de novo* in federal court?

There are three answers to this exercise in futility: (1) abolish state habeas for nonfactual federal questions; (2) abolish the exhaustion doctrine for any question subject to *de novo* review on habeas;

140. *See* note 32 and accompanying text, *supra*.
141. 62 Stat. 869.
142. *See* Reviser's Note following 28 U.S.C.A. § 2254.
143. *See* note 44 and accompanying text, *supra*.
144. 28 U.S.C. § 2254(d). *See* Rose v. Lundy, 455 U.S. 509, 519 (1982).
145. Rose v. Lundy, *supra*, at 518.
146. *Ibid.*

or (3) abolish *de novo* review on habeas and give some respect to the state decision. The third option will be discussed in part G, below.

2. Stays of execution.

When a claim has not been presented on appeal, exhaustion sometimes places the defendant in a dilemma regarding stay of execution. If a state court will not grant a stay pending the state collateral attack, a federal petition must be filed to obtain a stay. Yet that petition must be dismissed if it contains unexhausted claims.[147] The problem is exacerbated when some claims have been exhausted on appeal or on a first state habeas petition and counsel then thinks up some more claims which have not yet been exhausted. A "mixed" petition with both types must be dismissed under *Lundy*, while omitting the unexhausted claims risks waiving them.[148] Solutions to this problem on the federal level are all unappetizing. The federal courts would have to either (1) relax the exhaustion rule, (2) tolerate successive petitions, (3) hold the petition in abeyance rather than dismiss it, thus tolerating simultaneous litigation of the same issue in multiple courts, or (4) require the defendant to abandon his unexhausted claims as the price of litigating the exhausted ones.

3. The unified state review.

A simpler and more satisfactory solution can be achieved by the state legislatures and courts. That solution is the single, unified review. The state supreme court hearing the direct appeal should require counsel for the appellant to investigate potential grounds for habeas corpus and file *in the supreme court* either a habeas petition or a declaration that due investigation was made and no claims were found.

The supreme court would appoint a trial court judge as a referee to hear any factual disputes.[149] The direct appeal and the state habeas petition would be decided together.[150] A strict state procedural bar should then prohibit the raising of new issues in successive petitions, subject only to the "actual innocence" exception.

A policy effectively requiring a unified review procedure was recently adopted by the California Supreme Court.[151] This procedure should eliminate the *Rose* v. *Lundy* problems. When state habeas is denied in the state supreme court concurrently with affirmance on appeal, all state issues are final and counsel can concentrate solely on federal questions.

A stay can be obtained pending the decision on the certiorari petition,[152] and the habeas petition can be prepared during that time. The petition and request for stay can then be filed immediately upon the denial of certiorari. With all claims either exhausted by the unified review or procedurally barred, there will be no unexhausted claims.

The operation of the system depends on the willingness of the state to pay for counsel on the

147. Rose v. Lundy, 455 U.S. 509 (1982).
148. *Id.* at 520.
149. *See* B. WITKIN, CAL. CRIMINAL PROCEDURE § 821 (1) at 788 (1963).
150. *See, e.g.*, People v. Guzman/In re Guzman, 45 Cal.3d 915, 755 P.2d 917 (1988).
151. *Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and for Compensation of Counsel in Connection with the Petitions*, California Supreme Court, June 6, 1989. A copy is attached as Appendix D.
152. *Ibid.*

habeas portion of the unified review, something not constitutionally required.[153] Refusal to do so, I submit, is false economy. The state must pay its own attorneys at every stage of the proceedings. If the number of proceedings can be substantially reduced, the savings should more than pay for the additional compensation of the defendant's counsel.

F. Retroactivity.

1. Relation to procedural bars and exhaustion.

The issues of exhaustion, procedural bar and retroactivity are intimately related. When the petitioner asserts a new claim for the first time on federal habeas, the state will be most willing to waive exhaustion where the state courts would consider the issue. Conversely, the state will be least willing to waive it when the state courts would rule that the claim is barred. The novelty of a new legal argument is the single most common ground asserted by petitioners as a reason why they either are not barred in state court or have "cause" under *Sykes* to have the claim heard in federal court.

The issue of novelty of the argument as "cause" is bracketed by the decisions of the Supreme Court in *Engle* v. *Isaac*[154] and *Reed* v. *Ross*.[155] Both cases involved claims that jury instructions had unconstitutionally shifted the burden of proof of an element of the offense to the defendant. In *Engle*, the defendants claimed that lack of self-defense was an element of the crimes as defined by Ohio law and that once they showed evidence of self-defense the prosecution must prove its absence beyond a reasonable doubt. The trials had occurred several years after *In re Winship*.[156] In the years between *Winship* and the trials in question, many defendants had relied on *Winship* to challenge instructions placing the burden of proof of particular issues on them.[157] The Court rejected the idea that failure to raise the claim had to sink to the level of ineffective assistance before it could be barred by the *Sykes* test. A claim need not be one that "every astute counsel" would have made before cause is found lacking. If a defendant does not lack the tools to construct the constitutional claim, novelty of the argument will not constitute cause for failure to comply with the state procedural rule.[158]

In *Reed* v. *Ross*, the jury in a murder case was instructed that use of a gun raises a presumption of malice shifting the burden of proof to the defendant.[159] The argument against this instruction would seem on its face to be considerably less novel than the argument advanced in *Engle*. Malice is traditionally an element of murder to be proved by the prosecution, while self-defense is traditionally an affirmative defense which many jurisdictions have required the defendant to prove.[160] The *Reed* court distinguished *Engle* by the fact that the trial in *Reed* had occurred before *Winship*.[161]

153. Murray v. Giarratano, 109 S.Ct. 2765 (1989).
154. 456 U.S. 107 (1982).
155. 468 U.S. 1 (1984).
156. 397 U.S. 358 (1970).
157. Engle, 456 U.S. at 131-33.
158. *Id.* at 133.
159. 468 U.S. at 6-7.
160. *See* W. LAFAVE AND A. SCOTT, CRIMINAL LAW 45 n. 13, 48-49 n. 24, 528 (1972).
161. 468 U.S. at 19-20.

Novelty will constitute cause "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel."[162] The most common instance of a claim without a pre-existing "reasonable basis" is where "this Court has articulated a constitutional principle that had not been previously recognized *but which is held to have retroactive application.*"[163] *Reed* then equates "not previously recognized" with the "clear break with the past" test.[164] This "clear break" language is taken from *United States* v. *Johnson*[165] where the Court indicated that "clear break" cases are "decisions whose nonretroactivity is effectively preordained."[166] The *Reed* court found that the pre-*Winship* authority was sufficiently sparse and that the practice of which Ross complained was sufficiently entrenched that the claim fell into one of *Johnson*'s three "clear break" categories. Therefore defense counsel had no reasonable basis to raise it at trial.[167]

The threads of retroactivity are woven throughout the fabric of *Reed v. Ross*. Justice Harlan had noted the connection fifteen years earlier, when he pointed out that retroactivity on habeas was not an issue until *Fay v. Noia*.[168] The *Reed* majority noted that retroactivity was a distinguishing characteristic of the primary category of cases to which its rule applied.[169] The majority also lifted its "clear break" test directly out of retroactivity law.[170] Justice Powell rested his deciding vote on the state's own procedural default in not raising the retroactivity issue.[171]

The dissent noted the anomalous result. "But this equating of novelty with cause pushes the Court into a conundrum which it refuses to recognize. The more 'novel' a claimed constitutional right, the more unlikely a violation of that claimed right undercuts the fundamental fairness of the trial."[172]

The correction to the anomaly and the solution to the conundrum is to always consider retroactivity with any *Reed* claim. Now that *Teague* v. *Lane*[173] has clearly separated retroactivity analysis on habeas from that on direct review, the *Reed* test must be deemed to refer to genuinely new constitutional principles which are retroactive *on habeas corpus*. Such new principles should be virtually nonexistent.[174]

The essence of a habeas petitioner's *Reed* claim is that the law has changed in an unexpected way and that he should not be "punished" for a lack of clairvoyance. But are the people of a state not entitled to make the same claim? The people's side of the unexpected change ledger is the issue of retroactivity.

162. *Id.* at 16.
163. *Id.* at 17 (italics added).
164. *Ibid.*
165. 457 U.S. 537 (1982).
166. *Id.* at 553-54.
167. 468 U.S. at 18-19.
168. Desist v. United States, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting).
169. 468 U.S. at 17.
170. *Ibid.*
171. *Id.* at 20.
172. *Id.* at 22 (Rehnquist, J., dissenting).
173. 103 L.Ed.2d 334, 109 S.Ct. 1060 (1989).
174. *See Reed*, 468 U.S. at 26 n. 3 (Rehnquist, J., dissenting); *Teague*, 103 L.Ed.2d at 358, 109 S.Ct. at 1077.

2. The rise of nonretroactivity: Linkletter-Stovall.

Under an earlier philosophy of jurisprudence, "retroactivity" was not an issue. Courts did not make law, it was thought, but only announced what had always been the law.[175] Unconstitutional statutes were not "invalidated" by the decisions, they had never been true "statutes" at all.[176]

Along with judicial activism and the quasi-legislative promulgation of detailed rules of criminal procedure came the realization that full retroactivity was not constitutionally required. A series of cases in the mid-1960s established a three-part test for retroactivity: (a) the purpose of the rule; (b) the extent of reliance on previous practice; and (c) the effect on the system of justice of full retroactivity.[177] The central concern of this approach seems to be whether retroactivity is needed to reverse the convictions of innocent people. If a rule has a powerful connection with the reliability of the truth-finding process and substantial numbers of innocent people have suffered false imprisonment, the reliance factor is swept away and the impact on the system must be borne as the cost of progress.[178] Conversely, if the rule would exclude evidence in spite of its reliability in order to enforce a collateral policy, the social cost of full retroactivity may be prohibitive.[179] In this practical cost-benefit analysis the status of review as direct or collateral had little weight.[180]

3. The Harlan approach.

By the end of the decade, opposition had begun to form. In *Desist* v. *United States*,[181] Justice Harlan took his stand that retroactivity must be rethought.[182] Instead of focusing on the purpose of the rule and weighing the costs and benefits of retroactivity, Justice Harlan focussed instead on the nature of the judicial process.

The first principle of jurisprudence is that courts decide cases according to the law. The most flagrant violation of this principle is the purely prospective "decision," one that is announced by the court but not applied to the parties before it. Because the power to announce constitutional rules flows solely from the duty to decide cases,[183] such "pure" prospectivity is itself of doubtful constitutionality.

A more difficult question arises at the next step of the retroactivity ladder. Ernesto Miranda's conviction was reversed and his confession suppressed.[184] Woodrow Whisman, whose similar case

175. 1 W. BLACKSTONE, COMMENTARIES 69-70 (1765).
176. Norton v. Shelby County, 118 U.S. 425, 442 (1886).
177. Linkletter v. Walker, 381 U.S. 618, 636 (1965); Johnson v. New Jersey, 384 U.S. 719, 727 (1966); Stovall v. Denno, 388 U.S. 293, 297 (1967).
178. Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel established on collateral review); Johnson, 384 U.S. at 727-28.
179. Linkletter, 381 U.S. at 637-38. (*Mapp* exclusionary rule not retroactive on collateral review.)
180. Stovall, 388 U.S. at 300-301.
181. 394 U.S. 244 (1969).
182. *Id.* at 258 (Harlan, J., dissenting).
183. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
184. Miranda v. Arizona, 384 U.S. 436, 491-92 (1966).

was on direct review at the same time, was denied the benefit of the *Miranda* rule.[185] How could the Georgia court be correct and the Arizona court in error when they reached the same result under the same circumstances? It may well be socially efficient to so hold. The reversal of Miranda's conviction had little or nothing to do with the justice of his case,[186] but it was a necessary cost of insuring that arrestees would be made aware of their rights in the future. But is the difference in the treatment of Miranda and Whisman consistent with the Anglo-American system of law built on precedent? Justice Harlan thought not.[187] If a legislature wishes to treat similarly situated people differently, it must at least have a rational basis for doing so.[188] How can the Supreme Court simply conduct a lottery? Equal treatment is an overriding imperative if the Court's decisions are legitimate.

The final step is the application of the Harlan theory to collateral review. If one accepts the analysis to this point, including the premise that the nature of the judicial process outweighs cost-benefit analysis, there are two principled answers. One could conclude that new rules must be applied on habeas as well, either on the Blackstone theory that law is discovered and not made, or on the theory that a habeas petition is not significantly distinguished from a direct appeal to apply a different rule. On the other hand, one could conclude both that a habeas petition is fundamentally different from an appeal,[189] and that the announcement of a truly new rule is an actual change in the law and not just a discovery. With only rare exceptions, new procedural rules should not be applied retroactively on habeas in the Harlan view.

4. Teague v. Lane.

Justice Harlan's view of retroactivity was accepted for all cases on direct review in *Griffith* v. *Kentucky*.[190] Last February, the Supreme Court adopted the Harlan theory, with minor modifications, for habeas cases in *Teague* v. *Lane*.[191]

Under *Teague*, "a case announces a new rule [subject to retroactivity analysis] if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[192] Such a new rule is not applicable on habeas corpus unless it makes the defendant's conduct not criminal[193] or requires "new procedures without which the likelihood of an accurate conviction is seriously diminished."[194] Once again, as in *Murray* v. *Carrier*,[195] we see the growing relevance of innocence.

185. Whisman v. Georgia, 384 U.S. 895 (1966) (Douglas, J., dissenting); *see* Johnson, 384 U.S. at 734.
186. The woman Miranda had raped had identified him *before* the now-famous interrogation. Miranda, 384 U.S. at 491. The justice of the outcome doubtless escaped her comprehension.
187. Desist, 394 U.S. at 258-59; accord Hankerson v. North Carolina, 432 U.S. 233, 246-48 (1977) (Powell, J., concurring).
188. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16.2 (2d ed. 1988).
189. Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring and dissenting).
190. 479 U.S. 314 (1987).
191. 109 S.Ct. 1060, 103 L.Ed.2d 334, (1989).
192. *Id.* at 1070, L.Ed.2d at 349 (plurality) (emphasis in original).
193. *Id.* at 1075, L.Ed.2d at 356. A new, substantive First Amendment decision would be such a rule.
194. *Id.* 1076-77, L.Ed.2d at 358.
195. *See* note 119 and accompanying text, *supra*.

Any doubts about the plurality status of *Teague* were erased in *Penry* v. *Lynaugh*.[196] Justice O'Connor's *Penry* opinion succinctly restates the *Teague* rule in part IV-A, which is explicitly joined by at least six other Justices.[197] *Penry* also eliminated any doubt that *Teague* applies to capital sentencing.[198]

Combining *Teague* with *Engle/Reed*, it is apparent that novelty of the claim as "cause" for avoiding the *Sykes* rule is now virtually dead. A constitutional claim which is "so novel that its legal basis is not reasonably available to counsel"[199] is necessarily "not *dictated* by precedent existing at the time,"[200] assuming that the times in question are the same. Depending on how the state procedural bar works, there may be a "window" period where the precedent-setting decision comes down after the last moment for counsel to raise it but before the decision becomes final.

5. Making new rules on habeas corpus.

Griffith v. *Kentucky*[201] adopted uniformity of treatment as an overriding imperative in retroactivity analysis. "[T]he integrity of judicial review requires that we apply [the new] rule to all similar cases pending on direct review .... Second, selective application of new rules violates the principle of treating similarly situated defendants the same."[202]

From this statement of principle, it follows beyond question that if a proposed new rule would *not* apply to habeas petitioners generally then it cannot apply to the petitioner who seeks to make the rule. Notwithstanding Justice Brennan's disapproval of the brevity of my brief on this point,[203] there is little more to be said on the matter. The Court either meant what it said in *Griffith* or it did not. There is no justifiable basis for overruling a principle so recently established merely because it benefits the prosecution rather than the defendant.

6. The impact of Teague.

The full impact of *Teague* has yet to be felt. The federal appellate courts seem to be doing their best to ignore it. Over two months after *Teague*, for example, the Ninth Circuit laid down a new rule regarding retroactive application of a post-*Gregg* capital sentencing statute.[204] Certiorari is pending.

The Harlan theory accepted in *Teague* is more than a rule of retroactivity. It is a reconsideration of the nature and purpose of habeas corpus.[205] The purpose of "forcing trial and appellate courts ... to toe the constitutional mark"[206] is not furthered by overturning the conviction of a murderer

196. 109 S.Ct. 2934 (1989).
197. *Id.* at 2959 (Brennan, J., joined by Marshall, J.); *id.* at 2963-2964 (Scalia, J., joined by Rehnquist, C. J., White, J., and Kennedy, J.). The syllabus calls this portion unanimous, *id.* at 2940, but Justice Stevens' concurrence is less than explicit. *Id.* at 2963.
198. *Id.* at 2944.
199. *Reed*, *supra*, 468 U.S. at 16.
200. *See* note 192, *supra*.
201. 479 U.S. 314 (1987).
202. *Id.* at 323.
203. *Teague*, *supra*, 103 L.Ed.2d at 369 (dissent).
204. Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1989).
205. Mackey v. United States, 401 U.S. 667, 682-84 (1971) (Harlan, J., concurring and dissenting).
206. *Id.* at 687.

tried in accordance with then-existing rules, and habeas therefore ought not to be granted in that situation.

From *Brown* until *Teague*, federal habeas courts have looked almost exclusively at the trial, treating the appeal as a virtual nullity. After *Teague*, though, the habeas court must look at the appellate process to see if the appellate courts gave the appellant the benefit of any decisions rendered up to the date of finality. If a reversal was not *dictated* by such decisions, then habeas should not be granted.

Teague may be a step toward a return to the pre-*Brown* law as stated in *Ex parte Hawk*.[207] It is a beginning of a recognition that the functioning or malfunctioning of the state corrective process is an element of the federal due process equation. At long last, we may be on our way back to the eminently sensible rule that "a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated."[208] A possible mechanism for reestablishing that rule is the doctrine of the law of the case.

G. The Law of the Case.

There are two principal purposes of federal habeas corpus: (1) "the imperative of correcting a fundamentally unjust incarceration"[209] and (2)"forcing trial and appellate courts ... to toe the constitutional mark."[210] While an absolute res judicata bar to *any* relitigation would defeat these purposes, it does not follow that *de novo* relitigation is necessary. A middle ground of respect of the state court decision would fulfill the purposes of habeas corpus while quickly eliminating that vast bulk of claims which challenge neither the justice of the result nor the integrity of the state adjudication. That middle ground is the doctrine of the law of the case.

1. The Doctrine.

The statement of the doctrine which is most often cited is that in *White* v. *Murtha*.[211] The law of the case "must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice."[212]

Unlike res judicata, law of the case is a rule of practice and not a limit on the power of the court.[213] In this sense it is similar to the exhaustion doctrine of *Ex parte Royall*[214] and the abstention doctrine of *Younger* v. *Harris*.[215] Even though federal courts had the power to interfere with the ongoing

207. *See* text accompanying notes 44 to 47, *supra*.
208. *Ex parte* Hawk, 321 U.S. 114, 118 (1944).
209. Murray v. Carrier, 477 U.S. 478, 495 (1986).
210. Mackey v. United States, 401 U.S. 667, 687 (1971) (separate opinion of Harlan, J.).
211. 377 F.2d 428, 431-32 (5th Cir. 1967).
212. *See* Arizona v. California, 460 U.S. 605, 618 n. 8 (1983); 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE, ¶ 0.404 [4.-6] 146-47 (2d ed. 1988) (cited below as "Moore's"); 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478, 790 n. 5 (1981).
213. Messenger v. Anderson, 225 U.S. 436, 444 (1912); Christianson v. Colt Industries Operating Corp., 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811, 831 (1988).
214. 117 U.S. 241, 251-52 (1886).
215. 401 U.S. 37, 52-53 (1971).

state proceedings in those cases, the Supreme Court decided that they should refrain from doing so. Similarly, the law of the case doctrine teaches that courts should refrain from reopening issues decided by a coordinate court, absent certain exceptional circumstances, even though the court has the power to do so.

In *Christianson* v. *Colt Industries Operating Corp.*, the Supreme Court applied the doctrine of the law of the case to a decision of one court of appeals to transfer a case to another. This is the "coordinate court" situation. The *Christianson* court stated that the courts of appeals should adhere strictly to principles of the law of the case,[216] and noted that the doctrine precluded relitigation of close questions.

In *Christianson*, the coordinate courts were courts of the same rank. That is, they were both federal courts of appeals. However, the coordinate court aspect of the law of the case doctrine is not limited to courts of precisely equal rank. In the federal courts, a prior ruling of a state court may be a ruling of a "coordinate court" for law-of-the-case purposes.[217]

2. The Exceptions.

The three exceptions to the preclusive effect of the law of the case demonstrate that the doctrine has enough "play in the joints" to meet the legitimate purposes of federal habeas corpus. The exceptions are (1) new evidence; (2) subsequent retroactive change in the law; and (3) the prior decision was clearly erroneous and would work a manifest injustice.[218]

The new evidence exception permits the use of habeas corpus to remedy denials of rights which do not appear in the appellate record. Ineffective assistance of counsel is the most common claim of this type. If the claim is that trial counsel did not investigate a defense or alibi, that very failure will necessarily cause the appellate record to be inadequate and require that new evidence be introduced on habeas.[219]

The second exception, a subsequent retroactive change in the law, would apply only if the change fell within one of the exceptions to nonretroactivity in *Teague* v. *Lane*[220] or if the change occurred after the decision but before it became final.

The final exception deals with the heart of the problem in habeas cases. Petitioners often seek habeas relief from the federal courts based on mere disagreement with the state court on a close question. Typically in habeas cases, the state court decision is mentioned only in the discussion of the facts.[221] It is often not mentioned at all in the legal analysis, as if the state appellate system did not exist.

216. 108 S.Ct. at 2179, 100 L.Ed.2d at 832.
217. Barrett v. Baylor, 457 F.2d 119, 123-24 (7th Cir. 1972); Greene v. Massey, 706 F.2d 548, 553 (5th Cir. 1983); Gage v. General Motors, 796 F.2d 345, 349-50 (10th Cir. 1986); 1B MOORE'S, *supra* note 212, ¶ 0.404[7] at 155. Two appellate courts are "coordinate" for this purpose if neither stands above the other on the same appellate ladder. These authorities refer to state court determinations of state law. The federal question aspect is discussed *infra* in part G. 4.
218. Greene v. Massey, *supra*, 706 F.2d at 556.
219. This exception would not apply, however, if all of the important evidence was considered in a state collateral proceeding.
220. *See* text accompanying notes 192 to 194, *supra*.
221. *See, e.g.*, Thomas v. Morris, 844 F.2d 1337, 1338 (8th Cir. 1988), reversed in Jones v. Thomas, 109 S.Ct. 2522, 2523 (1989).

Under a law of the case approach, the task of the federal court would be greatly simplified and the dignity of the state courts greatly enhanced. The first question would be whether the state court decision is "clearly erroneous." A decision is clearly erroneous only if it violates a precedent binding on the court which decided it or if it violates the clear language of the Constitution or the statute in question. If the state courts are truly renegade, this standard allows the federal courts to force them to "toe the constitutional mark." If not, simple disagreement with another court does not justify the drastic remedy of nullifying a final judgment.

The second part of the third exception is "manifest injustice."[222] Consistently with the Supreme Court's jurisprudence on procedural defaults,[223] this exception keeps the door open for the truly innocent.

3. Application on collateral attack on convictions.

Deferring for a moment the question of state court versus federal court rulings on federal questions, the threshold question is whether the law of the case doctrine has any application to collateral attacks on convictions. The cases that have considered the matter have generally held that it does.

The most obvious application of the doctrine is in a habeas petition raising issues addressed by the Supreme Court on the direct appeal. In that situation, the Second Circuit decided that the doctrine applied in *United States ex rel. Epton* v. *Nenna*.[224]

The next, and more common, application is a successive federal habeas petition raising an issue considered by the federal court of appeals on the first petition. Again the courts of appeals have generally had little difficulty finding the doctrine applicable.[225] The court in *Lacy* v. *Gardino*,[226] expressed some doubt but did not reach the question. *Burton* v. *Foltz*,[227] assumed the doctrine to be generally applicable, but found that it did not apply to rulings which had been vacated by a higher court, and also found that the change in controlling law exception applied.[228]

Cases involving collateral attacks by federal prisoners confirm that the law of the case doctrine applies to such attacks. In *Davis* v. *United States*,[229] the Supreme Court implied that the doctrine generally applies to proceedings under 28 U.S.C. § 2255, but held that the change in controlling law exception applied. The courts of appeals have applied the doctrine to Rule 35(a) motions.[230]

222. There seems to be some doubt whether "clearly erroneous" and "manifest injustice" are conjunctive or disjunctive conditions. Compare Doe v. New York City Dept. of Social Services, 709 F.2d 782, 789 (2nd Cir. 1983) with White v. Murtha, *supra* note 211, 377 F.2d at 431-32. A disjunctive condition would meet both of the purposes of habeas corpus set out above.
223. *See* notes 119 to 139 accompanying text, *supra*.
224. 446 F.2d 363, 365-66 (1971). This case relates to the higher court mandate facet of law of the case, *see* 1B Moore's, *supra* n. 212, ¶ 0.404[10] at 169-74, rather than the coordinate court aspect.
225. Bromley v. Crisp, 561 F.2d 1351, 1363 (10th Cir.1977); Raulerson v. Wainwright, 753 F.2d 869, 875 (11th Cir. 1985).
226. 791 F.2d 980, 984-85 (1st Cir. 1986).
227. 810 F.2d 118, 120 (6th Cir.1987).
228. *Id.* at 121.
229. 417 U.S. 333, 341-42 (1974).
230. United States v. Mazak, 789 F.2d 580, 581 (7th Cir. 1986); Ekberg v. United States, 167 F.2d 380, 384 n. 4 (1st Cir. 1948); and Paul v. United States, 734 F.2d 1064 (5th Cir. 1984). *See* also 18 Wright, *supra* note 212, 1988 supp. at 413.

