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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Calhoun County

Honorable Kristi F. Curtis, Circuit Court Judge

HERMAN HUGHES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001415

APPENDIX

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duplicates. I'll tell you about that in just a moment, 187-page order is dog-eared. This is just the proposed order. It will be reviewed that carefully in light of the issues that are brought up here today as well. I want to set that very clearly on the record. I know that that was some concern that was raised on the part of the Applicant that there had been little independent judicial analysis. Rest assured that there will be thorough judicial analysis, but this Court clearly has, as you understand, ruled. I understand that there are some issues that had not been addressed that do need to be addressed. The Court's ruling in this case was not favorable to the Applicant. So, I understand the concerns on the part of the Applicant. Because it was not favorable to the Applicant more than likely the language that the Applicant proposes would not be used. The Court is not ruling in that fashion.

Now, let's deal individually with each one of these objections. I think in essence we've dealt with the first objection and that was the concern that it did not reflect an independent judicial decision. I believe that I have addressed that. I will certainly address it more fully if necessary.

All right, let's move on then to, "The proposed order contains findings that are clearly inaccurate." It goes into, and I think that this is probably the easiest

way to handle it. I'll be glad to -- I've got my outline of the order right before me. I have the proposed order that has been submitted, and I also have the objections that have been submitted, and I think if we run through those then I can ask you if there are any other matters that need to be addressed that we have not addressed.

All right, in the Section 2, "The Attorney General's proposed order contains findings that are clearly inaccurate," again, I'm addressing the Applicant's objections to Respondent's proposed order. It says, "The Attorney General's proposed order contains a number of statements regarding trial counsel's investigation, development and presentation of sentencing phase evidence which are factually inaccurate. For example, the order contains statements to the effect that Mr. Newsom met with undersigned counsel, John Bloom, in the South Carolina Death Penalty Resource Center, and that the Resource Center did not advise Mr. Newsom to seek any expert opinions or services," and it goes on that, in fact, John Bloom had retained assistance or did advise Mr. Newsom to retain the assistance of a neuropsychologist, retain the services of an expert in mental retardation and secure mental records.

Now, these -- it's -- attached to this objection are notes that do indicate that there are names of individuals who are experts in these particular areas and

there are some articles that have been attached as well.

Let me see if I can go to the particular pages. The only time that I see in this order, and I have been through it and through it, and I'll be glad to hear from the Applicant on this, that it specifically said I have deleted it from the order, that there was a specific finding that he was not told, and let me see if I can find where I deleted that.

I thought I had put down exactly where I had dealt with it but I did not, but rest assured that I am now omitting from the order anything that says that that was not -- that that advice was not given, and in fact, my recollection is it did not say specifically the South Carolina Death Penalty Resource Center. I don't believe that that has been addressed specifically in this order at all, and I'm trying to remember what it did address. Let me get to that -- page 128.

All right, on 128, under Section 1, and it was the Center for Capital Litigation rather than the South Carolina Death Penalty Resource Center, but again, the findings of the Court would end with, "Counsel provided an explanation for his failure to retain a child development expert. He believed that the experts available could handle the issue."

MR. ZELENKA: Okay, Judge, I would just point out

that that finding addressed the child development expert, which is not related to Mr. Blume's objection. I don't think any of those experts are child development experts.

THE COURT: All right, now, there was more than the child development expert. Let me see, because I had to go back to these notes which were hard to read and see who all was listed in the notes.

MR. ZELENKA: Right, I mean, if that, if that finding of fact goes merely to whether they provided them experts for child development, those witnesses ---

THE COURT: Were not?

MR. ZELENKA: --- were not.

THE COURT: Yeah, nobody, Dr. Ven is -- John Ven is not, Evans ---

MR. ZELENKA: Dr. Nagle is the mental retardation expert.

THE COURT: Uh-huh (affirmative response), all right, and so, that would be on the issue of mental retardation.

MR. ZELENKA: Yeah, I was ---

THE COURT: All right, and if you would address and I'll make sure that I have any language -- let me go back, I have page 110 that I looked at as well as page 115. I'm going to keep the language there. Let me go back to page 110, see if it's there.

All right, here we go, and I've put omit this. This is on page 110 under the paragraph that says, "Counsel Newsom testified that he did not retain another expert in mental retardation." The last sentence says, "However, counsel conceded that he was not aware of a mental retardation specialist," and I think that's particularly what -- that's specifically what the objection is to is he testifying that he was not aware and there is some evidence that at least it had been brought to his attention, the name of an individual who was an expert in that field. That sentence will be omitted.

MR. ZELENKA: Your Honor, I think that's a summary of his testimony though ---

THE COURT: Yeah.

MR. ZELENKA: --- as opposed to findings of fact.

THE COURT: That's correct. It is simply a summary of his testimony. I think there's enough in that, and let me see whether -- on 115 I've got it marked down as well. Let me see whether there's a finding in that regard. No, 115 deals then with the -- no, 115 is some language that I changed at the end, the last sentence of page 115, "that counsel stated that he was aware of the syphilis finding and those records were provided to the experts, but that he had no knowledge that his mother had syphilis," and just added syphilis. "To the contrary, the information they

developed was that it was a normal pregnancy and birth."

I still am omitting on 110, "Counsel conceded he was not aware of a mental retardation specialist," even though that was his testimony. There's evidence that there was and I feel like I'd have to go into but there was evidence that he had been provided ---

MR. ZELENKA: That's fine; that's fine.

THE COURT: --- and it's just not -- all right.

Is there any other place that in this order that you feel that there was an inaccuracy?

MR. BLUME: On that issue, Your Honor?

THE COURT: Yes.