There seems to be general consensus among those courts that have considered the question that the doctrine of the law of the case applies generally to collateral attacks on convictions and that the appeal and any prior collateral attacks are "closely related" proceedings. The only question remaining is whether a state appellate court is a "coordinate court" for the purpose of applying the doctrine. There seems to be no doubt of this as to questions of state law.[231] Should the result be any different on federal questions?

4. Federal questions in state courts.

The heart of the question is whether the decision of a state appellate court on a federal question is entitled to respect as the decision of a "coordinate court." For civil cases, Moore asserts that "the federal court would not be obliged to follow the state court's law of the case,"[232] yet his primary authority for this proposition implies just the opposite. He quotes Justice Holmes in *Remington* v. *Central Pacific R.R.*,[233] stating that the state court decision was not *res judicata* and permitting the Circuit Court to reexamine the decision on the *same* basis as if the Circuit Court itself had made the decision.[234] If Justice Holmes is correct then the law of the case doctrine *does* apply. The state decision on the federal question stands no higher than a prior federal court of appeals decision, but it also stands no lower.

Still, the contention is made that criminal cases are different and that the defendant must have a federal *de novo* hearing. This argument "stem[s] from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights."[235] The *Stone* court answered this argument.

> "The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. *Martin* v. *Hunter's Lessee*, 1 Wheat 304, 341-44 (1816)."[236]

I propose that the competing considerations call for the division of federal habeas claims into three categories. First, the decision in *Rose* v. *Mitchell*,[237] should remain in force, permitting *de novo* review of equal protection claims of discrimination on the basis of race. The unique history of claims of this type places a burden of proof on those who would abolish de novo review; I do not believe that burden has been met. For the reasons stated in *Rose*, the case for federal intervention is particularly strong for claims of this type.

Second, the decision in *Stone* v. *Powell*, should also stand. The exclusionary rule is a unique

231. Greene v. Massey, 706 F.2d 548, 553 (5th Cir. 1983).
232. 1B Moore's ¶, *supra* note 212, 0.404[7] at 155.
233. 198 U.S. 95, 99-100 (1905).
234. 1B Moore's ¶ 0.404[6] at 151. Moore's only other authority is a 1939 district court case. *Id.* at 151 n. 12.
235. Stone v. Powell, 428 U.S. 465, 493 n. 35 (1976).
236. *Id.* at 494 n. 35.
237. 443 U.S. 545 (1979).

creature of criminal procedure, with no relation whatever to the fairness of the trial, and complete preclusion following a full and fair state hearing is appropriate. In this same category belong all cases claiming violations of rules erected by the Supreme Court which are not themselves constitutional rights.[238]

Finally, for the remainder of federal questions, I propose that the state court decision be considered that of a "coordinate court" and respected as the law of the case subject to the "flexible contours" of that doctrine.[239] Where state collateral proceedings are adequate to develop facts not in the appellate record and where no change in the law which applies retroactively on habeas is in issue, federal habeas review would be limited to the questions of whether the state decision was "clearly erroneous" and whether there has been a miscarriage of justice.

One aspect of the rule I propose is that the lower federal courts would no longer have the authority to make new federal rules of criminal procedure which are binding on the states. That change, however, has largely been made by *Teague* v. *Lane*.[240] Furthermore, at the present stage in the development of the law of criminal procedure, that authority is unnecessary and disruptive. There are no rules of *Gideon* magnitude remaining to be made.

From the standpoint of individual cases, the question is whether justice would be better served by the rule I propose than it is by the present system. The fact that a second review is conducted does not necessarily mean that justice is better done.[241] If we define the "right" answer to be the one which the Supreme Court would have reached had it granted certiorari,[242] is that "right" answer more likely to be reached by allowing *de novo* review in the lower federal courts of every federal claim? Not necessarily.

The claim has been made that "[t]o the extent state trial and appellate judges faithfully, accurately, and assiduously apply federal law and the constitutional principles enunciated by the federal courts, such determinations will be vindicated on the merits when collaterally attacked."[243] Is this confident assertion really justified? The California Supreme Court faithfully, accurately, and assiduously applied federal law in *People* v. *Harris*.[244] That decision was *not* vindicated by federal court of appeals on habeas.[245] The grave injustice to the people of California resulting from the court of appeals's nullification of their perfectly proper judgment was partially corrected only because the Supreme Court saw fit to grant certiorari and reverse.[246] "Misapplication of [the Supreme] Court's opinions is not confined to the state courts...."[247]

Few would disagree with the maxim that it is better to let the guilty go free than to punish the innocent.[248] In the absence of any claim of innocence, however, the balance is quite different. When the state courts and lower federal courts disagree on a close question and the Supreme Court denies certiorari, we do not know which court is "right." We must choose between the risk of

238. *See* Duckworth v. Egan, 109 S.Ct. 2875, 2884 (1989) (O'Connor, J., concurring) (*Miranda* claims).
239. *See* Arizona v. California, 460 U.S. 605, 618-19 (1983).
240. *See* text accompanying notes 201 to 203, *supra*.
241. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).
242. "We are not final because we are infallible, but we are infallible only because we are final." *Ibid.*
243. Stone v. Powell, 428 U.S. 465, 529-30 (1976) (Brennan, J., dissenting).
244. 28 Cal.3d 935, 623 P.2d 240 (1981).
245. Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982).
246. Pulley v. Harris, 465 U.S. 37 (1984). The judgment remains unexecuted to this day.
247. Amalgamated Clothing Workers of America v. Richman Bros. Co., 348 U.S. 511, 519 (1955).
248. 4 W. BLACKSTONE, COMMENTARIES 352 (1769).

vacating a sentence which was properly imposed if the state court is right and the risk of leaving a sentence in place despite a procedural error if the federal court is right. *If the habeas petitioner is in fact guilty*, I submit that the erroneous grant of habeas is a greater injustice than the erroneous denial. The law of the case doctrine with its "manifest injustice" safety valve thus optimizes the quest for justice.

Adoption of a law-of-the-case rule will save an enormous amount of time for the federal courts as institutions and especially for the judges individually. The decision of a point of law on which there is no controlling precedent is a task which the judge cannot delegate, but legal research to determine whether another court's decision is or is not in violation of a controlling precedent is delegable to a far greater degree. For 99 claims out of 100, a magistrate or even a clerk can determine that the state court decision is not clearly erroneous.

Most importantly, the "manifest injustice" prong of the law of the case doctrine would help restore public respect for the law by reserving the extraordinary remedy of collateral attack on a final judgment for those who genuinely deserve it.

PART II
A Study of Recent Habeas Corpus Cases

A. Purpose of the Study.

The defenders of unlimited federal review in these cases claim that such review is justified by the large number of grants of habeas corpus in the federal courts.[249] The NAACP Legal Defense and Education Fund once counted a 73 percent success rate for petitioners.[250] One defense lawyer has put the figure at 'up to 60 percent.'[251] Much attention has focussed on the Eleventh Circuit, where the former chief judge once estimated that "the court found serious constitutional error in fully one-half of the post-conviction reviews."[252]

The inference which many seek to draw from these statistics is that state court judges are trampling constitutional rights on a large scale and disregarding their explicit constitutional duty to uphold the federal constitution first.[253] Such a sweeping condemnation of the state judiciary must not be made on the basis of speculation. Nor is it fair to the state courts to evaluate their performance on a "scorecard" basis.

The number of grants of habeas corpus in the past can be relevant to the debate on what to do in the future only if this history is evaluated in a detailed examination of individual cases. That evaluation must consider the state of the law at the time of the state court decision, at the time of the federal court decision and at the present time. The purpose of this study is to make that evaluation.

B. Methodology.

To do a meaningful study, it is necessary to have a substantial number of occurrences. Studies of courts which attempt statistical analysis on the basis of a handful of cases are worse than worthless. Balancing the need for an adequate sample size against the limitations of time and resources, we settled on approximately one hundred federal habeas corpus decisions as an adequate sample.

To keep the study within reasonable bounds, we also decided to focus on the decisions of one court. The United States Court of Appeals for the Eleventh Circuit was chosen because of the large number of cases it has heard and because it has been the subject of many of the statistics cited.

The next step was to select the cases for review. The initial selection of cases was made with a Westlaw search using a search condition of "habeas & (sentence* /s death)." This search selects every case which uses the word "habeas" and also uses "sentence," "sentenced," or "sentences" with the same sentence as the word "death." This method of selection produced a few "false positive" results, selecting cases which are not capital habeas cases. It doubtless also missed a few cases that should have been selected. The first type of error is corrected by removing the noncapital

249. *See* Robbins, *supra* note 129 at 85.
250. Brief Amicus Curiae for the NAACP Legal Defense and Education Fund, Inc., app. E, at 6e, Barefoot v. Estelle, 463 U.S. 880 (1983), *see* Amsterdam, *supra* note 92, at 51.
251. ROBBINS, *supra* note 129 at 85, quoting Jack Boger.
252. Raven, *Death Penalty Cases: Ensuring Fairness While Reducing Delay,* 74 A.B.A. J. 8 (Oct. 1988).
253. *See* U.S. Const. art VI, cl. 2.

cases from the sample. The second type is random with respect to the issues involved in this study and therefore does not affect the validity of the result.

The search turned up 521 cases. A sufficient number of citations was printed (in reverse chronological order) such that after deleting both the "false positive" cases approximately one hundred cases would remain in the sample. The results are listed in Appendix A.

The remaining cases were divided into three categories. The first category consisted of cases which were not the Eleventh Circuit's final decision on the case. This category includes preliminary procedural matters and cases in which the Eleventh Circuit later granted rehearing. The second category consisted of cases in which the habeas petition in question was finally decided against the prisoner, although many of these prisoners filed successive petitions. These cases are listed in Appendix B, with a brief description of each case. The delay of all collateral proceedings, from affirmance on appeal to denial of federal habeas, was determined.

The final category is the cases finally resolved in favor of the petitioner. These cases were examined in detail, along with the prior state court proceedings where those were reported. The analysis is in Appendix C. The examination focussed on the question of why relief was granted in the federal court and not in the state court. The possible reasons are:

1. The defendant never raised the issue in state court.

2. The state court did not reach the merits because the defendant did not raise the issue at the proper time and was therefore procedurally barred.

3. The federal and state courts disagree in their findings of fact.

4. The federal court applied a new rule of law announced by the United States Supreme Court after the state court decision.

5. The federal court applied a decision of the United States Supreme Court clarifying an earlier decision, where the earlier decision was rendered before the state court decision but the clarifying decision came afterward.

6. The state and federal courts disagree on a "mixed question of law and fact," such as whether defense counsel was effective.

7. The state and federal courts disagree on a question of law not yet settled by the United States Supreme Court.

8. The state and federal courts disagree on a question where the state court was clearly wrong based on United States Supreme Court precedent existing at the time of the state court ruling.

9. The state and federal courts disagree on a question where the federal court is clearly wrong.

Each case was also given a designation as to whether it appeared from the facts as stated in the opinions that there was a colorable claim of innocence. This determination is necessarily subjective, and it is hindered by the fact that innocence is generally not yet relevant in habeas proceedings. Nonetheless, most judges are sensitive enough to the basic justice of the case to recite vital facts showing that the decision is fundamentally just, when such facts exist. Where one court upholds the sentence and another vacates it, therefore, the opinions taken together will generally state enough detail in the facts to make a reasonable judgment.

The claim of innocence designation is either "yes," "no," or "mental only." Absent a voluntary confession or overwhelming evidence, the answer is "yes." For those defendants who clearly committed the act with "intent" in the common-sense meaning of that term but who claim that intent was negated by a mental defect or intoxication, the claim is listed as "mental only." In light of the strong trend toward limitation of such defenses, it is significant to distinguish such cases from those where the defendant reasonably contends he did not commit the act.

The cases were also examined to determine whether the result would be different under *Teague* v. *Lane*.[254] Under *Teague*, a rule of procedure handed down after the direct appeal became final is not to be applied on habeas corpus unless that rule was "*dictated* by existing precedent," with rare exceptions.[255] Also, any rule which would not be retroactive on habeas corpus cannot be initially made on habeas corpus.[256] The *Teague* plurality opinion was raised to majority status in *Penry* v. *Lynaugh*.[257]

Examination of the cases to determine whether *Teague* v. *Lane* would have made a difference involves some judgment calls about when a rule is new. Fortunately, there is some guidance. In *Penry* v. *Lynaugh*, the Supreme Court decided that *Teague* did not preclude a *Lockett*[258] claim for a case which became final after *Eddings* v. *Oklahoma*,[259] decided January 19, 1982.

Penry does not indicate the status of case which became final before *Eddings* but after *Lockett*, however. *Lockett* was only a plurality opinion. When the court is thus divided, the holding of the case is the "position taken by those members who concurred in the judgments on the narrowest grounds."[260] In the *Lockett* case, that is the opinion of Justice Blackmun that the particular compelling mitigating circumstances in Lockett's case had to be considered.[261] The Florida statute expressly required consideration of Lockett's situation[262] and was therefore not affected by this narrow holding. The sweeping rule that *all* conceivably mitigating circumstances had to be considered was not "dictated" until *Eddings*.[263] Habeas for *Lockett* error in Florida should therefore be denied if the sentence became final before January 19, 1982.

254. 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *See* pp. 17-22, *supra*.
255. *Id.*, S.Ct. at 1070, L.Ed.2d at 349 (emphasis in original).
256. *Id.*, S.Ct. at 1078, L.Ed.2d at 359.
257. 109 S.Ct. 2934 (1989).
258. Lockett v. Ohio, 438 U.S. 586 (1978). *See* text accompanying notes 271-294, *infra*.
259. 455 U.S. 104.
260. Marks v. United States, 430 U.S. 188, 193 (1977), quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976) (plurality).
261. Lockett, *supra*, 438 U.S. at 615-16. These factors were minor accomplice status and lack of intent to kill.
262. *See* Fla. Stat. § 921.141 (6)(d).
263. The Florida Supreme Court did modify its interpretation of the statute after *Lockett*, Songer v. State, 365 So.2d 696, 700 (Fla. 1978), but that modification was not *dictated* until *Eddings*.

For "*Sandstrom/Franklin* error"[264] we have guidance in *Yates* v. *Aiken*.[265] *Yates* decided that *Franklin* applied to cases which became final after *Sandstrom*, under the theory of retroactivity adopted later in *Teague*.[266] The implication seems clear, though, that *Sandstrom* itself was a "new rule" subject to nonretroactivity on habeas corpus.[267] The *Sandstrom* cases, therefore should be decided differently if they were final before June 18, 1979. For "*Caldwell* error"[268] the date of *Caldwell*, June 11, 1985, is used.

C. Case background.

Two cases recur throughout the Eleventh Circuit's habeas corpus cases in the period studied: *Lockett* v. *Ohio*[269] in Florida cases and *Sandstrom* v. *Montana*[270] in Georgia cases. A brief overview of these two lines of cases is therefore helpful before looking at the Eleventh Circuit cases themselves.

1. Lockett v. Ohio

In 1971, the United States Supreme Court rejected the argument that capital punishment was unconstitutional in a master-crafted opinion by Justice John M. Harlan.[271] The very next year the Supreme Court handed down its fractured opinion in *Furman* v. *Georgia*.[272] Five Justices said that the existing death penalty laws were unconstitutional, but they could not agree on the reason. The states had to guess. Justices Douglas, Stewart and White each indicated that too much jury discretion was the culprit.[273] The two former opinions contained open invitations to enact mandatory sentencing laws.[274]

Four years later, on the same day that it upheld "guided discretion" statutes,[275] the Supreme Court ruled that the mandatory sentencing approach was unconstitutional in *Woodson* v. *North Carolina*.[276] The plurality opinion in *Woodson* referred to the collective legislative judgment. After reviewing the long history of mandatory and discretionary sentencing, the plurality concluded that the people of North Carolina had not adopted mandatory sentencing as a rational choice. They

264. Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). *See* text accompanying notes 295-302, *infra.*
265. 108 S.Ct. 534, 98 L.Ed.2d 546 (1988).
266. 108 S.Ct. at 538, 98 L.Ed.2d at 554. *Yates* may not have anticipated that the definition of "new rule" in *Teague* would be as strict as it is. This analysis may err in favor of the defendant in accepting *Yates* at face value.
267. *Sandstrom* does not come within either of the exceptions to the *Teague* rule. It does not make otherwise proscribed conduct legal, *see* 109 S.Ct. at 1075, 103 L.Ed.2d at 356, nor does it involve the kind of *fundamental* unfairness, on the order of lynch mobs or torture-extracted testimony, which *seriously* diminishes the accuracy of the result, *see id.* at 1076-1077, L.Ed.2d 357-58.
268. Caldwell v. Mississippi, 472 U.S. 320 (1985).
269. 438 U.S. 586 (1978).
270. 442 U.S. 510 (1979).
271. McGautha v. California, 402 U.S. 183 (1971).
272. 408 U.S. 238.
273. *Id.* at 253 (Douglas, J., concurring); *id.* at 309-310 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).
274. *Id.* at 257, 307.
275. Gregg v. Georgia, 428 U.S. 153 (1976).
276. 428 U.S. 280 (1976).

had only chosen mandatory sentencing over no death penalty at all in the well-founded belief that *Furman* had eliminated discretionary sentencing as an option.[277] Thus the people of North Carolina and the other "mandatory" states were punished by the Supreme Court for the Court's own inability to reach a coherent decision in *Furman*.

The plurality in *Woodson* stated two other grounds for disapproval of the North Carolina statute: one making perfect sense and the other appearing out of nowhere. The plurality noted that a mandatory death penalty for all first-degree murders made widespread jury nullification inevitable.[278] The point is well taken. A statute mandatory on its face but so vastly broad that it would never genuinely be applied over its full range would be arbitrary and discriminatory in practice.

The third reason cited by the plurality was made out of whole cloth, and would eventually undo much of the anti-discriminatory good of *Furman*. Admitting that no precedent made individualized consideration a "constitutional imperative," the plurality decided to create such an imperative anyway. Not only must the circumstances of the crime be considered, but also "the character and record of the individual offender."[279]

Two years after *Woodson*, the Supreme Court expanded on the third prong of that decision in *Lockett* v. *Ohio*.[280] It is easy to see why the sentence in this case disturbed the Court. Lockett was simply a getaway car driver in a pawnshop robbery. There was no indication she intended to physically harm anyone.[281] The triggerman had plea-bargained for a life sentence.[282]

Justice Blackmun believed that the sentence must be reversed because the sentencing authority was not permitted to consider, in its discretion, the extent of involvement or the *mens rea* of the defendant.[283]

Justice White concurred in the result, in a separate opinion foreshadowing *Enmund* v. *Florida*,[284] proposing a constitutional *mens rea* requirement which would be binding, not merely submitted to the discretion of the sentencing authority.[285] He repeated his disagreement with the third prong of *Woodson* and its companion case, *Roberts* v. *Louisiana*,[286] warning that a rule of "anything goes" in mitigation would take us back to the arbitrary sentences which prevailed before *Furman*.[287]

Despite the warning, the "anything goes" rule was embraced by the plurality, led by Chief Justice Warren Burger. Although he had joined Justice White's dissents in *Woodson* and *Roberts*, he accepted and even expanded those decisions in *Lockett*, apparently in an attempt to provide clear rules for the states and get capital punishment back on track.[288]

277. *Id.* at 298-99.
278. *Id.* at 291-96.
279. *Id.* at 303-05.
280. 438 U.S. 586 (1978).
281. *Id.* at 590-91.
282. *Id.* at 591.
283. *Id.* at 613.
284. 458 U.S. 782 (1982).
285. Lockett, 438 U.S. at 624-28 (White, J., concurring).
286. 428 U.S. 325 (1976).
287. Lockett, 438 U.S. at 623 (White, J., concurring).
288. *Id.* at 602 (plurality opinion).

With only the foundationless holdings of the *Woodson* and *Roberts* pluralities for authority, the *Lockett* plurality declared that, with the possible exception of murders by life prisoners, the sentencer must be permitted to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[289]

This broad holding was unnecessary to invalidate the Ohio statute. The statute was very close to the mandatory statute struck down in *Woodson*. The Ohio statute permitted consideration of only three narrow mitigating factors: (1) complicity of the victim, (2) duress or strong provocation, or (3) diminished capacity.[290] Obviously mitigating factors such as minor accomplice status and lack of *mens rea* are missing. A requirement that such major factors be considered, as Justice Blackmun suggested, is a far cry from throwing the door wide open.

The "anything goes" rule of *Lockett* was finally adopted in a majority opinion in *Eddings* v. *Oklahoma*.[291] Eddings was a 16-year-old runaway who shot and killed an Oklahoma highway patrolman.[292] The trial judge stated that Eddings's youth was not sufficient, by itself, to outweigh the aggravating circumstances and that he could not take Eddings's troubled childhood into account.[293] The Court embraced the plurality opinion in *Lockett* and reversed.

Eddings added little to *Lockett* beyond giving the rule the stamp of majority approval. *Woodson*, *Roberts* and *Lockett* had by this time taken on a life of their own. The complete absence of any constitutional foundation for the rule was, by now, forgotten. Justice White's warning that the Court was headed back to pre-*Furman* arbitrariness was but a distant echo. After *Lockett/Eddings*, the Constitution was deemed to *require* a degree of discretion that the Court in *Furman* had strongly implied was constitutionally *prohibited*.[294]

2. *Sandstrom v. Montana*

One of the bedrock maxims of our common-law heritage is that "every man is presumed to intend the natural and probable consequences of his own act."[295] The Supreme Court itself endorsed this fundamental proposition many times after the enactment of the Fourteenth Amendment.[296] Yet in 1979, in *Sandstrom* v. *Montana*,[297] the Supreme Court decided that this pillar of the common law was a violation of the Fourteenth Amendment.[298]

There remained a great deal of doubt about the reach of *Sandstrom*, however. The instruction used in Georgia trials retained the time-honored "presumed" language, but clarified it with instructions carefully explaining that the presumption of intent was rebuttable and that any reasonable doubt must be resolved in favor of the defendant.

289. *Id.* at 604 (italics in original).
290. *Id.* at 607.
291. 455 U.S. 104 (1982).
292. *Id.* at 105-106.
293. *Id.* at 109.
294. This history is necessarily condensed. For a more complete version, *see* Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 WEST. ST. L. REV. 95, 104-116 (1987).
295. Allen v. United States, 164 U.S. 492, 496 (1896).
296. *Ibid*; Agnew v. United States, 165 U.S. 36, 53 (1897); Cox v. Louisiana, 379 U.S. 559, 567 (1965).
297. 442 U.S. 510.
298. *Id.* at 524.

The Georgia Supreme Court believed that the additional language fixed the *Sandstrom* problem.[299] So did one panel of the Eleventh Circuit.[300] Four justices of the Supreme Court also agreed that the instruction was constitutional.[301] By the narrowest possible vote, however, the majority disagreed.[302] Georgia cases involving "*Sandstrom* error," therefore, are cases involving an instruction which was considered proper for over a hundred years and which is so far from fundamental unfairness that it split the Supreme Court down the middle.

D. Findings.

The list of cases and their breakdown into the initial categories is shown in Appendix A. Of 116 cases, 45 were not suitable for further study because they were "false positives" from the Westlaw search (14), or because they were not the Eleventh Circuit's last word on the merits of the habeas petition (31)). Included in the latter category, to avoid double counting, were cases where a published denial of rehearing was also located by the search.

Of the 71 remaining cases, there were 28 grants[303] and 43 denials,[304] for a "grant rate" of 39.4%. This rate is about half of the 73% estimated by the NAACP-LDEF in 1983.[305] Even this rate does *not* mean, however, that state courts have turned their backs on clearly meritorious federal claims in four out of ten cases. Closer examination shows that the quality of justice is better in the state courts than the gross numbers indicate.

1. Reason for federal, not state, relief.

a) State court disregard of precedent.

Table 1 summarizes the results of analysis of the habeas-granted cases. The most important result here is that there is not a single case of a state court decision being set aside on federal habeas because the state court violated precedent in effect at the time of the state decision. That is, there are no cases in our "category 8." Every time an appellant presented his federal claim to the state supreme court on direct appeal, he received a ruling which obeyed the precedents established by the United States Supreme Court, within the limits in which reasonable judges may differ.

This finding devastates the principal argument used to justify relitigation on federal habeas corpus of cases affirmed by the state supreme court. The specter of elected state supreme court judges trampling on individual rights in mortal fear of the electorate is an illusion. The state supreme courts *are* conscientiously applying the law.