MR. BLUME: I think those were mostly the points, those questions. I don't -- I can't find any others. I don't know. There might be. I can't -- I'm not aware, really, of any other, Your Honor. There might be one or two more, but I can't -- 110 I know. You've mentioned 128. There's 109 addresses the child development expert.

THE COURT: Okay, let's look at that.

MR. BLUME: In footnote 19.

THE COURT: Now, again, the child development, there was not listed a child development expert.

MR. BLUME: No, no, no, I was just saying.

THE COURT: Okay.

MR. BLUME: I was just trying to go through the

different points. I'm not ---

THE COURT: Okay, it was addressed, okay, all right.

That would bring us over then to number 3, "It goes beyond the scope of the outline provided by the Court," and I certainly would expect that it would go beyond the outline. The outline was simply that, it was an outline. Now, I do understand that there were some things that the Court had failed to address and those need to be addressed at this time and I will do so. Let's deal with the first, the juvenile transfer hearing.

There was no finding by the Court, at least through the outline, but there is a finding at this time that a due process claim is barred. It wouldn't bar the ineffective assistance of counsel, Sixth Amendment, but it will bar the due process claim.

Those were the claims -- I'm just ruling and filling in that gap. Those were the claims that the Court had rejected, the potential for rehabilitation, that they heard inaccurate information, that they impermissibly considered, that the Court impermissibly considered factors such as, "We're going to send a message," that was -- that argument. These could have been raised at the hearing and then on direct appeal; and therefore, the Court finds that they're barred.

Anything further that needs to be addressed in regards to the due process claim? That's under the juvenile transfer hearing.

All right.

MR. BLUME: Let me make sure, Your Honor, just so I understand. I'm a little confused.

THE COURT: All right.

MR. BLUME: But just to make sure I understand what we're doing. We're going through specific objections, some of the specific things we raised, and you have, as I understand it, you're filling in some of the gaps and have indicated places, other places which you're going to modify the proposed order, but my question is, does that mean in addition to that the order will stand as is or in addition that you're going to also go through it yourself sort of after this and make and sort of the final order will reflect more of your own, I mean, am I making myself clear is what I'm trying to figure out.

THE COURT: Let me state, much of the language that's contained in the order now will remain. That's the Court's ruling. That's the Court's position. I have already gone through and modified quite a bit. This is on disk and in my secretary's computer at this time. So, yes, it will be modified. It will not read, will not have even the same number of pages that this current one has,

although it will have much of the same law and points and decision because that is the Court's -- that is the Court's ruling, and rest assured also, that every page, every word, everything will have been over and gone over by this Court prior to the Court ever signing the order. When that -- when the order is signed, and that's part of what we're doing right now, then each of the findings of fact, the conclusions of law are the determination of this Court.

All right, the next point that was brought up is that, "The proposed order addresses at some length Martin Banks' failure to make a timely request for a waiver evaluation by the Department of Juvenile Justice, and in fact, the proposed order treats this as a central issue pertinent to Mr. Hughes' ineffective claim, yet this Court's outline relied on wholly different factors, most significantly the Court's conclusion that Mr. Hughes would have been transferred to General Sessions Court regardless of what counsel had done."

All right, clearly I note that this was not addressed in the memo and needs to be addressed at this time, appropriately, appropriate concern on the part of the Applicant.

MR. BLUME: Well, I think, I mean, there are two things going on which I am not sure I need to address the first one, to just sort of go back to it.

THE COURT: All right.

MR. BLUME: A lot of this -- the point of this memorandum, well, when we filed it and the objections to the order was to point out ways and areas in which we thought the proposed order went beyond what was in the Court's outline and understanding, of course, that was an outline. You've made that clear. So, we had concerns about that, and Your Honor has addressed some of those by indicating that you're going to sort of enter your own order while adopting large parts of the proposed order, but reviewing it for factual accuracy and to make sure about the findings, but again, the main point of this was that the order does on the juvenile waiver hearing seems to address in detail, the primary detail was that Mr. Banks failed to make a timely request for a waiver evaluation but that wasn't the basis of the Court's, the basis, at least what we understood was the Court's ruling. So, that was the basis of our objection at that point.

THE COURT: I understand.

MR. BLUME: As I understood Your Honor to say, "Well, I think he's going to be waived, he would have been waived up in any event."

THE COURT: I can go ahead and address now that assertion because it was not, and I can understand your position. It was not addressed in what I'll point out for

the record was a rather lengthy outline, a 13-page outline, but yet, even so, even in its length, it did omit certain points, and was not the intention of the outline to hit every point that would be addressed in the order. This is a 180-page order plus, but it certainly did intend to address every issue that had been touched on by the Applicant.

In this particular case the Applicant asserts that counsel was ineffective or deficit in failing to request the pre-adjudicatory transfer evaluation by the Department of Juvenile Justice prior to the hearing. The Court finds that the evaluation is not mandated either by state statute or by constitution and he is not, per se, ineffective for failure to request this evaluation.

Next, "He made a request for an evaluation from the Department of Juvenile Justice. That was denied." Certainly he was not ineffective for making that request. He at the transfer hearing stated because of the time constraints, and he brought that to the Court's attention, that he wanted the delay and he wanted the evaluation. The Court basically rejected that argument and proceeded to order a transfer. I find there's no showing that the Family Court would have ordered the Department of Juvenile Justice evaluation if it had been requested any earlier by counsel rather than at that time, and in fact, to the

contrary, when presented with the matter the Court chose to proceed without the evaluation; and so, I find that counsel can't be deemed constitutionally deficient in making a request, appropriate request at the time of the hearing.

Further find that even with the testimony of Dr. Ven at the post conviction relief hearing that evidence wasn't presented that undermined in any way the factors the Family Court relied upon in making its determination. I think that all of the eight Kent factors have been addressed fully, and I believe you would agree outlined and addressed fully in the order. Is there anything in that regard? Let's see what else your concern was.