299. Godfrey v. Francis, 251 Ga. 652, 308 S.E.2d 806, 810-811 (1983).
300. Potts v. Zant, 734 F.2d 526, 532-35 (1984).
301. Francis v. Franklin, 471 U.S. 307, 327 (1985) (Powell, J., dissenting); *id.* at 332 (Rehnquist, J., dissenting).
302. *Id.* (majority).
303. Including Amadeo (80), decided for the state but reversed by the Supreme Court.
304. Including Adams (81), decided for Adams but reversed by the Supreme Court.
305. *See* note 250, *supra*.

TABLE 1
CASES FINALLY RESOLVED IN FAVOR OF PETITIONER

Case # State	Defendant	Cat*	Claim of Inn	Succ. Pet.	Changed by *Teague*	Issue on which habeas was granted	Description of crime(s)
114 Ala.	Magwood	3	Mental	No	No	Existence of mitigating factor	Premeditated revenge on sheriff
106 Ga.	Thomas	6	No	No	No	Ineffective assistance	Killed, probably molested nine-year-old boy
103 Fla.	Smith, D.W.	6	Yes	No	No	Ineffective assistance	Robbed gay man, locked him in car trunk & torched it
84 Ga.	Potts	1/7	No	Yes**	No	Instructions & argument	Robbed, shot one man; kidnapped, killed another
80 Ga.	Amadeo	2	No	Yes***	No	Jury venire cross-section	Held up, murdered old man in multi-state crime spree
70 Fla.	Elledge	7	No	No	Yes	Shackling	Raped, murdered woman; robbed, murdered two men
69 Fla.	Christopher	6	No	No	No	*Miranda*	Killed couple who took him in
67 Fla.	Magill	2/6	No	No	No	*Lockett* & ineffective assistance	Robbed conv. store, killed clerk
53a Ga.	Bowen	1	Mental	No	Yes	*Sandstrom*/harmless error	Raped and murdered young girl
53b Ga.	Dix	1	Mental	No	Yes	*Sandstrom*/harmless error	Horribly tortured and murdered ex-wife
49 Fla.	Hargrave	2	No	No	Yes	*Lockett*	Robbed conv. store, killed clerk to prevent ID
48 Fla.	Armstrong	2/3	No	No	No	*Lockett* & ineffective assistance	Robbed, murdered elderly couple
47 Ga.	Dick	5	Mental	No	No	*Sandstrom*/harmless error	Robbed store, murdered owner
46 Fla.	Messer	1	No	No	No	*Lockett*	Robbed, murdered motorist at rest stop
41 Ga.	Godfrey	5/7	No	No	Yes	*Sandstrom* & double jeopardy	Murdered wife and mother-in-law
39 Fla.	Jackson	7	No	No	Yes	"Mandatory" death instruction	Robbed couple, shot both, strangled woman
38 Fla.	Stone	1	No	No	Yes	*Lockett*	Murdered, dismembered employer's wife while on bail
37 Ga.	Corn	1	Mental	No	Yes	*Sandstrom*/harmless error	Robbed conv. store, murdered clerk
28 Fla.	Mann	7	No	No	Yes	*Caldwell*	Kidnapped, murdered 10-year-old girl
27 Ga.	Stephens	2	No	No	No	Ineffective assistance	Calmly murdered disabled police officer
20 Fla.	Ruffin	5	No	No	Yes	*Lockett*	Robbed, raped, murdered 7-month pregnant woman
19 Fla.	Middleton	1	No	No	No	Ineffective assistance	Parolee murdered woman who took him in
16 Ga.	Cervi	5	No	No	No	*Miranda/Edwards*	Hitchhiker robbed, murdered driver
15 Ga.	Smith, W.A.	6	Mental	No	No	*Miranda*	Robbed, murdered 82-year-old grocer
12 Ga.	Berryhill	6	No	No	No	Jury "cross-section"	Broke into home, murdered resident
9 Fla.	Knight	1	No	No	Yes	*Lockett*	Kidnapped couple, extorted $50K, shot w/ machine gun
5 Fla.	Jones	5	No	No	Yes	*Lockett*	Robbed liquor store, shot prone clerks, killed one
2 Fla.	Harris	6	No	No	No	Ineffective assistance	Robbed, murdered 73-year-old woman in her home

* See explanation in Table 2.
** First petition voluntarily withdrawn, not resolved on the merits.
*** First petition dismissed for nonexhaustion, not resolved on the merits.

TABLE 2
TOTALS IN HABEAS-GRANTED CASES

Reason for relief being granted in federal but not state court:		Alabama	Florida	Georgia	Totals
1:	Claim never raised to state court	0	4	4	8
2:	Claim raised too late, barred	0	3	2	5
3:	Courts disagree on the facts	1	1	0	2
4:	New Supreme Court rule after state ruling	0	0	0	0
5:	Clarifying Supreme Court case after state ruling	0	2	3	5
6:	Courts disagree on mixed fact/law question	0	4	3	7
7:	Courts disagree on unresolved question of law	0	3	2	5
8:	State court was clearly wrong based on Supreme Court precedent at the time of the state ruling	0	0	0	0
9:	Federal court is clearly wrong on question previously ruled on by state court	0	0	0	0
Totals:		1	17	14	32
Colorable Claim of Innocence:					
	Not to have committed act	0	1	0	1
	Mental defense only	1	0	5	6
	None	0	14	7	21
Issues:					
	Lockett	0	8	0	8
	Ineffective assistance	0	5	2	7
	Sandstrom	0	0	5	5
	Caldwell	0	1	0	1
	Miranda	0	1	2	3
	Other	1	2	5	8

b) Claims not timely presented to the state court.

Of the 32[306] claims found meritorious by the federal courts, eight of them apparently were never presented to state courts at all.[307] Six of those claims are based on rules which did not exist at the time of the direct appeal;[308] the state court could have correctly decided against the claim if it had been raised.

Five other claims were presented too late to be considered.[309] Ironically, the only one of these five who had good cause for not presenting his claim earlier was Amadeo, who was denied relief by the Eleventh Circuit and received it from the Supreme Court. In the four cases where the Eleventh Circuit itself granted relief despite a procedural default, it did so only by straining, if not breaking, the limits established by the Supreme Court.[310]

In this group of cases, federal habeas corpus has kept the prisoner on death row long enough for the rules to change in his favor or for his lawyers to think up new grounds of attack after the first assault failed. In only one case, Amadeo, was the new attack based on *facts* not known to the defense at trial or on direct appeal.

c) Subsequently-clarified rules.

There are five cases where the state court was "wrong" in hindsight, because a later decision of the Supreme Court further expounded upon an earlier case after various courts had differed in their interpretation.[311] These cases therefore involve rulings by state courts which were well within the bounds of judicial discretion at the time they were rendered, even though they are considered "wrong" by the time the Eleventh Circuit ruled on the case.

None of these cases, however, involves a fundamental unfairness of the proceeding. One of them[312] involves a violation of a mere prophylactic rule on confessions, while the confession itself was actually voluntary. The other four involve *Sandstrom*[313] and *Lockett*[314] error: instructions considered perfectly proper until relatively recently.

306. Four of the cases have two claims: Potts (84), Magill (67), Armstrong (48) and Godfrey (41). Hence there are four more claims than cases.
307. *See* Potts (84), Bowen (53a), Dix (53b), Messer (46), Stone (38), Middleton (18) and Knight (9). We say "apparently" because the Eleventh Circuit does not always mention prior state rulings. Some of these claims may have been raised and dismissed in unpublished rulings.
308. Potts (84), Bowen (53a), Dix (53b), Stone (38), Corn (37) and Knight (9).
309. Amadeo (80), Magill (67), Hargrave (49), Armstrong (48) and Stephens (27).
310. In one of the habeas-denied cases, Adams (81), the Eleventh Circuit did break the limits and was reversed.
311. Dick (47), Godfrey (41), Ruffin (20), Cervi (16) and Jones (5).
312. Cervi (16).
313. Dick (47) and Godfrey (41).
314. Ruffin (20) and Jones (5).

d) Disagreement between courts.

The remainder of the cases represent simple disagreement between the state and federal courts on questions where it cannot be said definitively that one court is right and the other is wrong.

There were two cases in which the state and federal courts disagreed on an issue of fact.[315] Congress and the Supreme Court have both mandated strong deference to the state courts on factual issues.[316] Both of these cases, in my opinion, violate the applicable standards.[317]

There are seven cases where the state and federal disagree on "mixed questions of law and fact."[318] Not surprisingly, over half of these involve ineffective assistance of counsel claims.[319] Two involve *Miranda* claims,[320] and one is a jury cross-section case.[321]

Finally, there are five cases in which the state and lower federal courts disagree on questions of pure law not resolved by the United States Supreme Court as of the date of the Eleventh Circuit decision.[322] In one of these cases, Godfrey, the Eleventh Circuit can now be seen to have been wrong, based on a subsequent Supreme Court decision.[323] In the other four cases, neither court can claim to be clearly "right."

2. Successive petitions.

Table 3 summarizes the results of the cases in which habeas was finally denied. Comparing the successive petition columns of Tables 1 and 3 shows the striking fact is that *all* of the petitioners who litigated their first petition to a decision on the merits succeeded on that petition or not at all. With the exceptions of Potts, who voluntarily withdrew his first petition, and Amadeo, whose first petition was dismissed for non-exhaustion, all of the successive petitions were denied. This result suggests that a strong barrier to successive petitions which allows them to be denied quickly in all but exceptional cases would speed up the process without changing the results.

3. Fundamental justice.

From the standpoint of gut-level justice, we see that federal habeas corpus in these cases is doing virtually nothing to improve the correctness of the result. Only *one* petitioner, Dennis Smith (103), had even a colorable claim that he did not commit the act of which he was accused. Six other

315. Magwood (114) and Armstrong (48).
316. 28 U.S.C. § 2254(d); Sumner v. Mata, 455 U.S. 591 (1982).
317. *See* comments to the cases in Appendix C.
318. These are questions where the legal question is intricately bound up with factual questions, as opposed to issues where a purely historical fact or an abstract legal proposition is the issue. Whether an attorney was "effective" is the most common mixed question.
319. Thomas (106), D. W. Smith (103), Magill (67) and Harris (2).
320. Christopher (60) and W. A. Smith (15).
321. Berryhill (12).
322. Potts (84), Elledge (70), Godfrey (41), Jackson (39) and Mann (28).
323. *See* comment to Godfrey (41) in Appendix C.

TABLE 3

	Defendant	Time b/t state affirmed and final federal denial Years	Months	Suc. Pet.	Issues*
112	Bowden	8	8	Yes	Proc. bar — Batson
105	Tafero	5	0	No	*Enmund*; *Lockett*, EAC
102	Tucker	6	9	No	*Caldwell*
96	Hall	5	4	No	Harmless error; Proc. bar — EAC
93	Demps	5	8	No	*Brady*
92	Johnson	5	10	No	*Lockett/Skipper*, Pros. misconduct
89	White	5	5	No	*Enmund*, DJ, *Lockett*
87	Dobbs	10	10	No	Jury cross-section
86	Ritter	4	0	No	*Baldwin* v. *Alabama*
81	Adams	6	9	Yes	*Caldwell*
79	Mulligan	7	3	Yes	*Caldwell*
77	Tucker	7	4	Yes	*Miranda*, *Thompson*, *Mich.* v. *Jackson*
76	High	6	4	No	*Lockett*, *Batson*, EAC, Pros. conduct, *Sandstrom*
75	Lindsey	2	9	No	*Swain*, *Batson*
72	Foster	8	4	Yes	EAC
66	Darden	11	4	Yes	Proc. bar — EAC, suggestive I.D.
65	Booker	3	10	Yes	Proc. bar — EAC, perjured testimony
63	White	5	11	Yes	Proc. bar
62	Ritter	4	4	Yes	Proc. bar — EAC, double use of element
61	Mitchell	12	5	Yes	Proc. bar — EAC, incompetency
59	Lightbourne	4	1	No	*Miranda*
60	McCorquodale	12	9	Yes	Proc. bar — Jury inst'ns
58	McCorquodale	12	9	Yes	*Caldwell*
56	Davis	8	10	Yes	Pros. remarks, DJ, *Miranda*, EAC
54	Messer	6	8	Yes	Proc. bar — psych. evaluation
51	Fugitt	3	1	No	DJ
44	Clark	7	10	No	Psych evaluation, cross exam of witness, *Lockett/Hitchcock*, EAC
42	Presnell	8	11	No	*Sandstrom*
40	Fleming	8	11	No	*Jackson*, *Edwards*
36	Daugherty	5	7	No	EAC, psych test, *Lockett*
35	Willis	9	0	No	Youth on jury, blacks on jury, pros. misconduct
34	Smith	5	11	No	Jury instn's, EAC, proc. bar, *Enmund*
33	Julius	3	7	No	EAC, proc. bar, lesser offense inst'n
31	Buford	6	5	No	Proc. bar — jury inst'ns
29	Harich	4	6	No	EAC, *Caldwell*
25	Williams	5	3	No	EAC - *Strickland*, fund. fairness, photos of victim, pros.
23	Stewart	5	7	No	*Caldwell*, *Strickland*
18	Bundy	3	6	No	Defendant competent, EAC - *Strickland*, *Faretta*,
17	Dunkins	5	5	No	*Miranda*, *Edwards*, *Strickland*
13	Singleton	3	7	No	*Strickland*, *Miranda*
8	Gates	9	3	No	Proc. bar, EAC - *Strickland*
7	Richardson	9	3	No	*Sandstrom*, jury instn's, EAC
1	Griffin	6	11	No	*Enmund*, pros. comments, racial statistics

Total: 43

* EAC = effective assistance of counsel; DJ = double jeopardy

petitioners had claims that, even though they were legally sane, they lacked intent or malice due to mental problems. A great many Americans would like to see such defenses abolished altogether.[324] Relatively few would consider an impairment of the presentation of such a defense to be an injustice of such magnitude as to warrant upsetting a final judgment.

Looking at the crimes that these people committed, no reasonable person could deny that virtually all of them are crimes that our society deems deserving of the death penalty. In 19 of the 28 cases, the motive was simple greed. The victims were killed only because they stood in the way of defendant's robbery or because they might identify him afterwards. Five cases are sex crimes, including three children and a pregnant woman. These innocent, helpless people were killed only because they happened to be the objects of the defendant's depraved sex drives. These are the kinds of random, senseless crimes that strike terror into the hearts of the law-abiding people.

Worst of all is the *Dix* case, number 53b. Attorneys working in the capital punishment area read hundreds of cases of terrible murders, but a very few are so vile, so revolting, that they turn even our hardened stomachs. *Dix* is one of these. The story of horrible torture that this inhuman monster gleefully inflicted on his helpless, suffering victim virtually screams off the page for justice. Yet the Eleventh Circuit Court of Appeals says that this methodical torturer deserves a new trial because the jury was not properly instructed on *intent!* Comparing the facts of *Dix* with the Supreme Court's example of harmless error in such cases,[325] one can only wonder whether the judges who decided *Dix* even *read* the controlling Supreme Court case.

With the possible exception of the one defendant who may not have committed the crime, all of these death sentences are richly deserved by the crimes committed. None is an injustice. However, it is axiomatic that justice must be tempered with mercy, and that is why we have discretionary sentencing. In one case, W. A. Smith (15), there may be good grounds for mercy. Smith was mentally retarded and, according to the federal court, in the lower two percent of the population in intelligence.[326]

In none of the rest of the cases are there compelling mitigating circumstances. There are no minor participants swept in by the felony murder rule.[327] There is no one with a mental condition which the jury was not allowed to consider.[328] While there are numerous other mental claims, they are largely contradicted by the deliberate nature of the crimes.

The Supreme Court's foremost proponent of federal habeas has said that its purpose is "to provide a prompt and efficacious remedy for whatever *society* deems to be intolerable restraints."[329] If "society" means mainstream America and not "a bevy of Platonic Guardians"[330] then very few

324. The diminished responsibility variant of the diminished capacity defense was abolished in California after the infamous "Twinkie defense" case. Cal. Penal Code § 28. For a devastating critique of the diminished responsibility nonsense, *see* Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984).
325. Rose v. Clark, 478 U.S. 570, 581-82 n. 10 (1986).
326. The evidence at the sentencing hearing, however, was that he was in the tenth percentile, a dramatic difference in terms of culpability.
327. Cf. Lockett v. Ohio, 438 U.S. 586 (1978).
328. Cf. Penry v. Lynaugh, 109 S.Ct. 2934 (1989).
329. Fay v. Noia, 372 U.S. 391, 401-402 (1963) (Brennan, J.) (italics added).
330. *See* L. HAND, THE BILL OF RIGHTS, 73 (1958).

of the cases in which habeas was granted achieve this purpose. Nearly all of these sentences are well-deserved punishments imposed on clearly guilty murderers.

Most of our society would not consider these sentences anywhere close to "intolerable" simply because they did not comply with a change or clarification in the rules made after the trial which would have been unlikely to have changed the result.[331] Nor would most people consider these sentences "intolerable" simply because two different sets of judges disagree about whether a lawyer was effective[332] or whether a prosecutor's argument was proper.[333] Finally, it staggers the imagination to assert that American society deems a conviction "intolerable" merely because it is based on a confession which was, in fact, voluntary but which did not strictly comply with the judicially-created prophylactic rule of *Miranda*.[334]

4. Application of Teague.

Applying *Teague* v. *Lane* to the cases, 12 of the 28 cases should have been decided differently if the *Teague* rule had been in effect at the time and properly applied by the court. This number includes five *Lockett/Eddings* claims in cases final before *Eddings*,[335] four *Sandstrom* cases[336] one *Caldwell* case,[337] and two cases in which the Eleventh Circuit made a new rule and imposed it on the states,[338] which it no longer has the authority to do.

The cases not affected by *Teague* fall predominently into the category of simple disagreement on questions of fact or law. Thus, a combination of the *Teague* rule, proper application of the existing requirement to defer to state factual findings, and a new rule requiring deference to state legal rulings could sharply reduce the number of grants of habeas corpus and reserve the writ for the correction of genuine injustice.

5. Delay.

Chief Justice Rehnquist recently stated that "to my mind the flaw in the present system is not that capital sentences are set aside by federal courts, but that litigation ultimately resolved in favor of the state takes years."[339]

The Chief Justice's concern is well-founded. The time from affirmance on direct appeal to decision against the petitioner by the Eleventh Circuit averaged about seven years. This delay represents *only* the delay for *collateral* review, excluding trial and appeal, and does not include further delay from the successive petitions which follow the ones decided in these cases. It is unfortunate but necessary that justice must be delayed for years in trial and appeal, but to further delay justice for the better part of a decade on mere collateral review is a national disgrace. By

331. All the Florida *Lockett* cases and the Georgia *Sandstrom* cases fall within this description.
332. *See* Thomas (106), Magill (67), Armstrong (48) and Harris (2).
333. *See* Potts (84), Mann (28).
334. *See* Christopher (69), Cervi (16), W. A. Smith (15).
335. Hargrave (49), Stone (38), Ruffin (20), Knight (9) and Jones (5).
336. Bowen (53a), Dix (53b), Godfrey (41) and Corn (37).
337. Mann (28).
338. Elledge (70) and Jackson (39).
339. Rehnquist, *More Judges Is Not Really the Answer*, Los Angeles Daily Journal, Feb. 8, 1989, § 1 at 6, col. 6.

reserving federal habeas corpus for the rare cases where the state court system has malfunctioned, the bulk of petitions can be quickly dispatched.

6. State responses.

One final observation arising from these cases is that neither Georgia nor Florida is doing as much as it might to protect the integrity of its own judgments. These two states err in opposite directions, though. Florida does too much on state collateral relief while Georgia does too little.

In the Florida cases, it was the state supreme court that opened the door to *Lockett* claims waived on direct appeal, thus opening the door to federal consideration of those claims as well.[340] A more strict procedural bar would better preserve the integrity of the state's judgments.

In Georgia, the typical pattern seems to be denial of a state habeas petition with an unpublished denial of review by the state supreme court.[341] In some cases, the state loses the benefit of the presumption of correctness of factual findings because those findings are not sufficiently explicit.[342] More attention to the state collateral review could prevent some costly retrials.

340. *See* Hargrave (49), Armstrong (48), Messer (46) and Stone (38) in Appendix C.
341. *See e.g.*, Thomas v. Kemp, 796 F.2d 1322, 1324 n. 1.
342. *See* Smith (15) in Appendix C.

PART III
Conclusions and Recommendations

A. Conclusions.

From the legal research in Part I of this paper and the study described in Part II, the following conclusions can be drawn:

1. The state supreme courts are conscientiously applying the precedents of the United States Supreme Court. Every capital defendant who properly presents his claim receives a decision following those precedents, as interpreted within limits in which reasonable judges may differ.[343]

2. To the extent that willful disobedience of Supreme Court precedent is a problem, it is the lower *federal* courts committing the disobedience.[344]

3. Federal habeas corpus is almost never employed to correct fundamentally wrong results. Almost all of the cases involve well-deserved sentences for horrible crimes.[345]

4. Few of the "errors" reviewed on federal habeas go to the fundamental fairness of the trial. Effective assistance of counsel is the only type of claim involved in these cases with a substantial impact on the reliability of the result. Most of the ineffective assistance claims that survive state review are marginal.[346]

5. The states are not doing as much as they could to preserve the integrity of their own judgments. Rapid resolution of claims, explicit findings of facts, strict procedural bars, and insistence on the exhaustion rule could have precluded many of the claims eventually granted.[347]

6. There is no constitutional limit on the legislative power to reduce or eliminate non-jurisdictional collateral attacks on convictions.[348]

B. The Purpose of Federal Habeas.

The purposes and functions of habeas corpus review of final convictions as presently practiced in the United States are:

1. To correct a fundamentally unjust incarceration.[349]

343. *See* pp. 34-38, *supra*.
344. *See* pp. 38 and 40, *supra*.
345. *See* pp. 38-41, *supra*.
346. *See* p. 41, *supra*.
347. *See* p. 42, *supra*.
348. *See* p. 3, *supra*.
349. Engle v. Isaac, 456 U.S. 107, 135 (1982).

2. To force trial and appellate courts to "toe the constitutional mark" under threat of having their judgments set aside.[350]

3. To ensure that no errors which caused the trial to be fundamentally unfair occurred, regardless of whether the result is just.[351]

4. To guard *any* violation of *any* of the myriad of rules today deemed "constitutional" regardless of the impact on the justice of the result, the fairness of the trial or the integrity of the judicial system.[352]

5. To delay execution long enough for new decisions to come down from the Supreme Court which are contrary to the decision in the defendant's case.[353]

6. To give the defendant multiple bites at the apple, improving the chances that one of the various sets of judges will consider a marginal claim meritorious.[354]

7. To delay simply for the sake of delay.[355]

8. To overprice capital punishment in the hope that the taxpayers will give it up.[356]

Of these purposes, the first three are both legitimate and sufficiently compelling to justify collateral review to the extent necessary to accomplish them. The fourth and fifth are legitimate but do not justify collateral attack on final convictions. Justice Brennan's statement that finality has *no* place in the criminal law is simply wrong; Judge Friendly's retort is correct.[357] Technical errors not affecting the fairness of the trial or the justice of the result are insufficient to overcome the need for finality. The sixth, seventh and eighth are illegitimate.

C. Recommendations: Federal Statutes and Rules.

1. Procedure default, exhaustion and retroactivity.

In the earthy wisdom of the auto mechanic, "if it ain't broke, don't fix it." The case law development in these areas is proceeding in an orderly manner toward the legitimate purposes of collateral review and away from the illegitimate purposes. It is highly unlikely that a statute or rule would be an improvement. Only a minor change is needed to deal with the "procedurally forced petition."[358]

350. Mackey v. United States, 401 U.S. 667, 687 (1971) (separate opinion of Harlan, J.).
351. Rose v. Lundy, 455 U.S. 509, 543-44 n. 8 (1982), (Stevens, J., dissenting).
352. This is the implicit basis of *Fay* v. *Noia*, 372 U.S. 391 (1963).
353. *See* p. 37, *supra*.
354. *See* p. 11, *supra*.
355. *See* Godbold, note 105, *supra*.
356. *See* note 106, *supra*.
357. *See* p. 9, *supra*.
358. *See* p. 16, *supra*.

2. Successive petitions.

A guilty convict who has already had an appeal, a state collateral review and a federal collateral review has already received *more* process than he was due. A second federal petition should be reserved for the genuinely innocent.[359]

3. Prior state adjudication.

The state decision should generally be respected on close questions of law, returning to rule of *Ex parte Hawk* and overruling *Brown* v. *Allen*.[360] The best mechanism for doing so is the doctrine of the law of the case.[361]

4. Specific language.

Modification of habeas corpus could be done either by amending the statutes[362] or by amending the rules for habeas corpus promulgated by the Supreme Court under the Rules Enabling Act.[363] The latter method has the advantage that Congressional inaction will not necessarily thwart reform. The Supreme Court can amend the rules subject to Congressional modification. I propose, then, the following amendments to the Rules Governing Proceedings in the United States District Courts on application under Section 2254, United States Code.