Oh, I see the other concern. That was that the proposed order contains findings that John Ven had a personal moral bias, and again, this Court made no finding that he was biased. I did note and will note of his position, but I've made no finding that it in any way affected his testimony.

He did testify of his opposition, but I'm not going to make a finding that it has made him biased in any way and I'll omit any language in that regard and have done so, and I agree with the objection that the Court had made no finding that he was compromised by those views.

We've moved on to "B" -- oh, well, first of all before we move on to that, is there anything else that

needs to be addressed in regard to the juvenile transfer hearing?

MR. BLUME: Not that I'm aware of, Your Honor.

THE COURT: All right, move on to "B", the ineffective assistance during the jury selection. This is the section that deals with the voir dire.

Let's see, all right. "The position of the Applicant is that the Attorney General's proposed order adds several gratuitous findings of fact and conclusions of law." First of all, there's an indication, "proposed order specifically finds William Barron and Brenda Wise convincingly stated they put aside their prior knowledge." I think that you're talking about on page 85 where it says, "Further, this Court must conclude that Six Amendment prejudice cannot be shown. Each of the jurors disclosed the fact that they had had the contact and knowledge prior to the selection during the voir dire. Each of the jurors convincingly stated that they could set aside the information," and I'll simply note, "Each of the jurors stated they could set aside the information and render a verdict based solely on the evidence," because it goes on to say, "The Trial Judge as well as the Defense counsel found these jurors to be sincere in their statements and concluded they were qualified. There was no -- there's no evidence presented to the contrary," is how I'll end that.

All right, that was the first point.

The next point, "The proposed order finds counsel was not ineffective for failing to object to Solicitor Bailey's questions about the juror's ability to vote for death for a 16 year old offender. In fact, the proposed order contains a rather extensive discussion of this issue and the Court's outline did not address the issue at all," and that's correct, the Court's outline failed to address the issue and it needs to be addressed. I'll address it at this time.

This is where the Applicant contends that counsel should have objected to the State's questions about the ability of the jurors to sentence a person to death who was 16 at the time of the crime. That was specifically, I think, Juror Brenda Wise, and whether she could impose a death sentence to a 16 year old. The Applicant's position was that South Carolina law on jury selection prevented this type of inquiry. Newsom, the trial attorney, testified that he didn't object to the questions. There was expert testimony that acknowledged that if a prosecutor asks a juror if they could ever sentence a 16 year old to death despite the facts or circumstances and the juror said that they could not, then he would -- that juror could be excused for cause.

This expert, this is particularly Mauldin the

expert at the time, indicated that it might have been the opinion of the Judge, that this question needed to be asked to see who needed to be excluded for cause, but he still contended that counsel should have objected. It's the Court's finding that the Solicitor complied with South Carolina law and the Trial Judge didn't err in allowing the 16 year old Defendant question to be asked. If this question resulted in an answer that said, "We could never give the death penalty to a 16 year old, regardless of the facts and circumstances," then they would be disqualified as a matter of law because they would not be applying the law. So, that's the basis for the decision. The case law is set out in the order, State v. Davis is one where the Court concluded disqualification was proper of a potential juror who unequivocally stated he would never impose a death sentence or a death penalty on a mentally retarded Defendant.

The next concern states that the Court did not go into the testimony of Jeff Bloom or John Mauldin. These were the Applicant's expert witnesses, and again, the outline really didn't go into the testimony a great deal. The outline tried to deal with the conclusions and findings and conclusions, but it had to be addressed to -- dealing with the second prong, and I am going to so address their testimony. I've done so just now. I did so in addressing

that what the expert had said in regards to the ineffective assistance of counsel for failing to object. I'll do so also on the Sixth Amendment violation concerning the order of questioning of jurors, recall the issue of the order of who would go first, the State or the Defendant, and again, there was expert testimony of how it was to be done, but I find that the failure of the Defense counsel to follow that particular strategy of Bloom or of Mauldin didn't create a constitutional violation. No statute sets forth the order of inquiry. I can't speculate as to how it would impact the ultimate selection of a jury and will not do so. I don't find deficit performance in seeking to -- in failing to follow a custom is all that had possibly been established.

That, that's at least dealing with what's under "B", ineffective assistance during jury selection. Is there anything more that comes to mind at this point that needs to be addressed under that section?

MR. BLUME: Not that I'm aware of.

THE COURT: We have moved to the guilt phase ineffectiveness.

All right, in the guilt phase ineffectiveness section of the proposed order, "The Attorney General moved significantly beyond the course of actual findings and the outline in two respects: one respect was that the proposed

order found that the Applicant failed to prove the existence of any relationship between Hoffman and Pearce which would suggest that she would only put blame on Hughes rather than on Pearce, and the Court's outline did not address that relationship."

Another point that has been raised is that, "The proposed order found that the trial counsel's failure to recall Officer Danny Kirkland to testify about Hoffman's statements at the crime scene did not constitute ineffective assistance," and this was not addressed either in the outline.

Both of those issues need to be addressed and they will be addressed at this time, although the Court did make a finding in the outline, this specific finding of, "failed to prove the existence of any relationship between Hoffman and Pearce was not there," that's really dealing with, once again, I believe with the second prong. Let me look and see exactly what was in the, in the outline on this issue.

A step ahead here -- all right, I see where the outline did deal with Gilmore, Carter Gilmore, but did not deal with Officer Danny Kirkland. Let me deal with that at this time. I recall the testimony very well in that regard.

First of all, I'm going to turn to the proposed order at page 99 and make the finding that, "The Applicant

has failed to prove the existence of any relationship between Hoffman and Pearce that would suggest," and I want to stress the way this is written, too, "that would suggest she would only put blame on Hughes rather than Pearce." It's clear by the testimony there was a dispute about whether or not any relationship existed, but clearly there was nothing that was presented to the Court that would lead the Court to believe that there was an existence of a relationship in which Hoffman felt or would in any way only put blame on Hughes rather than Pearce. Now, whether they were just school acquaintances or something else, that was in dispute.

All right, also for Officer Danny Kirkland, that must be addressed, is addressed in the order. Was not addressed in the outline. I think it's addressed on page 100. The Court's ruling is this, it was not ineffective assistance of counsel to not call Officer Danny Kirkland. Hoffman was cross examined on this issue, the issue for which Kirkland would have testified, could have testified and she clarified her statement, and again, that was whether or not there were one or two individuals. That was the statement that she had clarified at the time that she was cross examined, and he did -- he, Newsom, did thoroughly cross examine Hoffman on that issue.

Now, before we get down to it, there's a -- but

there is something that needs to be addressed that's still on this page seven. That's page seven of the objections to the proposed order and that is a footnote that's indicting that perjury had been committed at the PCR hearing. That's something -- that's not something this Court can ignore. If there's -- if there is evidence of perjury that needs to be brought to the Court's attention then I'm asking you at this time to bring it to the Court's attention.

MR. BLUME: Well, I think what this was referring to, what I was referring to is she clearly was asked several times if she had ever been convicted of a crime at the end of her examination. She said no. I asked her again and she said no. I asked her, I said, "Are you absolutely sure," and she said, "Yes," I think, and then I asked her again and she said, "No." And then finally she was confronted with the record of conviction and then said, "Oh, yes, that was me." So, I mean, I think that was clear evidence, as well as there were a number of other things that she was confronted with, too, where she told drastically different stories in Kelsey Pearce's trial as opposed to Herman Hughes' trial about whether there was more than one person there, but the clear indication was she was given repeated opportunities at the hearing on that issue under oath and she didn't tell the truth about it. So, I mean, that's what that's referring to and I think if,

you know, if you don't tell the truth about ---

THE COURT: It's both of those incidences because one of them is dealing with -- one of them deals with credibility very much, but the other one is dealing with facts that have to do with this particular case. It's both of those that you're talking about?

MR. BLUME: Well, I mean, it's obviously difficult for me to say she told two different accounts at the two trials so that's perjury. I mean, I think you would say that obviously one of them is wrong or not. I mean that's not what I'm talking about, but I think when you -- it is, as I understand the law, it is perjury to repeatedly deny something under oath and given repeated opportunities to deny it and to deny it and then when confronted with it go, "Oh, yes, you caught me," and that is what happened. So, that's what that's referring to. I cannot say -- I can just say the two accounts are different on the other ones and that is a matter, I think, as Your Honor had indicated, of credibility.

THE COURT: All right, I've got the transcript, and it may be appropriate for this Court to send the transcript to the appropriate authority in that regard, highlight if, in fact, there is the allegations of perjury, let them take whatever actions might be necessary and that'll make -- that'll be -- I'll certainly look at that.

We are down to the penalty phase, ineffectiveness. All right, "The Court's outline stated only that counsel was not ineffective in failing to object to the victim impact evidence. He provided an explanation for his failure. In addition to this finding, the proposed order introduces specific finding that all the victim impact evidence was admissible. The Court found a strategic reason for counsel's actions, but the proposed order added that there was no opportunity or need to make a strategic decision."

Well, first of all, let me state that he did indicate a reason, that, in fact, it was his intention to enter those himself, that that was the information that he wanted the jury to hear and that was his reason, but he also stated and I did state in the outline that he had believed it was admissible. Now, what I did not go on to do is say, "The Court finds it admissible." I'll do so at this time. It was admissible, and he indicated that he believed it was admissible at that time as well, but the Court will further find it was admissible.

MR. BLUME: Your Honor, one -- two quick things. One thing on this is I would have to go back and look at this, but it's my understanding that what Mr. Newsom actually said was, "I wasn't aware of any way to keep it out," not that he made a strategic decision to -- well,

we're talking about the victim impact evidence, not his school records ---

MR. ZELENKA: The victim impact, I believe.

MR. BLUME: That -- now, my recollection could be wrong. I looked at this recently.

THE COURT: All right.

MR. BLUME: But that he -- what he said was, "I -- if there would have been a way to keep it out I might have done it. I was not aware of any way," and I think that was the testimony.

THE COURT: All right, let me take a look at that.

MR. BLUME: But I could be wrong on that.

THE COURT: I will go back and look carefully at the transcript in that regard and address it appropriately. In fact, let me see if I can figure out where -- yeah, pull the penalty phase of the transcript and we'll look at -- we'll make sure we pull that and get that straight before you leave today.

Okay, here it is, page 119. Now, let me let you know as I went through this, and again, I have dog-eared this proposed order, but I did find, and I don't know if you're going to find it in yours as well, that there were some pages that were duplicative. That was 156 through 178, and I have taken all of those out. You might find you have more than one page 156, at least I did.

All right, here it is, on the bottom of page 122, "At the PCR proceeding Counsel Newsom testified he was aware of the intent of the Solicitor Bailey to introduce this type of evidence and unaware of anything that he could do to stop it," which is the Applicant's memory of the testimony.

But he goes on to say, "Particularly, he did not see anything during -- no testimony that caused him to feel a need to object. He stated it was admissible in his opinion, although he did not like hearing the evidence." So, he did indicate that it was admissible in his opinion and he didn't feel a need to object, and I find he was not deficit in failing to object, that it was, in fact, admissible.