§ 1. Rule 9, subdivision (b) is rescinded and a new subdivision (b) added to read:

"**(b) Successive petitions.** A second or successive petition shall not be granted where a prior petition was decided against the petitioner on the merits unless either (1) the judgment is a miscarriage of justice, or (2) the petition is based on facts intentionally and illegally concealed by agents of the State."

Comment: This rule cracks down severely on the successive petition. "Miscarriage of justice" is defined in rule 15, below. The illegal concealment exception deals with egregious misconduct by state officials. Any other fundamental unfairness will have been raised in the first petition.

§ 2. Rule 12 is added, to read:

"**12. Prior State Decision of Federal Legal Question.**

"a) When a petitioner claims intentional racial discrimination in violation of the equal protection clause of the Fourteenth Amendment, the federal court shall consider the questions of law in that claim independently of any prior state decision.

"b) When a petitioner claims a violation of a rule which has been established by the Supreme Court to protect or enforce a constitutional right but which is not itself a constitutional right, the federal court shall accept the outcome of a full and fair determination of that issue in the state court. Included in this category are all claims under *Mapp* v.

359. *See Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986) (plurality).
360. *See* pp. 4 to 6, *supra*.
361. *See* pp. 22 to 27, *supra*.
362. 28 U.S.C. §§ 2241-2254.
363. 28 U.S.C. § 2072.

Ohio, 367 U.S. 643, *Miranda* v. *Arizona*, 384 U.S. 436, and *Griffin* v. *California*, 380 U.S. 609.

"c) For all other claims, the state court shall be considered a coordinate court to the lower federal courts for the purpose of the doctrine of the law of the case. The state court decision shall be followed by the district court and the court of appeals unless (1) the findings of fact on which the decision was based are not entitled to deference under 28 U.S.C § 2254 (d); (2) subsequent controlling authority which applies to the case has since made a contrary rule applicable; (3) the decision was clearly erroneous based on authority binding on the state court at the time of the decision; or (4) the judgment is a miscarriage of justice."

Comment: This rule preserves intact the decisions in *Rose* v. *Mitchell*[364] and *Stone* v. *Powell*[365] *Rose* recognized the special responsibility of the federal courts to provide a remedy for claims of racial discrimination. This rule would expand the *Stone* rule to include all cases where no constitutional right was violated, but where there is an allegation that a deterrent or prophylactic rule established by the Supreme Court has been violated. Direct review is adequate to remedy such violations. The additional costs of collateral review are unnecessary when the trial and imprisonment violate no constitutional right.

Subsection (c) is entirely new and is the single most important element of this proposal. It recognizes that there no sufficient reason to elevate the views of the federal courts over the state courts in a close case.[366]

§ 3. Rule 13 is added to read:

"**13. Stays of execution.**

"a) A proceeding is not pending for the purpose of 28 U.S.C. section 2251 until the petition is filed.

"b) The state court judgment shall not be stayed pending consideration of a successive petition unless the petition demonstrates a colorable claim that the petition is not barred by rule 9(b).

"c) Any stay granted by a court or judge of a district court or court of appeals pending consideration of a petition or appeal shall automatically terminate five days after a final decision against the petitioner. The court or judge may grant a new stay pending consideration of a petition for rehearing, an appeal, or a petition for certiorari. However, a stay granted pending a petition for rehearing shall not exceed thirty days and may not be renewed."

Comment: Subsection (a) should be perfectly obvious, yet the federal district courts in California have assumed the power to issue stays in cases not yet "pending."[367] These purported stays are probably void for lack of jurisdiction, placing the warden in an awkward position.

364. 443 U.S. 545 (1979).
365. 428 U.S. 465 (1976).
366. *See* Friendly, *supra* note 1, at 165 n. 125.
367. *See, e.g.*, Local Rules for the United States District Court, Eastern District of California, rule 19(h).

Subsection (b) provides for the rapid denial of stays on successive petitions. Such petitions would only be considered on the basis of actual innocence or suppression of evidence under proposed rule 9(b), and very few convicts have a colorable claim of either.

Subsection (c) provides for a reasonable termination of the stay. The last sentence is addressed to the Ninth Circuit's disgraceful obstruction of justice in the case of *Harris* v. *Pulley*.[368] As of this writing, a stay of execution has been in effect for over a year *after* the Ninth Circuit decided his petition had no merit.

§ 4. Rule 14 is added to read:

"14. Exhaustion of remedies.

"a) A court or judge may consider a petition containing both exhausted and unexhausted claims if the unexhausted claims are clearly without merit.

"b) A court or judge may issue a stay of execution and defer consideration of a petition containing an unexhausted claim if (1) the state court refuses to stay execution while the claim is being exhausted, (2) the claim is not clearly barred under state law, and (3) the petition is not barred by rule 9(b)."

Comment: Subsection (a) avoids a pointless exhaustion exercise for clearly meritless claims. Subsection (b) deals with the procedurally forced petition, something which will not occur if the state recommendations in the next section are adopted.

§ 5. Rule 15 is added to read:

"15. Miscarriage of justice defined.

(a) A sentence of death is a "miscarriage of justice" for the purpose of these rules if and only if either (1) the petitioner is actually innocent of the offense for which he was sentenced to death, or (2) the sentence of death is not within the discretion of the sentencing authority to impose based on the actual circumstances of the offense and the defendant.

(b) The burden of proving a miscarriage of justice is on the petitioner. A miscarriage of justice must be shown by a preponderance of the evidence unless it is based on a mental defense, in which case it must be shown by clear and convincing evidence.

Comment: Actual innocence is self-explanatory. The second possibility is to disprove all the aggravating or special circumstances which were used to elevate the crime to a capital offense or to prove an exemption, such as an accomplice without intent to kill.[369] The higher burden of proof for mental defenses is borrowed from 18 U.S.C. § 17(b) and reflects the growing societal consensus disfavoring such defenses.

D. Recommendations: State Procedure.

My recommendation to the states is simple: resolve all challenges in a single proceeding with explicit and detailed findings of fact and "plain statements" of procedural bars. A strict procedural

368. 852 F.2d 1546 (1988).
369. *See* Enmund v. Florida, 458 U.S. 782 (1982).

bar should preclude new claims after that time without a showing of actual innocence. The specific language will, of course, need to be worked into the state's own system, but the model below gives a general guide.

> **§ 1. Jurisdiction** When a sentence of death has been imposed, the supreme court shall have original and exclusive jurisdiction over all collateral challenges to the judgment. [In any habeas corpus proceeding in any court other than the supreme court, the judgment of the superior court shall be conclusive on the legality of the detention.]

Comment: The bracketed language is for states where the constitution directly vests habeas jurisdiction in other courts.[370] While the Legislature cannot divest the other courts of habeas jurisdiction, it can limit that jurisdiction to its common-law scope.[371]

> **§ 2. Duties of Counsel; Timelines of Petitions.**
>
> (a) Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus.
>
> (b) Within 60 days of the final due date for the filing of appellant's reply brief in the direct appeal, counsel shall file one of the following:
>
> (1) A petition for writ of habeas corpus;
>
> (2) An application for extension of time to file the petition; or
>
> (3) A description of the investigation conducted by counsel and a statement that no reasonable grounds for habeas corpus relief were found.
>
> (c) Any petition filed after the time allowed in subsection (b) of this section, including any extensions granted, shall be denied as untimely unless either (1) the petition is based on facts intentionally and illegally concealed by an agent of the state or (2) the judgment is a miscarriage of justice.

Comment: This section is adapted from the policies recently adopted by the California Supreme Court.[372] In conjunction with section 1, this section effectively forces the habeas petition to be filed concurrently with the review on appeal.

> **§ 3. Evidentiary hearing.**
>
> (a) If the habeas petition involves a genuine dispute of issues of material fact, the supreme court shall appoint a referee to hear the issues in the same manner as a habeas corpus proceeding in the superior court.
>
> (b) Within 90 days, unless the supreme court grants an extension for good cause, the referee shall submit a written report detailing each disputed issue of material fact and stating the referee's finding as to each issue.

370. *See, e.g.*, Cal. Const. art. VI, § 10.
371. *See* p. 3, *supra*.
372. *See* Appendix D.

(c) The referee shall also make a recommendation on each disputed question of law. If counsel for the people asserts that any claim of error raised by the defendant is procedurally barred, the referee shall explicitly recommend a ruling on the question. If the referee finds that the claim is procedurally barred and also addresses the merits of the claim, the referee shall explicitly state whether the procedural bar alone is sufficient to support the judgment.

(d) Any finding or recommendation of the referee which is neither disapproved by the court in its decision nor inconsistent with the court's resolution of the case shall be deemed a finding or ruling of the court.

Comment: This section is designed to fortify the judgment of the state court against federal collateral attack by making explicit the findings of fact and rulings on procedural bars which will generally be binding in the subsequent federal proceeding. The last two sentences of subsection (c) mandate the "plain statement" required by *Harris* v. *Reed*[373] Delegation of the bulk of the issues to a referee followed by approval by the state supreme court should provide both detailed rulings and quick finality.

§ 4. Miscarriage of justice defined.

(a) A sentence of death is a "miscarriage of justice" for the purpose of this [chapter] if and only if either (1) the petitioner is actually innocent of the offense for which he was sentenced to death, or (2) the sentence of death is not within the discretion of the sentencing authority to impose based on the actual circumstances of the offense and the defendant.

(b) The burden of proving a miscarriage of justice is on the petitioner. A miscarriage of justice must be shown by a preponderance of the evidence unless it is based on a mental defense, in which case it must be shown by clear and convincing evidence.

Comment: See comment to rule 15 in section C, *supra*.

E. Epilogue.

"Although, if past experience is any guide, I am sure I will be accused of proposing to abolish habeas corpus, my aim is rather to restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by the current excesses."[374] Adoption of the foregoing proposals will do exactly that.

373. 103 L.Ed.2d 308, 109 S.Ct. 1038 (1989).
374. Friendly, *supra* note 1, at 143.

APPENDIX A

Results of Westlaw Search

Date: 06/01/89 Time: 11:24 AM Identifier: HABEAS
Database: CTA11 Documents retrieved: 521
Query: HABEAS & (SENTENCE* /S DEATH)

CITATIONS LIST (Page 1) Database: CTA11 Total Documents: 521

1. *C.A.11, 1989. K. Griffin v. R. Dugger 874 F.2d 1277, 1989 WL 52944 (11th Cir.(Fla.))*
   Decision in favor of state.

2. *C.A.11, 1989. Harris v. Dugger 874 F.2d 756, 1989 WL 49526 (11th Cir.(Fla.))*
   Decision in favor of defendant.

3. *C.A.11 (Ala.) 1989. In re Lindsey --- F.2d ----, 1989 WL 46034 (11th Cir.(Ala.))*
   Not a final decision.

4. *C.A.11 (Ga.) 1989. Burden v. Zant 871 F.2d 956*
   Not a final decision.

5. *C.A.11 (Fla.) 1989. Jones v. Dugger 867 F.2d 1277*
   Decision in favor of defendant.

6. *C.A.11 (Ga.) 1989. Smith v. Kelso 863 F.2d 1564*
   Not a capital case.

7. *C.A.11 (Ala.) 1989. Richardson v. Johnson 864 F.2d 1536*
   Decision in favor of state.

8. *C.A.11 (Ga.) 1989. Gates v. Zant 863 F.2d 1492, 57 U.S.L.W. 2450*
   Decision in favor of state.

9. *C.A.11 (Fla.) 1988. Knight v. Dugger 863 F.2d 705*
   Decision in favor of defendant.

10. *C.A.11 (Ala.) 1988. Ringstaff v. Howard 861 F.2d 644*
    Not a capital case.

11. *C.A.11 (Ala.) 1988. Chatom v. White 858 F.2d 1479*
Not a capital case.

12. *C.A.11 (Ga.) 1988. Berryhill v. Zant 858 F.2d 633*
Decision in favor of defendant.

13. *C.A.11 (Ala.) 1988. Singleton v. Thigpen 856 F.2d 126*
Decision in favor of state.

14. *C.A.11 (Ala.) 1988. Beverly v. Jones 854 F.2d 412*
Not a capital case.

15. *C.A.11 (Ga.) 1988. Smith v. Zant 855 F.2d 712*
Decision in favor of defendant.

16. *C.A.11 (Ga.) 1988. Cervi v. Kemp 855 F.2d 702*
Decision in favor of defendant.

17. *C.A.11 (Ala.) 1988. Dunkins v. Thigpen 854 F.2d 394*
Decision in favor of state.

18. *C.A.11 (Fla.) 1988. Bundy v. Dugger 850 F.2d 1402*
Decision in favor of state.

19. *C.A.11 (Fla.) 1988. Middleton v. Dugger 849 F.2d 491*
Decision in favor of defendant.

20. *C.A.11 (Fla.) 1988. Ruffin v. Dugger 848 F.2d 1512*
Decision in favor of defendant.

21. *C.A.11 (Fla.) 1988. LoConte v. Dugger 847 F.2d 745*
Not a capital case.

22. *C.A.11 (Ga.) 1988. Smith v. Kemp 849 F.2d 481*
Not a final decision.

23. *C.A.11 (Fla.) 1988. Stewart v. Dugger 847 F.2d 1486*
Decision in favor of state.

24. *C.A.11 (Ala.) 1988. Singleton v. Thigpen 847 F.2d 668*
Decision in favor of state. Rehearing denied, see #13. Counted as not final to avoid double counting with #13.

25. *C.A.11 (Ga.) 1988. Williams v. Kemp 846 F.2d 1276*
Decision in favor of state.

26. *C.A.11 (Ga.) 1988. Waters v. Kemp 845 F.2d 260, 56 U.S.L.W. 2691*
Not a final decision.

27. *C.A.11 (Ga.) 1988. Stephens v. Kemp 846 F.2d 642*
Decision in favor of defendant.

28. *C.A.11 (Fla.) 1988. Mann v. Dugger 844 F.2d 1446*
Decision in favor of defendant.

29. *C.A.11 (Fla.) 1988. Harich v. Dugger 844 F.2d 1464*
Decision in favor of state.

30. *C.A.11 (Fla.) 1988. Rembert v. Dugger 842 F.2d 301*
Not a capital case.

31. *C.A.11 (Fla.) 1988. Buford v. Dugger 841 F.2d 1057*
Decision in favor of state.

32. *C.A.11 (Fla.) 1988. Miller v. Dugger 838 F.2d 1530*
Not a capital case.

33. *C.A.11 (Ala.) 1988. Julius v. Johnson 840 F.2d 1533*
Decision in favor of state.

34. *C.A.11 (Fla.) 1988. Smith v. Dugger 840 F.2d 787*
Decision in favor of state.

35. *C.A.11 (Ga.) 1988. Willis v. Kemp 838 F.2d 1510*
Decision in favor of state.

36. *C.A.11 (Fla.) 1988. Daugherty v. Dugger 839 F.2d 1426*
Decision in favor of state.

37. *C.A.11 (Ga.) 1988. Corn v. Kemp 837 F.2d 1477*
Decision in favor of defendant.

38. *C.A.11 (Fla.) 1988. Stone v. Dugger 837 F.2d 1474*
Decision in favor of defendant.

39. *C.A.11 (Fla.) 1988. Jackson v. Dugger 837 F.2d 1469, 56 U.S.L.W. 2456*
Decision in favor of defendant.

40. *C.A.11 (Ga.) 1988. Fleming v. Kemp 837 F.2d 940*
Decision in favor of state.

41. *C.A.11 (Ga.) 1988. Godfrey v. Kemp 836 F.2d 1557*
Decision in favor of defendant.

42. *C.A.11 (Ga.) 1988. Presnell v. Kemp 835 F.2d 1567*
Decision in favor of state.

43. *C.A.11 (Fla.) 1987. Agan v. Dugger 835 F.2d 1337*
Not a final decision.

44. *C.A.11 (Fla.) 1987. Clark v. Dugger 834 F.2d 1561*
Decision in favor of state.

45. *C.A.11 (Ga.) 1987. Hill v. Kemp 833 F.2d 927*
Not a capital case.

46. *C.A.11 (Fla.) 1987. Messer v. State of Fla. 834 F.2d 890*
Decision in favor of defendant.

47. *C.A.11 (Ga.) 1987. Dick v. Kemp 833 F.2d 1448*
Decision in favor of defendant.

48. *C.A.11 (Fla.) 1987. Armstrong v. Dugger 833 F.2d 1430*
Decision in favor of defendant.

49. *C.A.11 (Fla.) 1987. Hargrave v. Dugger 832 F.2d 1528*
Decision in favor of defendant.

50. *C.A.11 (Fla.) 1987. Brown v. Dugger 831 F.2d 1547*
Not a capital case.

51. *C.A.11 (Ga.) 1987. Fugitt v. Lemacks 833 F.2d 251*
Decision in favor of state.

52. *C.A.11 (Fla.),1987. HITCHCOCK v. DUGGER 832 F.2d 140*
Remand from Supreme Court, see 481 U.S. 393, to district court. Counted as

not a final decision because the mental decision fell outside the boundaries of the search.

53. *C.A.11 (Ga.) 1987. Bowen v. Kemp 832 F.2d 546, 56 U.S.L.W. 2306*
Decision in favor of defendant.

54. *C.A.11 (Ga.) 1987. Messer v. Kemp 831 F.2d 946*
Decision in favor of state.

55. *C.A.11 (Fla.),1987. DAUGHERTY v. DUGGER 831 F.2d 231*
Not a final decision. See #36.

56. *C.A.11 (Ga.) 1987. Davis v. Kemp 829 F.2d 1522*
Decision in favor of state.

57. *C.A.11 (Fla.) 1987. Davis v. Dugger 829 F.2d 1513, 56 U.S.L.W. 2251*
Not a final decision.

58. *C.A.11 (Ga.) 1987. McCorquodale v. Kemp 829 F.2d 1035*
Decision in favor of state. Successive petition denied, see #60.

59. *C.A.11 (Fla.) 1987. Lightbourne v. Dugger 829 F.2d 1012*
Decision in favor of state.

60. *C.A.11 (Ga.) 1987. McCorquodale v. Kemp 832 F.2d 543*
Decision in favor of state.

61. *C.A.11 (Ga.) 1987. Mitchell v. Kemp 827 F.2d 1433*
Decision in favor of state.

62. *C.A.11 (Ala.) 1987. Ritter v. Thigpen 828 F.2d 662*
Decision in favor of state.

63. *C.A.11 (Fla.) 1987. White v. Dugger 828 F.2d 10*
Decision in favor of state.

64. *C.A.11 (Fla.) 1987. Marrero v. Dugger 823 F.2d 1468*
Not a capital case.

65. *C.A.11 (Fla.) 1987. Booker v. Dugger 825 F.2d 281*
Decision in favor of state.

66. *C.A.11 (Fla.) 1987. Darden v. Dugger 825 F.2d 287*
Decision in favor of state.

67. *C.A.11 (Fla.) 1987. Magill v. Dugger 824 F.2d 879*
Decision in favor of defendant.

68. *C.A.11 (Ga.) 1987. Moore v. Kemp 824 F.2d 847*
Not a final decision.

69. *C.A.11 (Fla.) 1987. Christopher v. State of Fla. 824 F.2d 836*
Decision in favor of defendant.

70. *C.A.11 (Fla.) 1987. Elledge v. Dugger 823 F.2d 1439*
Decision in favor of defendant.

71. *C.A.11 (Ga.) 1987. Thomas v. Newsome 821 F.2d 1550*
Not a capital case.

72. *C.A.11 (Fla.) 1987. Foster v. Dugger 823 F.2d 402*
Decision in favor of state.

73. *C.A.11 (Fla.) 1987. Agan v. Dugger 828 F.2d 1496*
Not a final decision. See also #43.

74. *C.A.11 (Fla.) 1987. Miller v. Dugger 820 F.2d 1135*
Not a final decision.

75. *C.A.11 (Ala.) 1987. Lindsey v. Smith 820 F.2d 1137*
Decision in favor of state.

76. *C.A.11 (Ga.) 1987. High v. Kemp 819 F.2d 988*
Decision in favor of state.

77. *C.A.11 (Ga.) 1987. Tucker v. Kemp 818 F.2d 749*
Decision in favor of state.

78. *C.A.11 (Fla.) 1987. Mann v. Dugger 817 F.2d 1471*
Decision in favor of defendant. Rehearing granted, see #28. Counted as not final to avoid double counting with #28.

79. *C.A.11 (Ga.) 1987. Mulligan v. Kemp 818 F.2d 746*
Decision in favor of state.

80. *C.A.11 (Ga.) 1987. Amadeo v. Kemp 816 F.2d 1502*
Decision in favor of state. Reversed by the Supreme Court. Counted as in favor of defendant.

81. *C.A.11 (Fla.) 1987. Adams v. Dugger 816 F.2d 1493*
Decision in favor of defendant. Reversed by the Supreme Court. Counted as in favor of state.

82. *C.A.11 (Ga.) 1987. Wilcox v. Ford 813 F.2d 1140*
Not a capital case.

83. *C.A.11 (Fla.) 1987. Bundy v. Dugger 816 F.2d 564*
Not a final decision. See #18.

84. *C.A.11 (Ga.) 1987. Potts v. Kemp 814 F.2d 1512*
Decision in favor of defendant.

85. *C.A.11 (Fla.) 1987. Harich v. Wainwright 813 F.2d 1082*
Not a final decision. See #29.

86. *C.A.11 (Ala.) 1987. Ritter v. Smith 811 F.2d 1398, 7 Fed.R.Serv.3d 218*
Decision in favor of state.

87. *C.A.11 (Ga.) 1987. Dobbs v. Kemp 809 F.2d 750*
Decision in favor of state.

88. *C.A.11 (Ga.) 1987. Moore v. Kemp 809 F.2d 702*
Modified on rehearing. See #68. Not final.

89. *C.A.11 (Fla.) 1987. White v. Wainwright 809 F.2d 1478*
Decision in favor of state.

90. *C.A.11 (Fla.) 1987. Bundy v. Wainwright 808 F.2d 1410*
Not a final decision. See #83, 18.

91. *C.A.11 (Fla.) 1986. Cooper v. Wainwright 807 F.2d 881*
Not a final decision.

92. *C.A.11 (Fla.) 1986. Johnson v. Wainwright 806 F.2d 1479*
Decision in favor of state.

93. *C.A.11 (Fla.) 1986. Demps v. Wainwright 805 F.2d 1426*
Decision in favor of state.

94. *C.A.11 (Fla.) 1986. Zeigler v. Wainwright 805 F.2d 1422*
Not a final decision.

95. *C.A.11 (Fla.) 1986. Porter v. Wainwright 805 F.2d 930*
Not a final decision.

96. *C.A.11 (Fla.) 1986. Hall v. Wainwright 805 F.2d 945*
Decision in favor of state.

97. *C.A.11 (Fla.) 1986. Adams v. Wainwright 804 F.2d 1526*
Modified on petition for rehearing. See #81. Counted as not final to avoid double counting with #81.

98. *C.A.11 (Fla.) 1986. Hargrave v. Wainwright 804 F.2d 1182*
Decision in favor of state. Rehearing granted, see #49. Counted as not final.

99. *C.A.11 (Ga.) 1986. Dix v. Kemp 804 F.2d 618*
Decision in favor of defendant. Rehearing granted, see *Bowen*, #53. Counted as in favor of defendant. Case #53 is counted separately as Bowen's case.

100. *C.A.11 (Ala.) 1986. McLester v. Smith 802 F.2d 1330*
Not a capital case.

101. *C.A.11 STEWART v. WAINWRIGHT 802 F.2d 395*
Not a final decision. See #23.

102. *C.A.11 (Ga.) 1986. Tucker v. Kemp 802 F.2d 1293*
Decision in favor of state. Successive petition denied, see #77.

103. *C.A.11 1986. Smith v. Wainwright 799 F.2d 1442*
Decision in favor of defendant.

104. *C.A.11 (Fla.) 1986. Miller v. Wainwright 798 F.2d 426*
Not a final decision. See #74.

105. *C.A.11 (Fla.) 1986. Tafero v. Wainwright 796 F.2d 1314*
Decision in favor of state.

106. *C.A.11 (Ga.) 1986. Thomas v. Kemp 796 F.2d 1322*
Decision in favor of defendant.

107. *C.A.11 (Fla.) 1986. Bundy v. Wainwright 805 F.2d 948*
Not a final decision. See #90, 83, 18.

108. *C.A.11 (Fla.) 1986. Wiley v. Wainwright 793 F.2d 1190*
Not a capital case.

109. *C.A.11 (Ga.),1986. MESSER v. KEMP 794 F.2d 572*
Not a final decision. See #54.

110. *C.A.11 (Ga.) 1986. Fleming v. Kemp 794 F.2d 1478*
Not a final decision.

111. *C.A.11 (Ala.) 1986. Thigpen v. Smith 792 F.2d 1507*
Not a final decision. See #40.

112. *C.A.11 (Ga.) 1986. Bowden v. Kemp 793 F.2d 273*
Decision in favor of state.

113. *C.A.11 (Ga.) 1986. Collins v. Kemp 792 F.2d 987*
Not a final decision.

114. *C.A.11 (Ala.) 1986. Magwood v. Smith 791 F.2d 1438*
Decision in favor of defendant.