All right, and the school disciplinary records are back a little bit I think. Anything else on that? I'm sorry? Did you have any double pages or not? Maybe it just happened in my order, is that what you're ---

MR. ZELENKA: No, I'm -- when you -- now, as I understand you're saying you had two pages 156.

THE COURT: Yeah, but they weren't in order. It was back, and let me see where I found out that it started to duplicate.

MR. ZELENKA: Yeah, somebody may have missed.

Is yours okay?

THE COURT: They actually are printed a little differently on each page, too. I mean, they -- it's not as if it's the exact same printing. It just may get a little difficult later because we'll see -- we may be on different pages.

MR. ZELENKA: Oh, certainly. The one that I have in front of me doesn't have that.

THE COURT: Doesn't have it? Well, I did, and I will be glad to show you ---

MR. ZELENKA: So, I must have the original that didn't get ---

THE COURT: Let's see where I had ---

MR. ZELENKA: No, I don't have the original.

THE COURT: On page -- on page -- what was actually 179, that begins, "Counsel's concession of guilt," do you have a page like that?

MR. ZELENKA: No, but I have now found what you're talking about.

THE COURT: Okay, you found it?

MR. ZELENKA: Yes.

THE COURT: What I did was on page -- what was originally 179, I crossed out that whole first section, "Counsel's concession of guilt," up until number four because my 177 has one, two and three, and I renumbered 179, 178 and started at number four, and then that just put

me off one number through the end of -- through the rest of the order.

MR. ZELENKA: The disk that I had provided to you did it also have the page problems?

THE COURT: I don't know. I'll have to ask my secretary that. She's been going through that and, in fact, I haven't had her modify. All my modifications are on my order now so far.

MR. ZELENKA: Okay.

THE COURT: All right, let's see where we are. On page seven down at the last full -- "summarily" or "similarly, this Court's outline states that counsel was not ineffective for failing to object to admission of Applicant's school disciplinary records," and that that, in fact, was where he had indicated that it was his intention to bring those in. There is a finding that was not on the proposed order, but that the Court would find now. The Court does find and has looked through that very carefully that the Solicitor's notice of evidence was sufficiently broad. In fact, evidence of that is Mr. Newsom himself saying he was not surprised by that evidence being presented. There was no surprise. I do find that the Solicitor's notice of evidence in aggravation was sufficiently broad and that trial counsel then had no objection, certainly wasn't deficit for failing to object

and indicated used that or indicated his intention of using that information as well.

All right, "In addressing counsel's failure to retain someone with specific expertise in child development, the Court's outline states only that trial counsel believed the experts he had already retained could handle the issue and no one advised him to secure such an expert. Then not limiting itself to that finding the Attorney General's proposed order also said the Court specifically finds the details of child and adolescent development are a matter of common sense such that jurors would need no expert assistance in these details," and I will omit this language. It's not necessary language and was not a specific finding by the Court, and I am going to have to -- let's see if I have already done that. I'll have to direct to the pages later.

All right, international law is a bar to Applicant's death sentence. The Applicant is correct. There was never any disposition or mention made of the claim that *jus cogens*, is that the pronunciation ---

MR. BLUME: That's as close as I can get, Judge.

THE COURT: --- also bars the sentence. That was not even addressed and I apologize for having not addressed it. It needs to be addressed and will be addressed at this time.

That is on page 150, "Any prohibition against the execution of 16 and 17 year old offenders has not obtained *jus cogens* status. He argues that the alleged customary international legal prohibition against the execution of 16 and 17 year olds has obtained the status and therefore binds South Carolina."

It goes into a definition, then states the -- a restatement, "Domestic court should on its own authority refuse to give effect to an agreement on the ground that it violates a preemptory norm. Not all human rights are *jus cogens*, but any violation of a human right is a violation of *jus cogens*," and that -- wait a minute, "According to the restatement not all human rights are violations of the restatement." That first sentence, look on page 151. I think there's -- unless I'm just reading it incorrectly, I'm not following that and that will not be included.

I'm going to back up the Court's decision on this with Sanford, where the United States Supreme Court had that opportunity to find that, "The execution of 16 and 17 year old offenders was prescribed by *jus cogens* but elected to rest its decision in Sanford on domestic law. Even so there's no clear consensus on whether international law finds the execution of 16 and 17 year old offenders violates *jus cogens*. The Court must deny relief. Counsel was not ineffective."

I further note in what appears to be a difficult area, further note that he was adjudicated as an adult and found to be an adult prior to being sentenced. This is an area that I'll do some modification probably in the proposed order. There will be some modifications. If there is a concern, of course, I would imagine that any additional concerns would be addressed by an appropriate motion for reconsideration.

All right, is there anything further we can deal with on the international law as the bar?

MR. BLUME: No, Your Honor.

THE COURT: Ineffectiveness of appellant counsel, the argument was that he should have argued that it was disproportional, and the Court's outline summarized it, "Explanation for the omission in terms. The South Carolina Supreme Court complied with its duty to determine proportionality," which it did. "To that outline the Attorney General has added a discussion of how appellant counsel through other sections of the brief informed the Supreme Court of factors relevant to the proportionality analysis," and I certainly feel that's appropriate. Without that, without the information having been provided, and that's the basis of this Court saying that the Supreme Court, in fact, did that balancing, without having the information they could not have done the balancing. It's

appropriate that the order state that the information was contained, that it was information that was adequate for them to review the appropriate factors.

Now, the "whether such out-of-context provision of information is even relevant to assessing prejudice are matters the Court did not address," and that's correct, I did not address that. It is not addressed in the order to my knowledge. Would you be so kind to point the Court's attention to that argument and that is the out-of-context provisions of information.

MR. BLUME: Well, as I understand it, Judge, what this is -- what we're really talking about here that that's really a continuation of the explanation of what was added. In other words, the memorandum just said that the Court had complied with its duty. The proposed order went on to say that, "Well, most of the information they would have put in a proportionality section was sort of interspersed throughout the brief and so that was enough to put the Court on notice." This other sentence about the out-of-context information is the same thing. I mean it's basically just saying that's sort of the conclusion from that and that's addressed -- it's not stated exactly like that. I'm not -- I don't think we were suggesting that but that's all on about page, I think it's 155 of the proposed order.

THE COURT: All right.

MR. BLUME: So, that was not intended to be a separate sort of allegation.

THE COURT: All right, that's more of saying that it wasn't an appropriate proportionality review based on ---

MR. BLUME: Just say -- what we're just saying is that he didn't raise the proportionality issue and it wasn't, in our opinion, it wasn't sufficient just to have the stuff sort of throughout the brief, in the statement of facts or maybe in discussion of another issue. It all should have been presented directly.

THE COURT: And again, the Court finds that the information that -- upon which the Supreme Court, the information that the Supreme Court needed in order to do an appropriate proportionality review was submitted, and the finding was as in the outline, that I do not find ineffective assistance of counsel, and also with the second prong, that the Applicant failed to show any probability that but for the errors on the part of the appellant counsel the jury would have found -- well, in this case that the Appellate Court would have found that it was disproportionate.

All right, the statutory right to appointment of two lawyers, "Proposed order contains a finding that the

Appellant failed to demonstrate that obtaining an additional attorney would have changed the outcome of the trial." That basically is, and I will make the finding, that basically is the second prong, and it needs to be addressed, and I may not have addressed it in the order, but I do find that he's failed to establish that second prong. That's the, that's in, that's 166. All right, that takes care of that.

"The proposed order also contains a legal conclusion. There was no requirement to have a waiver hearing by Hughes because Hughes was not entitled to the alleged writing now asserts." That's on page 170. The Court's outline doesn't touch the issue of waiver at all and needs to, and I note and do find that on July of '95 there was a motion hearing that revealed that there was a waiver of the right to the two appointed counsel that he had and in favor of his retained counsel. There is no requirement for a waiver hearing under 16-326 is not applicable to this situation. Specifically there would need to be and it's made clear as well in the order that there would need to be a finding, a determination that such person is unable financially to retain adequate legal counsel, and in this particular case he had, in fact, retained counsel.

All right, now, "H", "The Court's findings are

extremely unfavorable, solicitation of false testimony claim, especially given the record evidence. Still the Attorney General has tried to make them better by inventing an additional reason to deny relief upon it, although this Court four times characterized Henry David Owens' descriptions of the sentence he faced as misstatements and does not at any point address Owens' motivation. The proposed order raises a new question, whether the response was not only inaccurate but false," and that's the proposed order at page 185, and we need to watch this 185 now because in mine it may be 184.

And again, my understanding is it's the Applicant's position that the testimony was false.

MR. BLUME: The legal standard is it can be either false or misleading such that it creates a materially false impression, even though not directly false. That's our position on what the law is, that it doesn't -- if it creates a false impression even if it's not necessarily false itself that that's the violation as opposed to it has to be 100 percent completely false.

THE COURT: All right, "It's a new question whether the response was not only inaccurate but false." Where is it raising a new question, and I -- will you direct me to it? It says 185, and I'm looking at what my -- what was 185. It's now my 184. If you'll direct me to that because

it appears to me that the Applicant's position is it was one or the other. It was false or it was so misleading that it left a false impression. It would be appropriate for the Court to deal with whether or not there was due process violation.

MR. BLUME: I'm sorry, page 185, Your Honor, is where I'm -- it's in the middle, "Thus the grant of a new trial based on a Napue violation is proper only if one the statements in question are shown to be actually false," is where that, in the middle of the page:

MR. ZELENKA: That's a cite from Blackburn.

MR. BLUME: In the -- there's -- I guess the first full paragraph, the carryover, the -- I guess the third sentence begins, "Thus the grant of a new trial based upon a Napue violation is proper only if, one, statements in question are shown to be actually false." That's where that -- that's what the objections were referring to as interjecting the issue of -- actually false as opposed to false impression, that that was an erroneous statement in our view of the legal standard.

THE COURT: All right, I'll deal with the issue of false impression also. You're not indicating that that's an inaccurate recitation of the law; are you? Are you saying that it's not complete or it's inadequate?

MR. BLUME: I'm saying that that is not an

accurate, in my opinion ---

THE COURT: Okay.

MR. BLUME: --- that's not an accurate statement of the law and then it's applied -- it was -- then in the first sentence the next paragraph it basically goes, "It was not proven that Owens was aware that his response was not only inaccurate but false." So, that's the points to which it's our position that you don't have to show the actual falseness, but a materially false impression based on the totality of the circumstances gets you to the same place.

THE COURT: All right, I will look up and check on that and make sure that that's appropriately cited. I'll go on to state at this time on this particular issue that I don't find any prejudice. The jury was told of the accurate sentence. They were made aware. It was clear. So, I don't find any prejudice. It fails on the second prong clearly. I'm going to look more on this issue.

All right, now, we're dealing with general -- generally the order -- no, let's see -- yes, we are, and I can go into the examples that have been submitted, and then we'll -- then I'll go through some of the changes in the order that have been done as well.

Now, before I get into that all the way through "H" have we answered or at least addressed the concerns through

"H" on page nine?

MR. BLUME: You mean in the -- from going through it? Yes, I don't think I need to say this, but just to sort of make sure the record is clear, I don't ever want there to be any question of waiver down the road, is that I understand how Your Honor has ruled and obviously we object in general and disagree with the Court's findings, but I just want -- I feel the need to go through and sort of like try and argue every point with you. I understand what the purpose of this. I just don't want anyone to ever say that we didn't object or preserve Mr. Hughes' rights by indicating our disagreement with the overall findings as well as the overall outcome.