115. *C.A.11 (Ga.) 1986. Dobbs v. Kemp 790 F.2d 1499*
Not a final decision.

116. *C.A.11 (Fla.) 1986. Zeigler v. Wainwright 791 F.2d 828*
Not a final decision. See #94.

APPENDIX B

Summary of Habeas Denied Cases

112. *Bowden v. Kemp, 793 F.2d 273 (1986)*
State affirmed: Bowden v. State, 238 S.E.2d 905 (Oct. 18. 1977)

Defendant's claim of discriminatory peremptory challenges was procedurally barred as he failed to raise it in either state court or his two prior federal habeas petitions. 793 F.2d at 275.

105. *Tafero v. Wainwright, 796 F.2d 1314 (1986)*
State first affirmed: Tafero v. State, 403 So.2d 355 (Fla. 1981)

Defendant was denied habeas corpus by the federal circuit because the evidence supported the state court's finding of fact that the murder was premeditated (no *Enmund* violation) 796 F.2d at 1318, because he failed to show counsel was ineffective to his prejudice, *id.* at 1320, 1321, and because *Lockett/Skipper* error, if any, was harmless.

102. *Tucker v. Kemp, 802 F.2d 1293 (1986)*
State first affirmed: Tucker v. State, 263 S.E.2d 109 (1980)

After an Eleventh Circuit decision rejecting Tucker's prosecutorial argument claim, the Supreme Court vacated and remanded for reconsideration in light of *Caldwell* v. *Mississippi*. The court decided that its earlier decision was consistent with *Caldwell*. 802 F.2d at 1295.

96. *Hall v. Wainwright, 805 F.2d 945 (1986)*
State affirmed: Hall v. State, 403 So.2d 1321 (July 16, 1981)

Federal habeas denied as defendant's absence during general qualifications of the jury and during jury request for evidence was harmless. 805 F.2d at 947. Defendant's other claim, ineffective assistance of counsel, was barred as having been deliberately by-passed in state court. *Id.* at 948.

93. *Demps v. Wainwright, 805 F.2d 1426 (1986)*
State affirmed: Demps v. State, 395 So.2d 501 (Fla. 1981)

Defendant was denied federal habeas as he was not denied fundamental fairness at trial when the court refused to admit that the eyewitness was homosexual, 805 F.2d at 1430, 1431, or that the eyewitness had cut a deal with the state. The court found no *Brady* violation. *Id.* at 1431. Finally, the Court of Appeals agreed with the state court that there was no interference with the defense, so defendant was not entitled to a hearing on this issue. *Id.* at 1436, 1437.

92. *Johnson v. Wainwright, 806 F.2d 1479 (1986) reh. denied 1987*
State affirmed: Johnson v. State, 393 So.2d 1069 (Fla. 1980)

Federal habeas denied as defendant failed to establish that trial court did not consider lingering doubt as to his death sentence, 806 F.2d at 1482, or that trial court failed to weigh mitigating factors, *id.* at 1483, 1484. Furthermore, alleged prosecutorial misconduct did not render the trial fundamentally unfair. *Id.* at 1486.

89. *White v. Wainwright, 809 F.2d 1478 (1987)*
State affirmed: White v. Florida, 403 So.2d 331 (1981)

The federal appellate court denied habeas relief as the evidence was sufficient to support a sentence of death such that *Enmund* was not violated, 809 F.2d at 1483, 1484, that double jeopardy protections were not violated, *id.* at 1485, and that the trial court properly analyzed the aggravating and mitigating circumstances. *Id.* at 1485-1486.

87. *Dobbs v. Kemp, 809 F.2d 750 (1987)*
State affirmed: Dobbs v. State, 224 S.E.2d 3 (March 11, 1976)

The Court of Appeals denied rehearing, finding that defendant failed to establish a constitutional violation of equal protection through underrepresentation of women on the jury. 809 F.2d at 752.

86. *Ritter v. Smith, 811 F.2d 1398 (1987) reh. denied April 13, 1987*
State affirmed: Ritter v. State, 429 So.2d 923 (Ala. April 8, 1983)

Ritter had initially been granted habeas corpus on the Eleventh Circuit's decision that the Alabama statute was facially unconstitutional. *Ritter* v. *Smith*, 726 F.2d 1505 (1984). The Supreme Court then upheld the statute in *Baldwin* v. *Alabama*, 472 U.S. 372 (1985). The district court granted the state relief from the first judgment and entered an order denying habeas corpus. The Court of Appeals held that this procedure was proper.

81. *Adams v. Dugger, 816 F.2d 1493 (1987), reversed Dugger v. Adams, 103 L.Ed.2d 435 (1989)*
Adams v. Wainwright, 804 F.2d 1426 (1986)
Adams v. State, 484 So.2d 1216 (Fla. 1986)
Adams v. Wainwright, 764 F.2d 1356 (1985)
Adams v. State, 456 So.2d 888 (1984)
Adams v. State, 412 So.2d 850 (Fla. 1982)

Adam's conviction and sentence were affirmed on appeal, and state and federal habeas were denied.

Adams then filed a second state habeas petition, raising for the first time a claim that the trial judge's statements to the jurors violated the Eighth Amendment because they placed ultimate responsibility on the judge, not the jurors. Thus, he claimed, the jury recommendation of death was unreliable, citing *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985). The state supreme court ruled that denial of successive post-conviction relief petition was proper because all grounds for relief had been or should have been raised in his first petition. 484 So.2d at 1217.

Adams filed a second federal habeas petition, which was denied. The Court of Appeals found merit in this challenge and reversed. 804 F.2d at 1528.

On petition for rehearing, the Court of Appeals modified its opinion and denied rehearing. The court held that the *Caldwell* issue was "so novel as to have no reasonable basis in existing precedent," thereby furnishing cause not to have raised it earlier. 816 F.2d at 1500.

The Supreme Court reversed. The *Caldwell* claim *was* procedurally barred because the essence of the claim was that the jury was incorrectly advised of its true role under state law. This was a state law question readily available at the time of trial. 103 L.Ed.2d at 443. Adams was executed May 4, 1989.

79. *Mulligan v. Kemp, 818 F.2d 746 (1987)*
State affirmed: Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204 (Feb. 20, 1980)

The federal appellate court denied habeas relief in a successive petition finding that defendant's claims of misleading and incomplete felony murder instructions, improper introduction of morgue photographs of the victim, unfair representation of black and female jurors from the traverse jury and improper instructions at the sentencing phase were procedurally barred as an abuse of writ. 818 F.2d at 747-748. The court also reviewed defendant's *Caldwell* claim and found no error. *Id.* at 748.

77. *Tucker v. Kemp, 818 F.2d 749 (1987)*
State affirmed: Tucker v. State, 263 S.E.2d 109 (1980)

Defendant's petition for certificate of probable cause to appeal from denial of habeas was denied. His claims that police obtained incriminating statements from him in violation of his right to counsel and that introducing photographs of the victim's body at trial were procedurally barred as decided on the merits in a previous federal petition. His other contentions, denial of an independent psychiatrist and incomplete jury instructions, were denied under the abuse of writ doctrine. 818 F.2d at 750. See #102.

76. *High v. Kemp, 819 F.2d 988 (1987)*
State affirmed: High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981)

Grant of habeas corpus by the district court was reversed by the Court of Appeals. The court determined that the jury instructions adequately described the nature and function of mitigating circumstances, 819 F.2d at 991, that *Batson* did not apply retroactively to defendant's case, *id.* at 992, that the death penalty may be imposed on a murderer under age 18 at the time of the crime, *id.* at 993, that defendant was not denied effective assistance of counsel, *id.* at 994, that any *Sandstrom* error was harmless, *id.* at 995, and that the prosecutor had not engaged in misconduct. *Ibid.*

Note: Cert. granted *High* v. *Zant*, 101 L.Ed.2d 930, 108 S.Ct. 2896 (1988) vacated and denied 109 S.Ct. 3264 (July 3, 1989).

75. *Lindsey v. Smith, 820 F.2d 1137 (1987)*
State affirmed: Ex Parte Lindsey, 456 So.2d 393 (Ala. Sept. 21, 1984)

Habeas relief was denied. Lindsey's *Swain* v. *Alabama* claim was procedurally barred. 820 F.2d at 1143. *Batson* v. *Kentucky* does not apply retroactively on habeas. *Id.* at 1145. Defendant's confessions were voluntarily given, *id.* at 1148, 1149, he was not denied effective assistance of counsel, *id.* at 1152, and the death penalty was properly imposed, *id.* at p. 1153, 1154.

72. *Foster v. Dugger, 823 F.2d 402 (1987)*
State affirmed: Foster v. State, 369 So.2d 928 (Fla. May 10, 1979)

Federal court affirmed the denial of defendant's second petition for habeas corpus, at he had not been denied effective assistance of counsel. The court refused to second-guess counsel's trial tactics. 823 F.2d at 408.

66. *Darden v. Dugger, 825 F.2d 287 (1987)*
State affirmed: Darden v. State, 329 So.2d 287 (Fla. 1976)

Defendant's claims were properly rejected by the district court as an abuse of writ when they were omitted, withdrawn or rejected on the merits in the previous petition. 825 F.2d at 288.

65. *Booker v. Dugger, 825 F.2d 281 (1987)*
State affirmed: Booker v. State, 441 So.2d 149 (Nov. 17, 1983)

Federal appellate court determined that district court did not abuse its discretion by denying defendant's third petition for habeas corpus as an abuse of the writ. 825 F.2d at 285.

63. *White v. Dugger, 828 F.2d 10 (1987)*
State affirmed: White v. Florida, 403 So.2d 331 (1981)

Successive petition raising claims omitted from first petition constituted an abuse of writ, and White failed to show that the "ends of justice" warranted reconsideration. 828 F.2d at 12.

62. *Ritter v. Thigpen, 828 F.2d 662 (1987)*
State affirmed: Ritter v. State, 429 So.2d 928 (Ala. April 8, 1983)

Defendant's failure to raise his claims (that (1) use of an element of the crime as an aggravating factor was unconstitutional and (2) that trial counsel's yielding to Ritter's request not to argue against death penalty was ineffective assistance) in a previous federal petition amounted to abuse of writ. 828 F.2d at 667. See #86.

61. *Mitchell v. Kemp, 827 F.2d 1433 (1987)*
State affirmed: Mitchell v. State, 214 S.E.2d 900 (1975)

In a successive habeas petition, Mitchell's claims of ineffective assistance of counsel and incompetence to stand trial were barred by the abuse of the writ doctrine. Thus, the federal court properly denied the habeas corpus petition. 827 F.2d at 1435, 1436.

59. *Lightbourne v. Dugger, 829 F.2d 1012 (1987)*
State affirmed: Lightbourne v. State, 438 So.2d 380 (Fla. 1983)

No *Miranda* violations occurred in questioning defendant, 829 F.2d at 1017-18. Cellmate testimony did not violate the right to counsel. *Id.* at 1021. Cross-examination by defendant's public defender of a witness previously represented by the same PD office did not deprive defendant of effective assistance of counsel. *Id.* at 1023. Thus, habeas relief was properly denied.

60. *McCorquodale v. Kemp, 832 F.2d 543 (1987)*

In a second habeas petition, the federal court denied relief on McCorquodale's claim of instructional error because the claim should have been raised in the first petition. 832 F.2d at 544. See #58.

58. *McCorquodale v. Kemp, 829 F.2d 1035 (1987)*
State affirmed: McCorquodale v. State, 211 S.E.2d 577 (1974)

McCorquodale was permitted to make a new attack on the prosecutor's argument in his third habeas petition because of a new decision by the Supreme Court, *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985). However, the trial judge properly corrected the prosecutor's misleading statements so that any *Caldwell* error was harmless. 829 F.2d at 1037.

56. *Davis v. Kemp, 829 F.2d 1522 (1987)*
State affirmed: Davis v. State, 252 S.E.2d 443 (1979)

Habeas relief was denied on appeal, the court finding that prosecutor's remarks did not render the trial fundamentally unfair, 829 F.2d at 1527-1531, 1536, double jeopardy was not violated, *id.* at 1532, 1533, *Miranda* was not violated, *id.* at 1535, and defendant's counsel did not provide ineffective assistance, *id.* at 1538.

54. *Messer v. Kemp, 831 F.2d 946 (1987)*
State affirmed: Messer v. State, 247 Ga. 316, 276 S.E.2d 15 (March 3, 1981)

The Court of Appeals affirmed the denial of defendant's second habeas petition, rejecting his claim of a fundamentally unfair trial where he was not given an independent psychiatric evaluation. The ends of justice did not require the court to relitigate the claim because the record failed to disclose a constitutional violation. 831 F.2d at 958.

51. *Fugitt v. Lemacks, 833 F.2d 251 (1987)*
State affirmed: Fugitt v. State, 253 Ga. 311, 319 S.E.2d 829 (1984)

Federal appellate court agreed with propriety of the state's retrial of the defendant, finding the prosecutor did not violate the protections afforded by the double jeopardy clause. 833 F.2d at 252. Thus habeas relief was denied.

44. *Clark v. Dugger, 834 F.2d 1561 (1987)*
State affirmed: Clark v. State, 369 So.2d 97 (Fla. 1979)

Habeas was denied, the court determining that the defendant was not entitled to a court-appointed psychiatrist, 834 F.2d at 1564, he was not denied effective cross-examination of witnesses, *id.* at 1565, he was not denied effective assistance of counsel, *id.* at 1566, and that the failure of the jury to consider non-statutory mitigating circumstances was did not constitute *Hitchcock* error. *Id.* at 1569, 1570.

42. *Presnell v. Kemp, 835 F.2d 1567 (1988)*
State affirmed: Presnell v. State, 241 Ga. 49, 243 S.E.2d 496 (1978)

Defendant's petition for habeas corpus was denied as he failed to raise his *Sandstrom* claims in state collateral proceedings and could not meet the "cause and prejudice" test for having failed to do so. 835 F.2d at 1572-1573.

40. *Fleming v. Kemp, 837 F.2d 940 (1988)*
State affirmed: Fleming v. State, 243 Ga. 120, 252 S.E.2d 609 (1979)

Although the Court of Appeals stayed defendant's execution following the district court's denial of habeas corpus and reviewed his *Jackson* claims, the appellate court found that any error in the admission of defendant's statements was harmless. The habeas denial was affirmed. 837 F.2d at 948.

36. *Daugherty v. Dugger 839 F.2d 1426 (1988)*
State affirmed: Daugherty v. State, 419 So.2d 1067 (Fla. Sept. 14, 1982)

Defendant was not denied effective assistance of counsel at sentencing, 839 F.2d at 1430, nor by his

lawyer's failure to obtain a psychiatric evaluation. *Id.* at 1432. Furthermore, the trial court properly considered nonstatutory mitigating circumstances at sentencing. *Ibid.* Thus, the federal court denied defendant's habeas petition.

35. *Willis v. Kemp, 838 F.2d 1510 (1988)*
State affirmed: Willis v. State, 243 Ga. 185, 253 S.E.2d 70 (Feb. 27, 1979)

Court of Appeals denied defendant's habeas petition as he failed to establish that young adults are a cognizable group for cross-section requirement under the Sixth Amendment, 838 F.2d at 1416, or that the prosecutor improperly excluded blacks from the jury. *Id.* at 1519. The court also rejected defendant's allegations of prosecutorial misconduct. *Id.* at 1523.

34. *Smith v. Dugger, 840 F.2d 787 (1988)*
State affirmed: Smith v. State, 424 So.2d 726 (Fla. April 15, 1982)

Habeas corpus denied as the trial court did not violate *Enmund*, 840 F.2d 793, defendant was not prejudiced by the jury instructions during sentencing, nor was he denied effective assistance of counsel. *Id.* at 795, 796. Defendant's claim of a fundamentally unfair sentencing proceeding was procedurally barred. *Ibid.*

33. *Julius v. Johnson, 840 F.2d 1533 (1988)*
State affirmed: Ex Parte Julius, 455 So.2d 984 (Aug. 24, 1984)

Habeas relief was denied as the federal court found defendant had not been denied effective assistance of counsel as claimed, 840 F.2d at 1538, nor was he deprived of an individualized sentencing determination. *Id.* at 1540. Other issues raised by defendant in federal court were barred for failure to timely raise them in state court.

31. *Buford v. Dugger, 841 F.2d 1057*
State affirmed: Buford v. State, 403 So.2d 943 (Fla. 1981)

Defendant's claim on improper jury instructions was procedurally barred, because he failed to raise the issue on direct appeal in state court and it was meritless. 841 F.2d at 1059.

29. *Harich v. Dugger, 844 F.2d 1464 (1988)*
State affirmed: Harich v. State, 437 So.2d 1082 (Oct. 12, 1983)

The appellate court affirmed the denial of defendant's habeas petition on rehearing. Defendant had not been denied effective assistance when counsel failed to present a voluntary intoxication defense, 844 F.2d at 1471, and the prosecutor did not mislead the jurors as to their role in sentencing in violation of *Caldwell*. *Id.* at 1473-1475.

25. *Williams v. Kemp, 846 F.2d 1276 (1988)*
State affirmed: Williams v. State, 250 Ga. 553, 300 S.E.2d 301 (1983)

Federal habeas was denied with the court finding that defendant's counsel rendered effective assistance, 846 F.2d at 1280, 1281, that the introduction into evidence of a peace warrant against defendant did not amount to fundamental unfairness, *id.* at 1281, nor did the introduction of nude photography of the victim, *id.* at 1282, and finally, that the prosecutor's closing remarks at defendant's sentencing hearing, though objectionable, did not render the proceeding fundamentally unfair, *id.* at 1283. The defendant

also raised the issue of *Sandstrom* error, but the court rejected it as harmless beyond a reasonable doubt. *Id.* at 1283-1284.

23. *Stewart v. Dugger, 847 F.2d 1486 (1988)*
State affirmed: Stewart v. State, 420 So.2d 862 (1982)

The Court of Appeals rejected defendant's claim that comments made during *voir dire* diminished the role of the jury in violation of *Caldwell*. The court found that the juror's sense of responsibility was not improperly reduced. 847 F.2d at 1493. Defendant's claim of ineffective assistance was also denied, as counsel presented a logical and well-constructed argument inviting the jury to find the defendant innocent of murder. *Id.* at 1494.

18. *Bundy v. Dugger, 850 F.2d 1402 (1988)*
State affirmed: Bundy v. State, 455 So.2d 330 (Fla. 1985) - a previous murder
State affirmed: Bundy v. State, 471 So.2d 9 (Fla. 1985)

Although the Court of Appeals disagreed with the district court ruling that filing a petition on the eve of defendant's execution was abusive, 850 F.2d at 1406-1407, the appellate court still affirmed the denial of habeas corpus. The appellate court found that defendant was competent to stand trial, *id.* at 1410, that counsel was effective according to the *Strickland* standard, *id.* at 1412, that any violations of *Faretta* by the trial court were harmless, *id.* at 1414, and that hypnotically refreshed testimony did not violate the Sixth or Fourteenth Amendments, *id.* at 1420.

17. *Dunkins v. Thigpen, 854 F.2d 394 (1988)*
State affirmed: Dunkins v. State, 437 So.2d 1349 (Ala. March 1, 1983)

Federal habeas denied over defendant's claims of *Miranda* violations because there was a break in custody between his alleged assertion of right to counsel and his subsequent confession. *See Edwards* v. *Arizona*, 451 U.S. 477 (1981). Furthermore, his waiver of *Miranda* rights was voluntary, knowing and intelligent. 854 F.2d at 399.

The federal court also found that defendant's counsel in lower court proceedings satisfied the *Strickland* standard for effective assistance. *Id.* at 400.

13. *Singleton v. Thigpen, 856 F.2d 126 (1988)*
Singleton v. Thigpen, 847 F.2d 668 (1988)
State affirmed: Ex Parte Singleton, 465 So.2d 443 (Ala. 1985)

The court denied relief, finding that defendant had not been denied effective assistance of counsel though counsel failed to search Singleton's neighborhood for possible mitigating circumstances. 847 F.2d at 669. Defendant's confession was voluntary despite his low intelligence, thus there was no *Miranda* violation. *Id.* at 670.

On denial of rehearing, the court held that a state procedural bar prohibited defendant from raising issue of invalid waiver of *Miranda* rights. 856 F.2d at 127. Defendant could not show cause or prejudice under *Wainwright* v. *Sykes*. *Id.* at 128.

8. *Gates v. Zant, 863 F.2d 1492 (1989)*
State affirmed: Gates v. State, 261 S.E.2d 349 (1979)

Defendant was not denied effective assistance of counsel. 863 F.2d at 1500. Handcuffing him during

his confession and then showing it to jury didn't amount to prejudice requiring a new trial. *Id.* at 1502. Although there was *Sandstrom* error, it was harmless. *Ibid.*

7. *Richardson v. Johnson, 864 F.2d 1536 (1989)*
State affirmed: Richardson v. State, 376 So.2d 228 (Ala. 1979)

Habeas was denied because defendant's *Sandstrom* claim was barred by procedural default, 864 F.2d at 1539-1540, he was not entitled to a lesser included offense instruction, *id.* at 1539, and he had not been denied effective assistance of counsel, *id.* at 1541-1542.

1. *Griffin v. Dugger, 874 F.2d 1397 (Fla. 1989)*
State affirmed: Griffin v. State, 414 So.2d 1025 (Fla. 1982)

On remand from the United States Supreme Court, the Court of Appeals affirmed the district court's denial of habeas corpus. The appellate court determined that the state trial court findings satisfied *Enmund*, 874 F.2d at 1399, and that neither the prosecutor's comments nor the racial statistical evidence precluded imposition of the death penalty. *Id.* at 1400, 1401.

APPENDIX C

Summary and Analysis of Habeas-Granted Cases

This appendix summarizes the facts, procedural history and holding of those cases in which the final decision was in favor of a grant of habeas corpus. The final decision is the decision of the Supreme Court when certiorari was granted or of the Eleventh Circuit when certiorari was denied or not applied for.

The "category" designation for each case refers to the reason why relief was granted in state but not federal court:

1. The defendant never raised the issue in state court.
2. The state court did not reach the merits because the defendant did not raise the issue at the proper time and was therefore procedurally barred.
3. The federal and state courts disagree in their findings of fact.
4. The federal court applied a new rule of law announced by the United States Supreme Court after the state court decision.
5. The federal court applied a decision of the United States Supreme Court clarifying an earlier decision, where the earlier decision was rendered before the state court decision but the clarifying decision came afterward.
6. The state and federal court disagree on a "mixed question of law and fact," such as whether defense counsel was effective.
7. The state and federal courts disagree on a question of law not yet settled by the United States Supreme Court.
8. The state and federal courts disagree on a question where the state court was clearly wrong based on United States Supreme Court precedent existing at the time of the state court ruling.
9. The state and federal courts disagree on a question where the federal court is clearly wrong.

Categories 1 and 2 are considered first in making the determination. Thus, a claim never presented to the state court is category 1 even if the federal court eventually applied a new rule that would have qualified as a category 4 had that claim been presented to and rejected by the state court.

114. *Magwood v. Smith, 791 F.2d 1438 (1986)*
Magwood v. Smith, 608 F.Supp 218 (M.D. Ala. 1985)
Magwood v. State, 449 So.2d 1267 (Ala. Crim. App. 1984),
late appeal denied, 453 So.2d 1349 (Ala. 1984)
Ex parte Magwood, 426 So.2d 929 (Ala. 1983)
Magwood v. State, 426 So.2d 919 (Ala. Crim. App. 1982)

Two months after having been released from the county jail where he had been serving a sentence for drug possession, defendant returned to the jail and shot a sheriff three times at close range. On several previous occasions, defendant had expressed an intense desire to retaliate against this particular sheriff for perceived injustice during his incarceration. The shooting was witnessed by another officer, and the facts were uncontested at trial. 791 F.2d at 1440.

Defendant offered a mental defense, but was found sane in the guilt phase. The same mental evidence was offered as mitigation. Four of the psychiatrists examining defendant agreed he had

some mental illness and none testified that he was free of mental illness, but most were of the opinion he was not insane. 791 F.2d at 1449-50. The trial court considered this evidence but still found the "mental disturbance" and "diminished capacity" mitigating factors had not been established. 791 F.2d at 1441, 426 So.2d at 932.

Defendant was convicted of capital murder and sentenced to death. The conviction and sentence were upheld on direct appeal over defendant's objections of error in refusing to grant change of venue, letting the sanity issue go before the jury and failing to properly consider aggravating and mitigating circumstances. 426 So.2d at 930-32. A state habeas petition was also denied. 449 So.2d 1267.

On federal habeas, the district court "remanded" defendant's case back to the state for resentencing. The district court ruled that the trial court's finding that the mental condition mitigating circumstances had not been established was "clearly erroneous" under 28 U.S.C. § 2254(d). 608 F.Supp. at 226. The remaining grounds for relief alleged by Magwood were rejected by the district court. He appealed to the Court of Appeals; the state cross-appealed on the grant of the writ.

The Court of Appeals affirmed the grant of the writ of habeas corpus by applying the "presumption of correctness" standard of 28 U.S.C. § 2254(d) and finding that the nonexistence of the mitigating circumstances was not supported by the record. 741 F.2d at 1449.

Colorable Claim of Innocence: Mental only
Category: 3
Different Result Under Teague: No

Comment: The Eleventh Circuit overlooked two controlling Supreme Court precedents in this case. In second-guessing the trier of fact on the ultimate issue, as opposed to foundational facts for a procedural matter, the standard is not 28 U.S.C. § 2254(d) but rather *Jackson* v. *Virginia*, 443 U.S. 307 (1979): whether *any* rational fact-finder could have found the fact proven (or not proven) by the applicable standard. Even under the looser § 2254(d) standard, however, the trier of fact is entitled to disbelieve uncontradicted psychiatric testimony and credit other indicia of mental competence. *Maggio* v. *Fulford*, 462 U.S. 111 (1983).

106. *Thomas v. Kemp, 796 F.2d 1322 (1986), cert. denied, 93 L.Ed.2d 601 (1986)*
Thomas v. State, 247 Ga. 233, 275 S.E.2d 318 (1981)
Thomas v. Georgia, 449 U.S. 988 (1980)
Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980)

In two separate statements, to his girlfriend and his stepfather, defendant admitted killing nine-year-old Dewey Baugus by beating him with a stick, choking him and jumping on his neck. He also showed the girl the dead body of his victim. The body was discovered eight days later, partially decomposed and with the pants pulled down. 266 S.E.2d at 501.

The state court affirmed defendant's conviction, rejecting his claims of verdict unsupported by the evidence, violation of his right to an impartial jury (*Witherspoon*), and incompetency at trial. An objection to a jury instruction was procedurally barred. *Id.* at 501-503.

The United States Supreme Court vacated the death sentence and remanded the case to the Georgia Supreme Court for further consideration in light of *Godfrey* v. *Georgia*, 446 U.S. 420 (1980). On remand, Georgia reinstated the death sentence. 275 S.E.2d 318. A state habeas petition was denied.

Defendant then petitioned the federal district court for a writ of habeas corpus. The district court granted relief on grounds of ineffective assistance of counsel and improper jury instructions, and the state appealed. 796 F.2d at 1324.

The Court of Appeals affirmed the grant of habeas corpus on the basis of ineffective assistance due to failure to investigate mitigating evidence. *Ibid.* The attorney believed that his client had in-

structed him not to present this type of evidence. There is no mention of ineffective assistance in the direct appeal. The claim was apparently made only to the trial court in state habeas, from which appeal was denied. *Id.* at 1324 n. 1. The record of the state proceeding did not include findings on foundational facts underlying the ineffective assistance claim, such as whether counsel's decision was strategic or negligent. *Id.* at 1324.

Colorable Claim of Innocence: No
Category: 6
Different Result Under Teague: No

103. *Smith (D.W.) v. Wainwright 799 F.2d 1442 (1986)*
Smith v. Wainwright, 741 F.2d 1248 (1984)
Smith v. State, 421 So.2d 146 (Fla. 1982)
Smith v. State, 400 So.2d 956 (Fla. 1981)
Smith v. State, 365 So.2d 704 (Fla. 1978)

According to the lead prosecution witness, Johnson, he (Johnson), Smith and Wagner met at a bar and decided to rob a homosexual to obtain beer money. They went to another bar and selected John Arnsdorff as their victim. On the pretext of asking him to a party, they took him to Johnson's shack, where they robbed him of six dollars and his watch. They later hit him with a tire tool, stabbed him with an ice pick and put him in the trunk of his own car. At Smith's direction, Johnson doused the car with gasoline and set it on fire. Smith and Johnson later killed Wagner in an argument over the six dollars and watch. 356 So.2d at 705-706.

Smith testified that although he accompanied Johnson and Wagner to the second bar and left with them and the victim, they took him straight home because he was too drunk and loaded to do anything but sleep. *Id.* at 706. The jury was aided in resolving the credibility conflict by "considerable circumstantial evidence against Smith." *Ibid.* Testimony of observers at the second bar fit Johnson's versions of the story better than Smith's. Shoe prints at the scene were consistent with Smith's shoes. *Ibid.*

Johnson had initially confessed to the police, making no mention of Smith. Johnson's wife's initial statement also made no mention of Smith. Neither statement was used to impeach the Johnsons, who testified inconsistently with those statements at trial. However, Smith was able to introduce evidence of numerous other statements by Johnson to the same effect. 400 So.2d at 961-62. On state coram nobis, the state supreme court held that the additional inconsistent statements were merely cumulative. *Id.* at 962. On a state petition to vacate sentence (Rule 3.850), Smith presented this issue to the state supreme court as a *Brady* violation, saying that the statements were not disclosed. The state supreme court remanded to the trial court to determine the *Brady* violation. 400 So.2d at 964.

After holding a hearing, the trial court determined that there was no violation of *Brady* and denied habeas relief. The Florida Supreme Court affirmed, finding that the prosecution had provided all exhibits (including Johnson's confession) to the defendant or had made the defense aware of their existence. Furthermore, the state court determined that none of the statements was favorable to the defendant. Although Johnson's statement did not mention Smith by name, it "was a clear indication that some unnamed person participated in the subject crimes." 421 So.2d at 147.

Defendant then filed for federal habeas corpus. The district court denied his petition. The appellate court vacated in part and remanded to the district court to hold an evidentiary hearing on the claim of ineffective assistance of counsel for failure to use the conflicting statements of the Johnsons. 741 F.2d at 1252. On remand, the federal district court found no *Brady* violation but did find ineffective assistance. That is, defense counsel had the statements but did not use them. 799 F.2d at 1444.

The Court of Appeals affirmed, reasoning that the only contested issue at trial was whether defendant was the one who committed the murder, and if the original statements of the accomplice and his wife had been introduced by the defense attorney, the result may have been different. *Id.* at

1443. The court states that "nothing came to light indicating that Johnson's story had ever been anything but that version which he told at trial." *Id.* at 1444.

Colorable Claim of Innocence: Yes
Category: 6
Different Result Under Teague: No

Comment: The last-quoted statement of the Court of Appeals is incorrect. It is flatly contradicted by an excerpt of the trial transcript quoted in the state court opinion. 400 So.2d at 961.

84. *Potts v. Kemp, 814 F.2d 1512 (1987)*
Potts v. Kemp, 478 U.S. 1017 (1986) (granting Potts' cert. petition & vacating)
Kemp v. Potts, 475 U.S. 1068 (1986) (denying state's cert. petition)
Potts v. Zant, 764 F.2d 1369 (1985)
Potts v. Zant, 734 F.2d 526 (1984)
Potts v. Zant, 638 F.2d 727 (5th Cir. Unit B. 1980)
Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978)

Defendant and a female companion persuaded one victim, Eugene Snyder, and another woman to give them a ride to a nearby city. While on the road defendant shot Snyder, but Snyder was able to stop the vehicle and hide the ignition key. Defendant then shot him again, dragged him into the underbrush and robbed him. Potts then walked to a nearby house and asked the occupants for help. Michael Priest agreed to give a him a ride.

When they arrived at the scene Priest tried to help Snyder, but defendant forced him at gunpoint to drive him and the two women away. In a secluded area, defendant ordered Priest out of the car, and though he pled for his life, defendant killed him by a shot to the head. 243 S.E.2d at 514. Potts was tried separately for armed robbery, aggravated assault and kidnapping in Cobb County, where the episode began, and for murder in Forsyth County, where he killed Priest. He was convicted and sentenced to death in both trials.

On appeal defendant alleged that the prosecutor's remarks to the jury prejudiced the jury to impose a death sentence. The prosecutor had read aloud discussions of the death penalty from *Gregg* v. *Georgia*, 428 U.S. 153 (1976) and *Eberhart* v. *State*, 47 Ga. 598 (1872). The state supreme court determined that although the argument was improper, it did not amount to reversible error. 243 S.E.2d at 522-523. A federal habeas petition was filed on Potts's behalf. Potts decided to withdraw the petition and cease fighting his execution. The district court permitted him to do so. He then changed his mind and authorized a second petition. The district court dismissed the successive petition as an abuse of the writ, but the Court of Appeals reversed, 638 F.2d 727, holding that an evidentiary hearing was required. The district court applied the extremely liberal standard of *Sanders* v. *United States*, 373 U.S. 1 (1963) and heard the claim on the merits. The Court of Appeals affirmed that there had not been an abuse of the writ. 734 F.2d at 528-529.

Attacking the Cobb County verdict, Potts claimed that the jury had not been specifically instructed that it had to find the element of bodily injury as a part of the kidnapping verdict. On the Forsyth County murder charge, he repeated his attack on the prosecutor's argument. He also attacked the instructions on intent in the Forsyth case on the grounds that they impermissibly shifted the burden of proof. The district court granted habeas on the first two grounds and rejected the third. 734 F.2d at 529. A double jeopardy claim was also rejected. *Ibid.*

The Court of Appeal affirmed on all grounds. On the kidnapping instructions, the court found that the lack of a specific finding on bodily injury was a fatal defect. There is no discussion of harmless error, despite the lack of any dispute that the kidnap victim was, in fact, killed. There is also no discussion of Potts's failure to present this claim to the state courts, of the exhaustion doctrine, or of the procedural bar rules. *Id.* at 529-530. On the *Sandstrom* claim, the court found that although some passages of the instructions used mandatory "presumption" language, the instructions as a whole did not shift the burden of proof. *Id.* at 533-535. On the issue of prosecutorial argument, the Court of Appeal found that because of the prosecutor's quotation from an old

Georgia opinion on the death penalty, "the jury may have been misled into believing that it had a legal duty to return a death sentence." 734 F.2d at 536.

Potts and the state both petitioned for certiorari. The state's petition was denied over a vigorous dissent by Chief Justice Burger and Justice Rehnquist. The Chief Justice noted that the jury instruction issue had never been presented to the state courts. "[T]he District Court and the Court of Appeals entertained [the] petition contrary to established law," by ignoring the exhaustion requirement. 475 U.S. at 1071.

By the time the Supreme Court ruled on Potts's petition, three decisions had clarified the issues. In *Francis* v. *Franklin*, 471 U.S. 307 (1985), the Court had narrowly decided that the additional language in the Georgia presumption of intent instruction had not cured the *Sandstrom* problem. *Rose* v. *Clark*, 478 U.S. 570 (1986) established that the *Sandstrom* error was subject to harmless-error analysis. *Darden* v. *Wainwright*, 477 U.S. 168 (1986), established that when a defendant claims improper prosecutorial argument, the court must not look at the argument in isolation but must also examine the defense argument and court instructions to see whether, on the whole, the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at p. 181-183. The Supreme Court vacated and remanded for reconsideration in light of *Francis* and *Rose*.

On remand, the Court of Appeal found that the overwhelming proof that Potts committed "the purposeful, cold-blooded killing of a defenseless human being," 814 F.2d at 1516, rendered the *Sandstrom* error harmless. The kidnapping instruction and prosecutor argument portions of the prior opinion were reinstated without discussion.

Colorable Claim of Innocence: No
Category: 1 (kidnapping instruction); 7 (prosecutor argument)
Different Result Under Teague: No

Comment: The Court of Appeals's holding that the *Sandstrom* error was harmless is clearly inconsistent with its implicit holding that the kidnapping instruction error was not. If Potts unquestionably murdered Priest in cold blood, then he most certainly caused him great bodily harm in the course of the kidnapping. In addition, *Darden* clearly calls for reconsideration of the prosecutorial misconduct finding.

80. *Amadeo v. Zant, 108 S.Ct. 1774, 100 L.Ed.2d 249 (1988)*
Amadeo v. Zant, 816 F.2d 1502 (1987)
Amadeo v. Kemp, 773 F.2d 1141 (1985)
Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718 (May 2, 1979) reh. den. May 29, 1979

Amadeo was convicted of murder and armed robbery by the Georgia state court. He and two friends were traveling through Tennessee, Georgia and Alabama while absent without leave from a Marine Corps base in North Carolina. 255 S.E.2d at 719, 720.

In a signed confession, the defendant admitted the three were driving around the back roads of Georgia, "looking for a little store to hit." They found an old man, James Turk Sr., alone, dumping trash. Amadeo pointed a .22 automatic at him demanding money, but before he had time to complete the robbery another vehicle pulled up. Amadeo shot Mr. Turk in the chest and ran. At trial, the eyewitness who drove in identified Amadeo as the man who fired the fatal shot. 816 F.2d at 1504 n. 4.

While pursuing the defendant's direct appeal to the Georgia Supreme Court, his lawyers found an unsigned, undated, unstamped memo from the district attorney's office to the County Jury Commission concerning a scheme to underrepresent blacks and women on the master jury list. 100 L.Ed.2d at 257. In an independent civil action the federal district court determined that the memo was intentionally designed to underrepresent blacks and women, but not so harshly as to give rise to a prima facie case of discrimination under *Swain* v. *Alabama*, 380 U.S. 202 (1965).

Relying on the decision in the civil case, Amadeo raised a jury composition challenge in state court. The Georgia Supreme Court considered his claim waived, as not having been timely made, and affirmed his conviction. 255 S.E.2d 718.

Defendant then petitioned for habeas corpus in federal court, raising the same issues as in state court plus an ineffective assistance claim for failure to argue the unconstitutional jury issue. The District Court dismissed the petition for failure to exhaust his contentions on ineffective assistance in state court. In a successive petition to the Georgia state courts, defendant was again denied relief. 773 F.2d at 1142.

Having exhausted his state remedies, defendant petitioned the federal district court a second time for a writ of habeas corpus. The district court granted relief, finding defendant had shown sufficient "cause and prejudice" for raising his claim of an unconstitutional jury in federal court despite state procedural bar. *Id.* at 1143.

On appeal, the Eleventh Circuit remanded for an evidentiary hearing to determine the specifics of the discriminatory selection process and whether the method was "nondiscoverable." *Id.* at 1145. The district court then made a factual determination that county officials had deliberately concealed the incriminating memo and that the defense had not withheld the claim as a ploy to get into federal court. Thus, the defendant was excused from the procedural default and habeas corpus was properly granted.

A divided panel of the Court of Appeals reversed, essentially because it disagreed with the district court's conclusions. 816 F.2d at 1507. The court found that the memo was "readily discoverable in the county's public records 'and that the defense lawyers' made a considered tactical decision" not to pursue the jury challenge. 816 F.2d at 1507.

The United States Supreme Court granted certiorari and reversed concluding:

A. That the district attorney's memo was concealed by county officials was the finding of the district court. The Court of Appeals ignored this finding of fact, substituted it's own decision that the memo was a readily discoverable public document, and declared that the district court was clearly in error. However, the circumstances of the discovery of the document indicate it was concealed and the finding of the district court was entirely reasonable. 100 L.Ed.2d at 261.

B. The district court also concluded, as a matter of fact, that the defendant's lawyers did not deliberately by-pass a jury challenge so as to save a claim for appeal. Although there was ample evidence to support the appellate court's contrary conclusion, "where there are two permissible views of the evidence, the factfinders choice between them cannot be clearly erroneous." 100 L.Ed.2d at 262.

As the Court of Appeals did not follow rule 52(a) by engaging in impermissible appellate factfinding, its determination that the defendant's jury challenge was procedurally barred was in error. Accordingly, the Supreme Court reversed.

Colorable Claim of Innocence: 2
Category: No
Different Result Under Teague: No

70. *Elledge v. Dugger, 823 F.2d 1439 (1987) and 833 F.2d 250, cert. denied 99 L.Ed.2d 715 (1988)*
Elledge v. State, 432 So.2d 35 (Fla. 1983)
Elledge v. Graham, 432 So.2d 35 (Fla. 1982)
Elledge v. State, 408 So.2d 1021 (Fla. 1981) and 432 So.2d 35 (1983)
Elledge v. State, 346 So.2d 998 (Fla. 1977)

Defendant was convicted in state court for a weekend crime spree in which he admittedly raped and murdered one woman and robbed and murdered two men. He was sentenced to death, and the

state supreme court affirmed the conviction but vacated the sentence and remanded for resentencing. 346 So.2d at 998.

Elledge was shackled during the second sentencing proceeding because he had threatened to attack the bailiff. The state supreme court affirmed. Precedents which hold that shackling during the guilt phase interfere with the presumption of innocence are simply inapplicable. "[A]ppellant did not stand before the sentencing jury as an innocent man; rather he stood as a confessed murderer of three persons." 408 So.2d at 1022. State collateral relief was also denied. 432 So.2d at 36.

The federal district court denied habeas corpus, and Elledge appealed.

On appeal, the court denied relief on all defendant's claims except on the improper shackling at his sentencing. The majority found this "inherently prejudicial." 823 F.2d at 1451. The dissent agreed with the state court and found the shackling precedents inapplicable to the penalty phase.

Colorable Claim of Innocence: No
Category: 7
Different Result Under Teague: Yes — Courts of Appeals created a new rule in this case

Comment: Of the four federal judges who examined this question, two of them agreed with the unanimous decision of the state supreme court. Yet Elledge, who is undisputedly guilty of *three* murders plus rape and robbery, nevertheless gets a new sentencing hearing on the basis of a claim which is marginal at best.

69. *Christopher v. Florida, 824 F.2d 836 (1987), cert. denied 98 L.Ed.2d 1019 (1988)*
Christopher v. State, 582 F.Supp. 633 (S.D. Fla. 1984)
Christopher v. State, 416 So.2d 450 (Fla. 1982)
Christopher v. State, 407 So.2d 198 (Fla. 1981)

William Christopher had no place to live, so Bertha Skillin, who had adopted his illegitimate daughter, took him in. While living with Ms. Skillin and her companion, George Ahern, defendant began an incestuous relationship with his daughter, who was fourteen at this time. Ms. Skillin discovered what was going on and confronted defendant. When she tried to call the police, defendant shot her and dragged her body into the bathroom.

Later, Mr. Ahern came home. Before he discovered the body, defendant persuaded him to lend him $300 so he could afford to leave the state. Upon withdrawing the money, defendant and Ahern returned to the home, where defendant shot him also. Defendant then fled the state with his daughter. 407 So.2d at 199-200. After apprehension, in another state, he confessed to both murders. 407 So.2d at 199-200.

On direct appeal, defendant alleged the confessions were obtained in violation of *Miranda*. However, the state supreme court found his confession was freely and voluntarily made and admissible at trial. 407 So.2d at 201. His claim that his request to cut off questioning was not honored was rejected. The court found "no evidence that appellant exercised his right to halt the interrogation." *Id.* at 200. Christopher's state habeas petition was denied. *Christopher* v. *State*, 418 So.2d at 450. The Florida Supreme Court determined that defendant should have raised his claims of incompetency on direct appeal, *id.* at 452, that he had not been subject to disproportionate or inappropriate sentencing, *id.* at 453, he had not been denied the right to an impartial jury or effective assistance of counsel. *Ibid.*

On federal habeas, the district court found that Christopher's claim that the interrogating officers "failed to scrupulously honor petitioner's right to cut off interrogation is simply unsubstantiated by the record." 582 F.Supp. at 643. At one point, Christopher indicated he wanted to stop talking but then continued talking. At another point, he indicated he wanted to stop, and the officers immediately stopped talking about the crime and began discussing waiver of extradition. *Ibid.*

Unlike the bright-line rule for requests for counsel, *Edwards* v. *Arizona*, 451 U.S. 477 (1981),

requests to cut off questioning are governed by the more vague rule of *Michigan* v. *Mosley*, 423 U.S. 96 (1975). The district court found that the requirements of *Mosley* had been satisfied. The Court of Appeals reversed because it disagreed with the district court's *Mosley* analysis and with the prior court's interpretation of the transcript of the interview. 824 F.2d at 839-845.

Colorable Claim of Innocence: No
Category: 6
Different Result Under Teague: No

Comment: The Florida Supreme Court and the federal district court both concluded that the confession was, in fact, voluntary, a conclusion not challenged by the Eleventh Circuit. Thus, a murderer who has not, in reality, been "compelled . . . to be a witness against himself" gets a new trial without the most important evidence against him, simply because the courts disagree on a fine point of the application of a prophylactic rule. This case makes a compelling argument for Justice O'Connor's thesis that *Miranda* claims should not be relitigated on habeas. *Duckworth* v. *Eagan*, 57 U.S.L.W. 4942, 4944 (concurring). See also Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 163 (1970).

67. *Magill v. Dugger, 824 F.2d 879 (1987)*
Magill v. State, 457 So.2d 1367 (Fla. 1984)
Magill v. State, 428 So.2d 649 (Fla. 1983)
Magill v. State, 386 So.2d 1188 (Fla. 1980)

Magill robbed a convenience store. He then kidnapped Karen Sue Young, the clerk, at gunpoint. He drove to a wooded area where he raped her and then shot her at point blank range. Police arrested the defendant within minutes of his completion of the crimes. Magill gave a confession, which was taped.

Initially, defendant pled not guilty by reason of insanity, but both court-appointed psychiatrists found him competent to stand trial and not legally insane at the time of the crimes. Magill testified at trial. He admitted he had killed Karen but claimed he did so on impulse, not with premeditation. The jury found him guilty of first degree murder and sentenced him to death. 824 F.2d at 880-882.

On direct appeal, the state supreme court affirmed defendant's conviction but vacated his sentence and remanded the cause to the trial court. 386 So.2d 1188. *Lockett* v. *Ohio*, 438 U.S. 586 (1978) was decided twelve days after oral argument on the initial direct appeal and was not argued to the court or mentioned in the opinion. After a motion for rehearing raised *Lockett*, the state court deleted a sentence from the opinion (which vacated the death sentence on other grounds) and denied rehearing. 824 F.2d at 891-92. Upon resentencing, the trial court considered both statutory and non-statutory mitigating and aggravating circumstances and again imposed the death penalty. The state supreme court affirmed. 428 So.2d at 649, 652.

On state collateral attack, the state trial court found, after a full evidentiary hearing, that the defendant had failed to show that any additional mitigating evidence would have been helpful or even what it would have been. The state supreme court affirmed, finding that counsel was competent. Trial counsel's guilt phase strategy to admit the killing and go for second degree, was reasonable. The state court found that any claim of exclusion of non-statutory mitigating circumstances was procedurally barred. 457 So.2d at 1370-71.

Magill then petitioned the federal district court for habeas relief. The federal court denied defendant an evidentiary hearing and denied relief. Defendant appealed. 824 F.2d at 879.

The Court of Appeals found that counsel's performance was deficient at the guilt phase, stating that "there was no strategic purpose in Magill taking the witness stand." 824 F.2d at 887. Counsel had also failed to prepare the witness and failed to object to an allegedly improper question on cross-examination. *Id.* at 885-888. In light of the taped confession admitting premeditation, however, this deficiency did not undermine confidence in the guilt phase outcome. *Id.* at 888. However,

the court found that this and other errors did undermine confidence in the penalty phase. One of the errors was that counsel did not call a psychiatrist who supposedly would have given more favorable testimony, and "there is no evidence that [this psychiatrist] was unavailable at trial." *Id.* at 889.

The Court of Appeals also found *Lockett* error and found that the *Lockett* claim was not procedurally barred. *Id.* at 891. The fact that Magill was properly resentenced by a judge post-*Lockett* was not deemed to cure the erroneous instructions in the first sentencing proceeding. *Id.* at 892. The state court's "plain statement" that the *Lockett* claim *was* procedurally barred, 457 So.2d at 1370, is not mentioned.

Comment: The Court of Appeals's statement that "there was no strategic purpose in Magill taking the stand" is absolute nonsense. With the state in possession of an admissible tape of one's client confessing to first degree murder, there is little an attorney can do but go for mercy. Common sense dictates that a sentencer will have more mercy for a wrongdoer who honestly confesses and expresses remorse, which is exactly what Magill did. 824 F.2d at 884. The court also erroneously placed the burden of showing witness unavailability on the state.

The court's holding that resentencing by a judge who explicitly considered nonstatutory mitigating circumstances does not cure any *Lockett* error is contrary to the holding of the Elledge (70) panel eight days earlier. See 823 F.2d at 1449.

Colorable Claim of Innocence: No
Category: 2 (*Lockett*); 6 (ineffective assistance)
Different Result Under Teague: No — resentencing final after *Eddings*

53a. *Bowen v. Kemp, 832 F.2d 546 (1987), cert. denied 99 L.Ed.2d 281 (1988)*
Bowen v. Kemp, 769 F.2d 672 (1985) vacated, 810 F.2d 1007 (1987)
Bowen v. State, 244 Ga. 495, 260 S.E.2d 855 (1979)
Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978)

After giving two young girls a ride to the local laundromat, Bowen took one of them to a vacant house where he raped her and stabbed her fourteen times in the face, chest and abdomen. He left the body at the house, but threw away the knife and bloody clothes. In a suicide attempt, Bowen then drank a bottle of iodine. When it failed to kill him, he drove to a hospital and admitted himself. 246 S.E.2d at 323-324.

On appeal, the state supreme court rejected contentions that the sanity verdict and intent finding were against the evidence and that a voluntary manslaughter instruction was improperly refused. However, the jury was not properly instructed on leniency, and the sentence was vacated. 246 S.E.2d at 324-325.

There was no objection to the guilt phase intent instructions. This appeal was decided before *Sandstrom* v. *Montana*. Bowen was sentenced to death again on remand, and the sentence was affirmed. 260 S.E.2d 855.