THE COURT: I understand.

All right, let's see, on page 10, there's a concern on the part of the Applicant of the proposed order not clearly -- inconsistent with the outline in some, but the order or the outline does not specifically say some points, and let me once again state for the record that this order has been gone through and will be continued to be gone through, worked through, modified, put into this Court's words or if the words that happen to come in the proposed order are the words the Court uses, the Court has adopted those. That is the finding. That is the determination of the Court. That would be the findings of fact and the

conclusions of law that would be reached by this Court.

We can go into some of the examples. One of them is, "The proposed order states there's no evidence that the Applicant did not understand the Court's questions. You indicate that certainly the outline doesn't say this, but certainly the evidence of mental retardation in youth could be construed as some evidence that he did not understand," and I believe I'll address that in some of the modifications I'll tell you about.

"Likewise, the proposed order's conclusion that the waiver was adequate to reveal his consent to concession of guilt strategy," that's 176. It says, "The Respondent submits that the wavier to reveal consent, concession of guilt strategy was sufficient and the Court finds that there was no showing that counsel's actions were either deficit nor prejudicial under Strickland." I've modified it to say, "Hughes' statement in open court carry a presumption of veracity. The record reveals that Hughes was informed of the strategy. Hughes has failed to show that he did not understand or agree with the strategy. Further there is no evidence that Hughes disagreed with the strategy." So, that language has been modified.

Okay, "The proposed order also draws a negative inference from the Applicant's failure to testify in post conviction on this issue, but the outline says nothing to

suggest that on the part," and that language will be removed, anything that has a negative connotation in that regard, and what I did say is that there was not evidence submitted. I did not say he didn't take the stand and therefore, but you heard the language that I just used, but there won't be anything to indicate that there was a negative inference. I'll deal only with the evidence that was or was not submitted. Once again, the burden is on the Applicant.

All right, then another example was that, "The Court's outline simply concluded that trial counsel was not deficit in failing to point out the comparative punishments between Owens' charge and the plea bargain. The proposed order attempts to provide a rationale for that conclusion, namely that the jury was aware of the difference between the potential penalties faced by Hughes and by Owens so that the comparison did not matter," and clearly that was my reasoning. That's correct. I'll state that now for the record. They were aware of the difference.

Let me see if there's anything else. All right, and then it says that, "The order strongly suggests that as a matter of law no seated juror was impermissibly biased. The Court's findings, the Court's outline contains no such findings nor is the finding necessary." I think that has been modified. Where it that located?

MR. BLUME: That's in the jury selection. I'm sorry, Judge.

THE COURT: That's quite all right. I understand.

MR. BLUME: I'm sure it's in the prejudice section.

THE COURT: Page 87?

MR. ZELENKA: I don't know if that's what he's referring to, but may have been.

MR. BLUME: I was looking for -- I believe the Court's question was where was the statement about no biased jurors were seated.

THE COURT: There is this -- the Court -- there is a section on 87 that says, "The Court finds that Juror Barringer, Brenda Wise were qualified to serve." I just put, "By their credible expressions they would both," I changed it, "The Court finds that Juror Barringer, Brenda Wise were qualified to serve. They both indicated they would rely upon the evidence in their decision not on what they had previously heard and could be fair and impartial, and so each were not subject to being stricken for cause. The discretion of defense counsel in selecting jurors is reasonable trial strategy." I've amended it in that way.

I can tell you how I will deal with that. I'll go through this and find -- let me get back to your issue, "that as a matter of law no seated juror was impermissibly biased." What I will do is make -- reiterate the findings

by the Trial Judge and assert that there has been if, in fact, there's nothing to -- that's been presented to dispute that.

I will not make that conclusion on my own. I will simply reiterate what the trial judge had indicated. If I knew exactly where that was -- it probably has already been modified in mine, but I'm not sure exactly where that language is and I don't want to overlook that, but I'll be going through every bit of it and I'll tell you that's how I handle that.

MR. ZELENKA: Okay.

THE COURT: My findings of credibility will be on the persons who were before me who I saw testify and I heard from, and I'll let the other courts make a determination and unless there's something to dispute that. All right, so, that will be addressed and I understand the Applicant's position in that regard.

Now, I don't know that I need to go through and tell you every typo or every rewording or omission. Let's see if there's anything.

On page eight I've made modifications that are mostly just grammar type of -- "Exhibit 55 showed a pool of blood on the desk, the presence of a victim and blood also on the calculator on the desk." That's how that is worded.

Number nine, on page nine, about the middle of the

page, "Kenneth was the youngest of four and was four years old and lived with her. She described him as her sweetheart who initially was picked on by his older sisters who eventually started to look out for him. She testified that they were a close family." And that's just going back to the record and reading what was -- page 10 at the top, "Kenneth telling her that he sometimes felt feared. He thought about getting a gun. She said that he would probably get hurt and he agreed." That's the testimony.

Number ten down towards the bottom, the third from the bottom, that line, "He testified he found his IQ to be low," he being James McKinney the guidance counselor at Ford Middle School. I modified what pages those were on. It was on 1430 to 33.

On page 12, "Dr. Morgan further described his opinion as to how his mental statues impacted on the," it said impact. It's just changed to impacted.

Page 13, the paragraph that begins with Annette Boette, the sentence that says, "She described his normal birth with both parents involved. Herman lived with his parents until he was four years old."

On down there was a clarification of language, too, "He was determined to be in need at the time of placement in a learning disabled classroom."