The federal district court granted habeas corpus on the basis of *Sandstrom* error and on the prosecutor's argument. A panel of Eleventh Circuit reversed on the *Sandstrom* point, finding the error harmless. From the method of killing it was evident that the killing was intentional in the usual sense of the word. Intent was at issue only so far as it related to the claim of insanity. Once the jury rejected the insanity claim, intent was no longer genuinely in dispute. 769 F.2d at 676-678.

The Eleventh Circuit granted rehearing en banc to resolve the intracircuit conflict with *Dix*, below. The en banc court rejected the panel's conclusion that the jury's rejection of an insanity defense removed the intent issue. 832 F.2d at 550. The court also rejected the panel finding that the evidence was overwhelming over the dissent of four judges. "When intent is at issue, however, we cannot infer overwhelming evidence of intent directly from the physical sequence that resulted in the victim's death." *Id.* at 551.

Comment: The last-quoted holding is flatly contrary to the controlling Supreme Court precedent, *Rose* v. *Clark*. See comment in *Dix*, below. In *Rose*, the high court stated in terms too clear for argument that intent *can* be found conclusively from the method of killing. This is precisely the kind of case the Supreme Court was talking about. The Eleventh Circuit also does not mention why it is applying *Sandstrom* retroactively to a case in which the guilty verdict was final before *Sandstrom*. Cf. *Yates* v. *Aiken*, 98 L.Ed.2d 546 (1988). (*Sandstrom/Franklin* applies to post-*Sandstrom*, pre-*Franklin* case, leaving the question open for pre-*Sandstrom* cases.)

Colorable Claim of Innocence: Mental only
Category: 1
Different Result Under Teague: Yes — guilt phase final before *Sandstrom*

53b. *Dix v. Kemp, 832 F.2d 546 (1987), cert. den. 108 S.Ct. 1120, 99 L.Ed.2d 281*
Dix v. Kemp, 804 F.2d 618, vacated, 809 F.2d 1486 (1987)
Dix v. Kemp, 763 F.2d 1207 (1985)
Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977)

Dixie Jordan, Dix's ex-wife, was found dead in the bedroom of her apartment. She had been struck in the jaw with a blunt object. Her mouth had apparently been taped shut. She had been strangled, but not fatally. "The strangulation was so severe that the pressure of the blood in the head rose to the point that it hemorrhaged through the pores of the skin, the white of the eyes and the eyelids." Cuts had been made on her throat which were not fatal but which severed the throat muscles and caused severe bleeding. Seven stab wounds had been made in the chest and abdomen "by a sharp instrument being forced through the layers of the skin and then pulled out in a slicing motion." A 6-inch "S" had been carved in her abdomen. "All of these blows, cuts and wounds, including the strangulation, were inflicted while Mrs. Jordan was still alive. The cause of death was three deep stab wounds to the heart." 232 S.E.2d at 49.

At 3:00 p.m. that day, before discovery of the body, Mrs. Jordan's sister called the apartment. Dix answered and asked Dixie's mother to come to the apartment. The mother, the sister and a niece all came. Defendant pulled a gun and forced them to drive away with him in Dixie's car. He stated that no one would ever mistreat Dixie any more. He also stated that he had hurt Dixie. The three women escaped when Dix stopped at a store. 232 S.E.2d at 48-49.

At trial, Dix claimed insanity and presented mitigating evidence, but the jury convicted him and recommended death. The state supreme court affirmed. There is no mention of an objection to the intent instruction.

The federal district court granted habeas relief. On appeal, a panel decided that the trial court's jury instructions violated both *Francis* v. *Franklin* and *Sandstrom* and was not harmless. 804 F.2d at 620.

The full court granted rehearing, and the case was consolidated with *Bowen*, above. 832 F.2d at 547. *Sandstrom* error was again found not harmless.

Comment: "[I]t would defy common sense to conclude that an execution-style killing or a violent torture-murder was committed unintentionally. [Citation] It follows that no rational jury would need to rely on an erroneous presumption instruction to find malice in such cases." *Rose* v. *Clark*, 478 U.S. 570, 581-82 n. 10 (1986).

There is no mention of whether *Sandstrom* is retroactive to cases which became final before the date of that decision, nor is there any mention of procedural default or exhaustion.

Colorable Claim of Innocence: Mental only
Category: 1 (*Sandstrom*); 9 (harmless error)
Different Result Under Teague: Yes — pre-*Sandstrom*

49. *Hargrave v. Dugger, 832 F.2d 1528 (1987) cert. denied 44 Cr.L. 4189 (1989)*
Hargrave v. Wainwright, 804 F.2d 1182 (1986), vacated, 809 F.2d 1486 (1987)
Hargrave v. State, 366 So.2d 1 (June 30, 1978, reh. den. Feb. 6, 1979)

During an attempted robbery, defendant shot the clerk of a convenience store twice in the chest when he could not get the cash register open. Later, he said that he shot the clerk a third time in the head because he was scared, aggravated and afraid he was going to get caught if the victim survived to identify him. 366 So.2d at 2, 5.

Defendant's conviction and death sentence were affirmed on direct appeal over his claims that the death sentence constituted a cruel and unusual punishment, that the trial court failed to conduct a presentence investigation, and that the death sentence was at variance with the evidence. 366 So.2d at 4.

On petition for rehearing in the state court, defendant first raised his claim of *Lockett* error. However, the original decision on direct appeal had been rendered three days before *Lockett* and state procedural rules at the time did not permit new issues to be raised on petition for rehearing. 832 F.2d at 1530. Florida later allowed such claims to be raised in state habeas proceedings. *Ibid.* It does not appear from the Court of Appeals opinion that any state habeas petition was filed.

The federal district court denied relief on the ground of state procedural default. A panel of the Court of Appeals affirmed. 804 F.2d 1182, 1187-90. Rehearing was granted, and the opinion was vacated. 809 F.2d 1486.

On rehearing, the Court of Appeals en banc found that Hargrave had shown sufficient cause and prejudice to obtain a review on the merits. 832 F.2d at 1529. The court held that Hargrave was excused from raising his *Lockett* claim on his pre-*Lockett* appeal because a state supreme court precedent was to the contrary. 832 F.2d at 1533. The court held that *Lockett* was thus enough of a clear break from the past to excuse not raising the claim on appeal.

Colorable Claim of Innocence: No
Category: 2
Different Result Under Teague: Yes — final before *Eddings*, although after *Lockett*

Comment: The holding that contrary state precedent constitutes cause for not raising a claim is squarely contrary to the controlling Supreme Court precedent, *Smith* v. *Murray*, 477 U.S. 527 (1986). The test for novelty as cause is "whether at the time of the default the claim was 'available' at all." *Id.* at 537. The *Lockett* claim was "available" within the broad meaning of *Smith* from the date of *Woodson* v. *North Carolina*, 428 U.S. 280 (1976).

48. *Armstrong v. Dugger, 833 F.2d 1430 (1987)*
Armstrong v. State, 429 So.2d 287 (Fla. 1983)
Armstrong v. State, 399 So.2d 953 (Fla. 1981)

Defendant, his wife and Earl Enmund knew that 86-year-old Thomas Kersey and his wife Eunice kept large amounts of cash on hand, so they decided to rob them. The robbers went to the house early in the morning pretending to need water for an overheated car. Defendant held a gun to Mr. Kersey while his wife stole his money. When Mrs. Kersey saw what was happening, she grabbed her own gun and shot the female robber. Defendant shot both victims, killing them instantly. Three bullets were recovered from Mrs. Kersey's body and two bullets from Mr. Kersey's. 399 So.2d at 955-57. The evidence consisted of substantial circumstantial evidence, Armstrong's admission of the crime to one J. B. Neal, who testified to it at trial, and the immunized testimony of Ida Shaw, who was Enmund's common-law wife and Mrs. Armstrong's mother. There was apparently no defense evidence. 399 So.2d at 955-59.

Armstrong was convicted of robbery and two counts of first degree murder. His sentence of death was affirmed by the Florida Supreme Court. The court specifically found that no mitigating circumstances had been established. 399 So.2d at 963.

In state collateral proceedings, Armstrong raised numerous contentions, including *Lockett* error and ineffective assistance. The state court squarely held that the *Lockett* claim was procedurally barred. 429 So.2d at 289. The direct appeal had been decided three years after *Lockett*, and Armstrong had not raised the issue. On the ineffective assistance claim, the state court found that counsel's decision as to the mitigating evidence to present had been a tactical choice. Nothing in the state collateral hearing negated that conclusion. *Id.* at 290-291.

The federal district court granted habeas relief with respect to the sentencing phase of the trial, declaring defendant had been denied effective assistance of counsel. After holding an evidentiary hearing, the district court concluded trial counsel failed to properly investigate before the sentencing hearing, failed to produce mitigating aspects of defendant's character and failed to produce witnesses who would have testified for defendant.

The state appealed. The Court of Appeals affirmed the ineffective assistance claim, based on the evidentiary hearing in federal district court. The state factual finding that the decision on mitigating evidence had been a tactical choice was not mentioned. There was no discussion of the presumption of correctness required by 28 U.S.C. § 2254(d) or whether any of the exceptions applied.

The Court of Appeals also found *Lockett* error. The court found that the *Lockett* claim was not procedurally barred, despite the plain statement to that effect in the state collateral proceeding, based on the Court of Appeals's own analysis of later state cases. 833 F.2d at 1435-36.

Colorable Claim of Innocence: No
Category: 2 (*Lockett*); 3 (ineffective assistance)
Different Result Under Teague: No — ineffective assistance is unaffected by *Teague*

Note: This is the case of the actual killer from *Enmund* v. *Florida*, 458 U.S. 782 (1982).

Comment: In failing to discuss the presumption of correctness, the Eleventh Circuit violated the mandate of *Sumner* v. *Mata*, 455 U.S. 591 (1982). The procedural bar analysis would now be erroneous under the "plain statement" rule of *Harris* v. *Reed*, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

47. *Dick v. Kemp, 833 F.2d 1448 (1987)*
Zant v. Dick, 249 Ga. 798, 294 S.E.2d 508 (1982)
Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982)
Dick v. State, 246 Ga. 697, 273 S.E.2d 124 (1980)

After an evening of drinking, defendant and two others held up the owner of a store operated out of a trailer. Defendant admitted shooting the victim once, a wound from which he subsequently died. Although he claimed to have shot the victim in fear as the victim came toward him, the actual entry wound was behind the victim's ear. 833 F.2d at 1449. After robbing the store, they attempted to flee. Their car got stuck in a ditch, so they forced the occupants of another car out at gunpoint. The robbers couldn't get the stolen car started, so they went back to their own car. Eventually they got it out of the ditch, but it broke down shortly thereafter. Defendant was arrested walking home. 273 S.E.2d at 127-128.

At trial, Dick requested a jury instruction relating to prolonged drunkenness which gives rise to permanent mania or insanity. However, he did not enter a special or general plea of insanity. The trial court refused to accept his request, instead charging the jury as to voluntary intoxication. 273 S.E.2d at 131. Defendant was subsequently convicted of armed robbery and murder and sentenced to death.

After defendant's first state habeas petition was denied, 287 S.E.2d 11, he refiled and was granted a stay of execution pending the disposition. *Zant* v. *Dick*, 294 S.E.2d 508 (1982). Ultimately, state habeas relief and certiorari were denied. See *Dick* v. *Kemp*, 464 U.S. 986 (1983). Having exhausted his state remedies, defendant petitioned the federal district court for a writ of habeas corpus. The district court denied relief. 833 F.2d 1448, 1449.

The Court of Appeal found *Sandstrom* error on the basis of language substantially the same as in *Francis* v. *Franklin*, 471 U.S. 307 (1985). 833 F.2d at 1450-1451. The court stated that the jury instructions on intent impermissibly shifted the burden of proof to the defendant. Based on the precedent in *Bowen/Dix*, above, the error was determined not harmless. There is no mention of whether the issue was raised in state court or what the decision there was.

Colorable Claim of Innocence: Mental only
Category: 5
Different Result Under Teague: No — appeal is post-*Sandstrom*

46. *Messer v. Florida, 834 F.2d 890 (1987)*
Messer v. State, 439 So.2d 875 (Fla. 1983)
Messer v. State, 403 So.2d 341 (Fla. 1981)
Messer v. State, 384 So.2d 644 (Fla. 1980)
Messer v. Florida, 330 So.2d 137 (Fla. 1976)

While drinking and driving along a Florida highway with a friend, defendant stopped at a rest area to use the facilities. They saw Henry Fowler asleep in his car and decided to rob him. They held him up, stole his watch and wallet and drove him out to a wooded area. Defendant shot him in the head. The pair then disposed of Mr. Fowler's personal effects and car tags. Several months later, defendant confessed to the police in order to clear his conscience. He was convicted of robbery and murder and sentenced to death in state court. 330 So.2d at 138-139.

On direct appeal, defendant's convictions were affirmed, but he was granted a new sentencing proceeding. *Id.* He was resentenced to death. The state supreme court remanded to the trial court for a hearing in light of *Gardner* v. *Florida*, 430 U.S. 349 (1977). The court later affirmed the sentence. 403 So.2d at 341.

On state habeas, defendant claimed ineffective assistance of counsel, erroneous exclusion of jurors and denial of due process on the ground that the supreme court failed to conduct "proportionality" review of his sentence. However, the state denied all relief, finding that counsel was effective; that exclusion of certain jurors did not create a tribunal organized to return a verdict of death; and that due process "proportionality" had already been considered in a previous review. 439 So.2d at 877-878.

Defendant then sought habeas relief in federal court. The court granted relief on the ground that the state trial court judge had violated *Lockett*. The state appealed.

The Court of Appeals affirmed on the basis of *Lockett* error. The Court of Appeals concluded that *Lockett/Hitchcock* error is not procedurally barred in Florida for pre-*Hitchcock* cases, citing *Thompson* v. *Dugger*, 515 So.2d 173 (1987). The court does not mention the exhaustion rule.

Colorable Claim of Innocence: No
Category. 1
Different Result Under Teague: No — Cert. denied post-*Eddings*

Comment: Habeas was granted in this case on a ground never presented to the state courts despite two hearings in the state supreme court after the decision establishing that ground.

41. *Godfrey v. Kemp, 836 F.2d 1557 (1988) cert. denied 101 L.Ed.2d 977 (1988)*
Godfrey v. Francis, 613 F.Supp. 747 (N.D. Ga. 1985)
Godfrey v. Francis, 251 Ga. 652, 308 S.E.2d 806 (1983)
Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981)
Godfrey v. Georgia, 446 U.S. 429 (1980)
Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979)

Defendant was convicted of shooting and killing his wife and mother-in-law and of aggravated

assault upon his daughter. At trial, there was no dispute as to the facts of the murders. Defendant went to the home of his mother-in-law, where the three were playing table games. He shot the two older women at close range, struck his 11-year-old daughter as she ran for help, and then called the police. When officials arrived, defendant admitted, "I killed them." 253 S.E.2d at 713-14.

He was given two death sentences which were subsequently vacated by the Supreme Court and remanded. On resentencing, one of the death sentences was vacated, the other was affirmed. 284 S.E.2d at 430. The court reasoned that because the two murders were "mutually supporting," one of the death penalties had to be set aside. The state court also determined that double jeopardy did not attach upon resentencing since the original sentencing had been nullified. 284 S.E.2d at 426.

On state habeas, the court considered the issue of *Sandstrom* error and determined that no violation had occurred. "In view of the trial court's charges on the presumption of innocence, burden of proof, reasonable doubt, and intent as a jury question . . . , the jury could not have interpreted the charge as shifting the burden of persuasion to Godfrey." 308 S.E.2d at 811.

Defendant then petitioned for federal habeas, which was granted in district court. The state appealed and the decision was affirmed.

The Court of Appeal found *Sandstrom* error and found that it was not harmless. After the state habeas proceeding but before the federal proceedings decision, the United States Supreme Court had decided by a 5-4 vote that a similar instruction in another Georgia case did not meet the requirements of *Sandstrom*. *Francis* v. *Franklin*, 471 U.S. 307 (1985).

The Court of Appeals also found that the prior U.S. Supreme Court decision reversing on the "outrageously vile, etc." aggravating circumstance was a double jeopardy bar to resentencing on the ground of multiple murder. The Court of Appeals distinguished *Poland* v. *Arizona*, 476 U.S. 147 (1986) on the basis that the additional circumstance in that case had been charged but found untrue by the trial judge, while in this case the additional circumstance used on resentencing had not been charged in the first proceeding. 836 F.2d at 1567-68.

Colorable Claim of Innocence: No
Category: 5 (*Sandstrom*); 7 (double jeopardy)
Different Result Under Teague: Yes — double jeopardy ruling is "new rule"

Comment: The court's interpretation of *Poland* is evasive. The double jeopardy claim rejected in *Poland* was stronger than the claim in this case, not weaker. Also, because evidence presented at the first hearing obviously *did* support the multiple-murder circumstance, the Eleventh Circuit's decision is now clearly erroneous under the subsequently-decided case of *Lockhart* v. *Nelson*, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988).

39. *Jackson v. Dugger, 837 F.2d 1469 (1988) cert. denied 100 L.Ed.2d 236 (1988)*
Jackson v. Wainwright, 421 So.2d 1385 (1982)
Jackson v. State, 366 So.2d 752 (Fla. 1978)

Defendant and a companion forcibly robbed Mr. Lamora and Mrs. Iturba of their money and jewelry in a downtown parking lot. The robbers then drove the couple's car out to a secluded swamp where they shot both of them. Mr. Lamora was able to get away, but they stuffed Mrs. Iturba into the trunk and drove her to another area. There they strangled her to death with an electrical cord and hid her body beneath some shrubbery. 366 So.2d at 753-54.

Defendant was convicted of first degree murder and sentenced to death. The trial judge, who has final responsibility for the sentence in Florida, explicitly found that the "aggravating circumstances in this case purely outweigh beyond and to the exclusion of every reasonable doubt, in the Court's mind, the mitigating circumstances." 366 So.2d at 757. The state supreme court affirmed defendant's conviction and sentence, rejecting claims of improperly excusing jurors, failure to prepare a presentence report, failure to recognize the mitigating circumstances of accomplice domination and inconsistent sentencing of the accomplice. 366 So.2d at 752, 753-757.

His state habeas petition was denied, the court finding that he had not been denied effective assistance of counsel. 421 So.2d at 1387. The court also upheld an instruction to the effect that aggravating circumstances required a death sentence unless outweighed by mitigating circumstances. *Id.* at 1388-89.

The federal district court also denied Jackson's habeas petition. The Court of Appeals reversed as to his sentence of death. Making no mention of the trial judge's finding on the relative weight of the circumstances, the court found that the "mandatory" jury instruction required habeas relief. The court reasoned that this presumption of the propriety of the death sentence "vitiates the individualized sentencing determination required by the Eighth Amendment," 837 F.2d at 1473, and violates the rule of *Roberts* v. *Louisiana*, 431 U.S. 633 (1977).

Colorable Claim of Innocence: No
Category: 7
Different Result Under Teague: Yes — the holding of this case is a "new rule."

Comment: In light of the trial judge's finding, this is an unquestionable case of harmless error, if error at all. The propriety of the instruction generally is a close question and is presently before the Supreme Court in *Blystone* v. *Pennsylvania*, cert. granted 103 L.Ed.2d 934.

38. *Stone v. Dugger, 837 F.2d 1477 (1988), cert. denied 103 L.Ed.2d 821 (1989)*
Stone v. State, 481 So.2d 478 (Fla. 1985)
Stone v. State, 378 So.2d 765 (1979)

Stone was out on bail after the Fifth Circuit granted him habeas corpus in an earlier case. *Stone* v. *Wainwright*, 478 F.2d 390, reversed *Wainwright* v. *Stone*, 414 U.S. 21 (1973). He was employed by Marvin and Jacqueline Smith and stayed at their home. Mrs. Smith did not return from work one night; her body was found eight days later in the river, missing the head, neck and arms. The body was identified by a surgical scar and a rib abnormality.

Stone was arrested in Missouri on a Florida detainer which had been lodged after the Supreme Court's reinstatement of his earlier conviction. He confessed to the murder. 378 So.2d at 767-68.

The state supreme court affirmed. Although the opinion was rendered over a year after *Lockett*, *Lockett* error was not one of defendant's objections. *Id.*

Six years later, the state supreme court affirmed the denial of Stone's state collateral attack. His claim that the Florida death penalty was unconstitutional as applied was denied as procedurally barred. 481 So.2d at 479.

The federal district court denied habeas relief, and Stone appealed. The Court of Appeals decided that Stone could raise *Lockett* error despite not raising it on appeal, citing *Hargrave*, above. The court then found *Lockett* error in light of *Hitchcock*.

Colorable Claim of Innocence: No
Category: 1
Different Result Under Teague: Yes — final before *Eddings*

37. *Corn v. Kemp, 837 F.2d 1474 (1988) cert. denied 100 L.Ed.2d 228 (1988)*
Corn v. Kemp, 772 F.2d 681 (1985)
Corn v. Zant, 708 F.2d 549 (1983) cert. denied 81 L.Ed.2d 375 (1984)
Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977)

Defendant was identified by five witnesses as the man loitering around a Stop-and-Go the night Mary Long, the clerk, was stabbed to death. All of the witnesses had seen Corn in the store at close range, and four had spoken to him. Long had been stabbed four times, twice in the front and twice in the back. "After he [had] killed Long, and with her blood on his hands and shirt, Corn waited on

customers telling them he had been the victim of an attempted robbery." 708 F.2d at 554. Subsequent tests revealed that the blood found in the store, on defendant's shoes and on a knife furnished by defendant's wife matched both defendant and victim. Defendant's fingerprints were found on the cash register. Furthermore, defendant admitted to his wife that he had killed the clerk. Corn was convicted and sentenced to death, and the Georgia Supreme Court affirmed. 240 S.E.2d at 694. The direct appeal was decided before *Sandstrom*. Corn's "enumerations of error" on appeal do not include any allegation that instructions on intent were incorrect.

Defendant petitioned the federal district court for habeas corpus on twenty-one grounds, including some never raised in state court. The district court granted relief and the state appealed. The state waived the exhaustion requirement, 708 F.2d at 554. The grant was reversed on appeal. The court rejected the *Sandstrom* claim with an analysis similar to the dissent in the subsequently-decided *Francis* v. *Franklin*, 471 U.S. 307 (1985). 708 F.2d at 558-560.

After denial of certiorari and after the decision in *Franklin*, the Court of Appeals recalled its mandate and vacated its prior opinion on the basis of *Sandstrom* error. *Corn* v. *Kemp*, 772 F.2d 681, 682-683.

On the state's petition for certiorari, the Supreme Court vacated and remanded for reconsideration in light of *Rose* v. *Clark*, 478 U.S. 570 (1986). On remand, the Court of Appeals held that the *Sandstrom* error was not harmless, citing *Bowen/Dix*. 837 F.2d 1474, 1475. Judge Garza, concurring, indicated that he felt bound by *Bowen/Dix*, but that he thought that case was wrongly decided and that this was a case of harmless error. 837 F.2d at 1477. Whether *Sandstrom* is retroactive on habeas is not discussed.

Colorable Claim of Innocence: Mental Only
Category: 1
Different Result Under Teague: Yes — final before *Sandstrom*

28. *Mann v. Dugger, 844 F.2d 1446 (1988), cert. denied 103 L.Ed.2d 821 (1989)*
Mann v. Dugger, 817 F.2d 1471, vacated 828 F.2d 1498 (1987)
Mann v. State, 482 So.2d 1360 (Fla. 1986)
Mann v. State, 453 So.2d 784 (Fla. 1984)
Mann v. State, 420 So.2d 578 (Fla. 1982)

Defendant was convicted for the murder of ten-year-old Elisa Nelson, whom he had abducted while she was on her way to school. Searchers found Elisa's body with a fractured skull and several stab wounds. Defendant's wife found a bloodstained note in his truck written by Elisa's mother. At trial, defendant was convicted of kidnapping and murder and sentenced to death. 420 So.2d at 580.

On direct appeal, the state supreme court affirmed the conviction, but ordered a new sentencing proceeding without a jury. 420 So.2d at 581. The trial court reimposed the death sentence. The supreme court affirmed on appeal. 453 So.2d at 784. The state court noted that the "remand directed a new sentencing proceeding, not just a reweighing." *Id.* at 786. The trial judge took new evidence, made new findings on aggravating and mitigating circumstances, and made a new sentence determination.

On state habeas, the state supreme court rejected defendant's ineffective assistance claims, finding that although defense counsel failed to object to the prosecutor's allegedly improper statements, the statements were within the limits of fairness and were permissible solicitation for a death recommendation. 482 So.2d at 1361.

The Court of Appeals found *Caldwell* error from the prosecutor's argument to the jury that its recommendation is only advisory. (This point is as yet unresolved. See *Dugger* v. *Adams*, 103 L.Ed.2d 435, 443 n. 4 (1989).)

The point had not been raised on appeal. The Court of Appeals said that it was raised in collateral proceedings. 844 F.2d at 1448 n. 4. The Court of Appeals also interpreted a statement of the state

supreme court that there was no constitutional infirmity at trial as a ruling on the merits of every contention, waiving all procedural bars. *Ibid.* The state court actually made that statement in the context of a discussion of an ineffective assistance claim. 482 So.2d at 1361-1362. The Court of Appeals also dismissed the fact that the sentence which had been rendered after the allegedly improper argument had been vacated and an entirely new sentencing proceeding held. 844 F.2d at 1447-48 n. 3.

Colorable Claim of Innocence: No
Category: 7
Different Result Under Teague: Yes — final before *Caldwell*

Comment: The Eleventh Circuit's assumption that the trial judge "relied" on the jury recommendation even though a new hearing, new evidence and new findings were required is speculation at best. The state supreme court characterized the remand as an entirely new sentencing proceeding, and its ruling on this state question is binding on federal courts. There is no federal right to a jury determination of punishment; the state can cure a federal sentencing error by a proceeding before a judge alone. *Cabana* v. *Bullock*, 474 U.S. 376, 385-386 (1986). Mann's claim in this case presents no federal question. See also comment to Magill (67).

27. *Stephens v. Kemp, 846 F.2d 642 (1988), cert. denied 102 L.Ed.2d 158 (1988)*
Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981)

Defendant was arrested as a suspect in the burglary of a department store from which several weapons had been taken. In exchange for being released on his own recognizance, defendant agreed to ask around to find out who was involved. When he failed to return to the police with information, the police began looking for him.

Later that day, officer Larry Stevens stopped defendant on the road and while the officer was getting out of his car, defendant shot at him twice, disabling him. An eyewitness saw defendant then walk over to the policeman's car and calmly and deliberately shoot him in the chest, killing him almost immediately. 278 S.E.2d at 401.

Defendant was convicted in state court and sentenced to death. His conviction and sentence were affirmed by the state supreme court in an appeal in which defendant alleged improper joinder of charges, prejudice resulting from failure to allow examination of individual jurors, prejudice from pre-trial publicity, improper appointment of expert witnesses, and error in allowing the widow of the victim to remain in the courtroom. 278 S.E.2d at 401-403.

Subsequently, defendant petitioned for state habeas relief, which was also denied. After this, defendant's counsel withdrew from the case. When defendant filed his first federal habeas petition, he alleged ineffective assistance of counsel. The claim was dismissed as unexhausted under *Rose* v. *Lundy*, 455 U.S. 509 (1982), and defendant returned to state court to file a second state habeas petition. However, the state court denied his ineffective assistance of counsel claim as procedurally barred. 846 F.2d at 645.

Defendant then filed his second federal habeas petition. The district court found his claims to be entirely without merit and dismissed the petition. *Ibid.*

The Court of Appeals reversed, finding that the fact that Stephens had the same lawyer on appeal and at his first state habeas petition as he had at trial was "cause" for not raising ineffective assistance in those proceedings under *Wainwright* v. *Sykes*. 846 F.2d at 651.

The Court of Appeals found that failure to investigate defendant's mental history was ineffective assistance in the penalty phase but not the guilt phase. *Id.* at 653. The court frankly applies a double standard without explanation. The court chastises defense counsel for not investigating, presenting, or arguing this evidence but makes no mention of what evidence was presented or what argument was made. *Id.* at 654-655.

Note: The variations in spelling of defendant's name are due to his numerous aliases. See 278 S.E.2d at 402.

Colorable Claim of Innocence: No
Category: 2
Different Result Under Teague: No

Comment: *Smith* v. *Murray*, 477 U.S. 527, 534 (1986) squarely holds that the intentional decision of counsel not to present a claim is not "cause" under *Sykes*. There is no room in that decision for the "same counsel" exception created by the Court of Appeals in this case. Counsel's omission is binding on Stephens unless he can make the showing required for an ineffective assistance claim. *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986).

20. *Ruffin v. Dugger, 848 F.2d 1512 (1988) cert. denied 44 Cr.L. 4141 (1989)*
Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984)
Ruffin v. State, 420 So.2d 591 (Fla. 1982)
Ruffin v. State, 397 So.2d 277 (Fla. 1981)

Ruffin and an accomplice kidnapped Karol Hurst, who was twenty-one years old and seven months pregnant, in order to steal her car for a planned convenience store robbery. They raped her in the back of the car. Despite her pleas for mercy, she was pistol whipped and shot in the head. At the convenience store, one of the robbers shot and killed a policeman. Defendant shot at another policeman during the escape. Ruffin confessed but claimed that the accomplice had committed the killings. 397 So.2d at 278-79. The jury convicted Ruffin of murder under instructions requiring a finding of specific intent to kill. Among the numerous contentions rejected on appeal was a claim of *Lockett* error. 397 So.2d at 283.

On state collateral review, defendant alleged ineffective assistance of counsel because his lawyer failed to call live witnesses to testify concerning defendant's psychiatric condition to show mitigating circumstances. However, the state supreme court recognized this as a trial strategy, rather than ineffective assistance. The psychiatric evidence was presented in the form of written reports which presented the mitigating factors but were not subject to cross-examination. 420 So.2d at 593.

After both his direct appeal and his state habeas relief were denied, Ruffin petitioned the federal district court for a writ of habeas corpus. He alleged nine grounds of error, all of which were rejected. 848 F.2d at 1515.

The Court of Appeal found *Lockett* error based on the clarification of *Lockett* in *Hitchcock* v. *Dugger*. *Id.* at 1518. A dissenting judge would have remanded for a determination of whether the *Lockett* error was harmless.

Colorable Claim of Innocence: No
Category: 5
Different Result Under Teague: Yes — final before *Eddings*

19. *Middleton v. Dugger, 849 F.2d 491 (1988)*
Middleton v. State, 426 So.2d 548 (Fla. 1982)

Defendant was paroled from prison. Mrs. Johnson, the mother of a friend of his, took him in because he had nowhere else to go. One day defendant argued with Mrs. Johnson because she would not let him use her car. While she was asleep on the sofa, he sat with a shotgun on his lap, contemplating killing her. When she woke up, he shot her in the back of the head. He then took her guns and car, abandoned the car, took a bus to New York and sold the guns. When arrested in New York for pickpocketing, he gave a full, detailed confession. 426 So.2d at 549-50.

On direct appeal, he was represented by a different attorney and made no claim of ineffective assistance. Rather, he argued that the trial judge erred in not finding the mitigating circumstance of

an altered emotional state as a result of a recent prison experience. 426 So.2d at 553. The Florida Supreme Court rejected this argument and affirmed defendant's conviction and sentence.

Defendant then applied for federal habeas relief. The district court granted his petition on the grounds that defendant did not have effective assistance of counsel at his sentencing proceedings. 849 F.2d at 493.

The state appealed. The Court of Appeals, making no mention of whether the claim had ever been raised to a state court, found ineffective assistance in failure to investigate the defendant's background. The court determined that there was no tactical strategy in not investigating defendant's psychological history to uncover mitigating circumstances. As the court found considerable mitigating evidence at the federal evidentiary hearing, it held that failure to present it at defendant's sentencing proceeding amounted to actual prejudice sufficient to warrant a new sentencing hearing. 849 F.2d at 494-495.

Colorable Claim of Innocence: No
Category: 1
Different Result Under Teague: No

16. *Cervi v. Kemp, 855 F.2d 702 (1988) cert. denied, Zant v. Cervi, 44 Cr.L. 4168 (1989)*
Cervi v. State, 249 Ga. 325, 282 S.E.2d 629 (1981)

Two AWOL sailors, Cervi and an accomplice, hitched a ride with Dr. Kenneth Lawrence. They decided to steal his car. They pulled out a gun, forced him to turn off the road and stole $1000 from him. They marched him out to a wooded area and tied him to a tree. The accomplice hit him with the butt of the rifle, and Cervi stabbed him several times in the neck. They left him to die and took his car. Dr. Lawrence got free and went back to the highway. He died the next day in the hospital, after identifying Cervi and his accomplice. 282 S.E.2d at 631-32.

The two were arrested in Iowa and taken before a magistrate. They requested counsel, and counsel was appointed. When Georgia officers arrived, they were not told of the appointment, and they obtained a *Miranda* waiver and a confession. In Georgia state court, Cervi and the accomplice were tried and convicted of murder.

The state court distinguished *Edwards* v. *Arizona*, 451 U.S. 477 (1981) on the grounds that: 1) defendant did not invoke his right to have counsel present during interrogation; 2) the Georgia authorities were unaware of the appointment; and 3) the limited appointment by a different sovereign for extradition only did not affect interrogation relating to the main offense. 282 S.E.2d at 632.

The lack of knowledge ground relied on by the state court was later disapproved by the Supreme Court in *Arizona* v. *Roberson*, 100 L.Ed.2d 704 (1988). That opinion also casts doubt on the other grounds for distinguishing *Edwards*.

Defendant then sought state habeas relief. The state held an evidentiary hearing and subsequently affirmed the death sentence in an unpublished opinion. See 855 F.2d at 704.

On federal habeas, defendant raised 20 issues; of which all but two were denied. The district court ordered an evidentiary hearing on these two issues, and subsequently denied relief on them as well.

In a post-*Roberson* decision, the Court of Appeal found *Edwards* error in this case. *Edwards* applied to Cervi's case because the case was pending on direct appeal when *Edwards* was decided. *Shea* v. *Louisiana*, 470 U.S. 51 (1985); 855 F.2d at 705 n. 9. Because Cervi's confession was obtained after his request for counsel and he did not reinitiate the questioning, he did not validly waive his *Miranda* rights.

Colorable Claim of Innocence: No
Category: 5

Different Result Under Teague: No

Comment: The Georgia Supreme Court came to the same conclusion on similar facts in another post-*Roberson* case, *Roper* v. *State*, 258 Ga. 847, 375 S.E.2d 605 (1989), cert. pending, see 45 Cr.L. 4086.

15. *Smith (W.A.) v. Zant, 855 F.2d 712 (1988)*
Smith v. Kemp, 849 F.2d 481
Smith v. Kemp, 664 F.Supp. 504 (M.D. Ga. 1987)
Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362 (1985)
Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982)

Smith entered a grocery store owned by 82-year-old Daniel Lee Turner. When he left a few minutes later, Turner was lying unconscious in a pool of blood. He had been stabbed seventeen times and beaten with a hammer. Smith met a friend of his outside the store and stated that he thought he had killed Turner. Smith went back into the store, took Turner's wallet, took money from the cash register and fled. Another eyewitness saw him run away.

Smith surrendered to the police. The next morning he waived his *Miranda* rights and gave a full confession. He had robbed the store to get money for a car. He killed Turner because he was resisting.

In support of his insanity claim, Smith presented evidence of mental retardation. The psychiatric testimony at trial indicated that Smith had intelligence at least as great as 10% of the population. 290 S.E.2d at 46.

Smith's contention that his retardation rendered his *Miranda* waiver invalid was considered and rejected by a state habeas corpus court. See 855 F.2d at 716 n. 5. The state supreme court affirmed the denial but did not discuss the *Miranda* issue. 325 S.E.2d at 366.

The federal district court came to a different conclusion based on different psychiatric testimony. At the federal evidentiary hearing, there was testimony that Smith was in the bottom two percent of the population in intelligence. Thus, he could not have validly waived his *Miranda* rights when he confessed. 664 F.Supp. 504. The district court granted habeas relief to defendant and ordered a new sentencing hearing. The state appealed.

The Court of Appeals concluded that the state fact-finding was not entitled to a presumption of correctness, stating that the state habeas court had made no explicit findings on the extent of retardation or its effect on ability to make an intelligent waiver. The substantial difference between the tenth-percentile found on appeal and the second-percentile intelligence found at the federal habeas hearing is not mentioned.

The Court of Appeals found that the admission of the confession was not harmless error. The court found that the jury might have found that Smith did not intend to kill Turner or that they might have convicted him of voluntary manslaughter if they had only Smith's trial testimony and not the confession. 855 F.2d at 720.

Colorable Claim of Innocence: Mental only
Category: 6
Different Result Under Teague: No

Comment: The Eleventh Circuit's discussion of the presumption of correctness in footnote 5 appears to be contrary to *La Vallee* v. *Della Rose*, 410 U.S. 690 (1973), but it is not possible make any definite statement without seeing the state habeas court ruling, which is unpublished and not discussed in the ruling on appeal.

12. *Berryhill v. Zant, 858 F.2d 633 (1988)*
Berryhill v. State, 249 Ga. 442, 291 S.E.2d 685 (1982)
Zant v. Berryhill, 640 F.2d 382 (5th Cir. 1981)
Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978)
Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975)

Berryhill and an accomplice selected the home of George Hooks for a burglary. When Hooks would not let them in, Berryhill fired a shot through the door and opened it. As Hooks ran upstairs Berryhill shot him twice in the legs. He followed the victim upstairs and shot him three more times. He demanded money from Mrs. Hooks, and she gave him all they had: six dollars. He grabbed the Hooks's son by the hair and threw him down. He ripped the phone out of the wall and left. On direct appeal, the state supreme court affirmed. 221 S.E.2d at 185. State habeas petition was also denied as to the murder, but granted on other charges. 249 S.E.2d at 197. The federal district court granted habeas relief. The Court of Appeals affirmed. 640 F.2d at 382.

On retrial, Berryhill challenged the jury selection process, claiming that it systematically underrepresented women. The jury list was about four-tenths women in a county where women were slightly more than half the population. The trial court found that Berryhill had presented no evidence of purposeful discrimination or systematic exclusion and that the statistical disparity was not significant. The trial court also found a greater percentage of women than men were eligible for excuse by virtue of age and that many of the elderly men but none of the elderly women waived that excuse and requested jury service. The court also found that women had frequently exercised other legal excuses. 291 S.E.2d at 690-691.

Again, Berryhill was convicted and sentenced to death. The state supreme court affirmed. 291 S.E.2d at 685. The court found that the jury commissioner had undertaken affirmative action to bring the percentage of women up to a level of disparity which defendant conceded was not significant. 291 S.E.2d at 691. State habeas was also denied.

In his federal habeas challenge to the second trial, the district court denied Berryhill's claim of underrepresentation, finding that women were sufficiently represented. 858 F.2d at 637. The federal court of appeal found a Sixth Amendment violation. Although the evidence consisted largely of the testimony in the state trial court, 858 F.2d at 636 n. 4, the court did not mention the state court findings of foundational facts or the requirement of deference to such findings. 28 U.S.C. § 2254(d).

The court clerk's testimony indicated that jurors were selected in this small county by the commissioners' selection of those they personally knew to be "intelligent and upright." The Court of Appeals stresses that the commissioners acted contrary to state law in granting excuses. 858 F.2d at 636 n. 6. The court notes that the commissioner passed over the names of women who were not professional business women, without mentioning whether the names of men were similarly passed over. *Id.* at 636.

The Court of Appeals concludes that "this underrepresentation was the result of systematic exclusion." The court then implicitly holds that the disparity could have been corrected only by bringing the percentage of women up to "full representation." *Id.* at 639.

Colorable Claim of Innocence: No
Category: 6
Different Result Under Teague: No

Comment: In failing to state its reasons for not deferring to the state finding of foundational facts, the Eleventh Circuit violated the command of *Sumner* v. *Mata*, 449 U.S. 539, 551 (1981).

9. *Knight v. Dugger, 863 F.2d 705 (1988)*
Muhammad v. State, 494 So.2d 969 (Fla. 1986)
Muhammad v. State, 426 So.2d 533 (1982)
Knight v. State, 394 So.2d 997 (1981)
Knight v. State, 338 So.2d 201 (1976)

In 1974, defendant Knight (who subsequently changed his name to Muhammad) abducted Mr. Sydney Gans. Defendant pointed an automatic rifle at Gans when Gans got out of his car and forced him to drive back home and pick up his wife. The three then drove to Gans' bank where defendant directed Gans to withdraw $50,000.

Once inside the bank, Gans reported the situation to the bank president who called the FBI. Gans got the money in marked bills and returned to the car in which defendant and his wife were waiting. Although FBI agents followed the trio, they lost them for about four or five minutes during which time defendant killed both Mr. and Mrs. Gans by perforating their necks with his machine gun. He then abandoned the vehicle. Agents subsequently found Knight hiding about 2000 feet from the car. Concealed beneath him were the automatic rifle and the $50,000. Knight was positively identified by numerous eyewitnesses and by his fingerprint on the vehicle. 394 So.2d at 999-1000.

Defendant was tried, convicted and sentenced to death. His convictions and sentence were affirmed on direct appeal in 1976. 338 So.2d at 201.

On state habeas, defendant made claims of ineffective assistance of counsel and incompetency to stand trial, which were both denied. 394 So.2d at 1003. The day this appeal was decided, defendant filed a federal habeas petition. The federal district court retained jurisdiction but ordered defendant to return to state court to exhaust his remedies.

Defendant returned to state court raising nine points, all of which were denied as previously decided, procedurally barred, or meritless. 426 So.2d at 533. In a proceeding conducted years after *Lockett*, that issue was presented only in the context of a claim of ineffective assistance for not anticipating *Lockett* and requesting instructions accordingly. 426 So.2d at 538. This decision is also nearly a year after *Eddings* v. *Oklahoma*.

Defendant then returned to his previously filed federal petition. The district court dismissed his petition after an evidentiary hearing on the issue of ineffective assistance.

The Court of Appeals reversed on the grounds of *Lockett* error. The district court held that the state court's ineffective assistance ruling was a ruling on the merits of the *Lockett* claim. 863 F.2d at 708 n. 5. The Court of Appeals held that *Lockett* was a sufficient change in the law to excuse procedural default in "pre-*Lockett*" cases, *ibid.*

Colorable Claim of Innocence: No
Category: 1 and 4
Different Result Under Teague: Yes — final before *Lockett*

Comment: The Eleventh Circuit ordered a new sentencing for an unquestionably guilty double murderer based on a change in the law made three years after his trial. This order is based on a claim never presented to the state courts despite three full hearings and published opinions by the state supreme court. The patent injustice of this result is a clear illustration of the wisdom of the Supreme Court's decision in *Teague* v. *Lane*, 103 L.Ed.2d 334 (1989) that new rules should not apply retroactively on habeas corpus.

This case also dramatically illustrates a heavy cost of extended collateral review. While state collateral proceedings were pending, Muhammad murdered a prison guard. Incapacitation is one of the principal reasons for capital punishment, and collateral review in this case frustrated that purpose. An innocent man is dead; if this sentence had been promptly carried out he would still be alive.

5. *Jones v. Dugger, 867 F.2d 1277 (1989)*
Jones v. State, 446 So.2d 1059 (Fla. 1984)
Jones v. State, 411 So.2d 165 (Fla. 1982)

Jones and an accomplice robbed a liquor store and forced the clerks, Peter Petros and Dorothy Hagg, to lie on the floor. Jones then shot them both to prevent them from identifying him. Mr. Petros was killed; Ms. Hagg survived and testified at trial. Jones's tape-recorded confession was also admitted. 411 So.2d at 412. The state supreme court affirmed the conviction and sentence, rejecting Jones's *Lockett* argument, *id.* at 168, among others. State habeas was denied. 446 So.2d at 1059.

The Court of Appeals affirmed the district court's grant of habeas corpus as to the sentence. The challenged instruction was essentially the same as the one in *Hitchcock.*

Colorable Claim of Innocence: No
Category: 5
Different Result Under Teague: Yes — final before *Eddings*

2. *Harris v. Dugger, 874 F.2d 756 (1989)*
Harris v. State, 528 So.2d 361 (Fla. 1988)
Harris v. Wainwright, 473 So.2d 1246 (Fla. 1985)
Harris v. State, 438 So.2d 787 (Fla. 1983)

Harris was convicted in state court of the murder of a 73-year-old woman in her own home. In a sworn confession, he admitted going into her house to rob her and when she came at him with a knife, he grabbed it and stabbed her to death with it. Evidence gathered from the scene indicated she tried to escape him and he chased after her from room to room; stabbing her approximately 50 times and beating her until she died. 428 So.2d at 789-90.

The state supreme court upheld defendant's conviction over his objections of illegal arrest, *id.* at 793, involuntary confession, *id.* at 793, 794, improper jury instructions and comments by prosecutor, *id.* at 794-796, and improper finding of aggravating circumstances, *id.* at 797, 798.

On state collateral review, he claimed ineffective assistance of counsel. The two defense attorneys testified that they had done no preparation for the penalty because each believed the other was handling the penalty phase. 528 So.2d at 365. They attempted to call some character witnesses at the last minute, but they were unavailable. *Id.* at 362. The trial court judge found unequivocally that these witnesses would have had no effect on the result, *id.* at 363, and the state supreme court affirmed, *id.* at 364.

The federal district court denied habeas corpus, and the Court of Appeals reversed. The court disagreed with the three courts that previously reviewed the case and found that counsel had been ineffective to Harris's prejudice circumstances because each thought the other was handling the penalty phase.

Colorable Claim of Innocence: No
Category: 6
Different Result Under Teague: No

Comment: By their own admission, one or both of these two attorneys have committed an egregious offense against the *state*, which apparently paid for their services. For two attorneys to fail to explicitly determine which one is handling a major phase of the trial is reckless misconduct. At the very minimum, the attorney responsible for this fiasco should be required to pay for the entire cost of the resentencing.

ADMINISTRATIVE OFFICE OF THE COURTS
STATE BUILDING, ROOM 3154, SAN FRANCISCO 94102

June 6, 1989

SUPREME COURT ADOPTS POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH

Chief Justice Malcolm M. Lucas today announced that the California Supreme Court has adopted policies on stays of execution, withdrawal of counsel, and standards governing habeas corpus petitions in cases arising from judgments of death.

1. Stays of execution.

The court will consider a motion for a stay of execution only if such a motion is made in connection with a petition for a writ of habeas corpus filed in this court, or to permit certiorari review by the United States Supreme Court.

2. Withdrawal of counsel.

The court will consider a motion to withdraw as attorney of record only if appropriate replacement counsel is ready and willing to accept appointment for appropriate post-appeal representation related to the case.

3. Standards governing filing of habeas corpus petitions and compensation of counsel in relation to such petitions.

For the reasons expressed therein, the court has adopted the attached "Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions."

The Chief Justice also indicated that the standards were not adopted unanimously. Both Justices Mosk and Broussard dissented to their adoption on various grounds. Justice Mosk particularly opposed the provision for obtaining a presumption of timeliness, while Justice Broussard primarily objected to the application of the standards to pending cases.

The standards as adopted follow.

Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions

The Supreme Court promulgates these standards as a means of implementing the following goals with respect to petitions for writs of habeas corpus relating to capital cases: (i) ensuring that potentially meritorious habeas corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses, and (iii) providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to investigate and file habeas corpus petitions.

For these reasons, effective June 6, 1989, all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved, are governed by these standards:

1. Timeliness standards

1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. All petitions for writs of habeas corpus should be filed without substantial delay.

1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 days after the final due date for the filing of appellant's reply brief on the direct appeal.

1-1.2. A petition filed more than 60 days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim.

1-1.3. Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of In re Stankewitz (1985) 40 Cal.3d 391, 396-397, fn. 1), the petition was filed within a reasonable time after that date.

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

2. Compensation standards

2-1. This court's appointment of counsel for a person under a sentence of death is for the following: (i) pleadings and proceedings related to preparation and certification of the appellate record; (ii) representation in the direct appeal before the California Supreme Court; (iii) preparation and filing of habeas corpus petitions and other ancillary pleadings in the California Supreme Court; (iv) preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court; (v) representation in the trial court relating to proceedings pursuant to Penal Code sections 1193 and 1227; and (vi) preparation and filing of a petition for clemency with the Governor of California no earlier than after exhaustion of the initial round of collateral challenges in federal court. Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition or pleading in any other California or federal court or court of another state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court.

2-2. Appellate counsel should expeditiously investigate possible bases for filing a petition for a writ of habeas corpus. As a general rule, this investigation should be done concurrently with review of the appellate record and briefing on appeal. Requests by appointed counsel for investigation expenses shall be governed by the following standards:

2-3. On or before the date the appellant's opening brief on appeal is filed, or within 120 days after the date on which these Standards are announced, whichever is later, counsel shall file with this court a "Confidential request for expenses to investigate potential habeas corpus issues." The court will entertain an initial request filed at a later time only if good cause for the delay is shown.

2-4. The confidential request for expenses shall set out:

2-4.1. The issues to be explored;

2-4.2. Specific facts that suggest there may be an issue of possible merit;

2-4.3. An itemized list of the expenses requested for each issue of the proposed habeas corpus petition; and

2-4.4. If applicable, an itemized listing of the fees and expenses previously submitted to, or approved or paid by, this court in connection with the present (or any previous related) habeas corpus proceeding or investigation.

2-5. If the confidential request for expenses appears both timely and reasonable, the court will grant it in whole or in part. Except when good cause is shown, this court will not reimburse counsel for expenses that have not been previously approved by this court.

2-6. On presentation of an accounting of the fees and expenses incurred for production of the confidential request for expenses, the court will reimburse counsel up to $3,000 for reasonable expenses and legal fees associated with preparing that request. Prior authorization will not be required for reimbursement of these fees and expenses. Counsel may include this accounting as an attachment to the confidential request. In exceptional circumstances, counsel may request reimbursement for fees and expenses exceeding $3,000.

2-7. Counsel generally will not be awarded compensation for fees and expenses relating to matters that are clearly not cognizable in a petition for a writ of habeas corpus.

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