Fourteen, "Ms. Boette and Miranda Hughes, the birth

mother" -- "Ms. Boette said Miranda Hughes, the birth mother, has unresolved conflict about the adoption and is in denial and the adoption is not seen as a positive move by Miranda Hughes." The point of that testimony was that Ms. Boette was saying that when it's not accepted that way it had a negative impact.

Let's see if there's anything else. They go on like that that are primarily my memory of how the testimony went and the location. Let me see if there's anything else.

We've talked about some of the changes we've made in response to the objections. Let's see if there's anything in addition to that at this point.

All right, on page 54, I think we've discussed this. I'm omitting the, "On cross examination, however, Mr. Ven revealed an important bias. He is morally opposed to the death penalty, would obviously be opposed to an individual that was 16 or 17 years old being sentenced to death." I'm starting with, "He admitted that people who blame others for their problems are likely to re-offend."

Again this is just changing the wording that -- on 57 it says about the middle of the page, it says, "First Respondent submits that counsel was not" -- I just put, "Applicant asserts counsel was constitutionally deficit in failing to request."

Let's see all the Kent factors. I'm just passing over things that I think are just little changes and -- all right, and on page 85, I think we addressed this, too. It's the first -- it's the paragraph that begins with "further" at the top of the page. I had, "Each of the jurors stated that they could." I'm just crossing out convincingly. "They stated that they could set aside the information and render a verdict based solely on the evidence. The Trial Judge as well as defense counsel found these jurors to be sincere in their statements and concluded they were qualified. There's no evidence present to the contrary."

The same type of thing on page 87. "The Court finds that Juror Barringer, Brenda Wise were qualified to serve. They both indicated they would rely upon the evidence." We had gone over that one. We'll skip over those we've already gone over. I'm having to overlook notes that I have on the side where I've just looked things up.

All right, page 103, about the middle of the page, "The Court found that even if counsel failed to present additional evidence at the re-sentencing hearing he was not prejudiced under Strickland." I think that was the sentencing hearing. I didn't want any confusion in that regard.

I believe I've talked about this, but Dr. Kenneth Keyes, an expert in mental retardation, the portion that says, and this is in page 109, "who candidly conceded his own moral opposition to the death penalty," is being omitted, and 110, "Counsel conceding he was not aware of mental retardation specialist," although that testimony was there and find it -- cite the transcript for it in light of the fact that there was -- there's evidence that he had been presented with that. It's not going to be in there. It would just require that I go on to say, "and there is also evidence that" -- all right, page 112, the last sentence of the very first paragraph, I've omitted it, "The glaring failure of the collateral proceedings speaks volume about the inadequacy of the showing made at the hearing," just that sentence is gone.

The bottom, it says, "The Applicant contends that counsel was ineffective in," I've inserted, "not locating an expert who would testify that he suffered from brain damage."

All right, and just little things like on 113, the bottom of the page, "Mr. Hughes would be unable to control" -- this is footnote 20, it's, "his behavior sufficiently."

I've told you about 115 that, "he has had no knowledge that his mother had syphilis." This is Attorney Newsom indicating that he didn't know that, and I don't

know whether the transcript's cited on that, but I do it.

All right, page 157, number one, I'm going to say that the -- that, "Appellant counsel gave facts sufficient for the Court to make a determination," just a typo. I've already read the changes on 177 that I'd be making, and then 178, depending on which one you're looking at, "The counsel's concession of guilt," is how this page starts. It's crossed out up till number four because that's duplicative of the page before the 177, and again that's where we have a group of pages that just repeat.

All right, and I've indicated that I'm going to check the statement of the law as to Napue as to whether it includes false impression also. I've ruled on the issue, but I'm going to check on that matter. I've ruled based clearly on the second prong, and that's where we are right now.

Again, I'm going to go through -- you understand the Court's rulings. What the exact language of this order will be is not determined yet. Much of it will be the proposed order that's been submitted. Some of it will not, but once again, rest assured as it would be if I had asked Applicant's counsel to draft the order, it would be carefully reviewed before being signed should that have been the case, and I would have adopted, should the ruling and should the order been appropriate, I would have adopted

that language as well. I will adopt some and not others, but once again, it will become this Court's once it is signed by this Court. I will not take that decision or that signing of the order lightly at all, and I want to make that clear because I did get the impression that that wasn't clear based on the exceptions.

Now, I understand without your waiving any concerns you have, is there anything else we can address at this point?

MR. BLUME: Not that I'm aware of, Your Honor.

MR. ZELENKA: Not that I'm aware of either.

THE COURT: All right, I think at this point now what's going to happen next is you are going to receive then the order, and once it is modified and it is signed you will receive a copy of that order and then I would expect any concerns would be addressed by way of a motion for reconsideration thereafter.

All right, thank you very much for coming here today. I appreciate that.

MR. ZELENKA: Thank you, Judge.

MR. BLUME: Yes, Judge, if I could just one quick thing ---

THE COURT: Yes.

MR. BLUME: --- in the past, just as an administrative matter, most of the things from the Court

have been correctly mailed to Pam Wilkins who was really the primary person, but she no longer works for the Center for Capital Litigation. So, if everything could be directed to me. I have a different address. That would avoid any delay.

THE COURT: Okay, and this is, though, the Sumter Street suite?

MR. BLUME: Yes.

THE COURT: P.O. Box 11744.

MR. BLUME: Yes, that's ---

THE COURT: All right, that's where we will send it. You will receive it. Each of you it will be mailed out at the same time.

All right, thank you very much.

(Adjourned.)

C E R T I F I C A T E

I, the undersigned Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing in the case of Herman Lee Hughes, Jr. v. Michael Moore, et al., 98-CP-09-101, held in the Court of Common Pleas for Georgetown County, South Carolina, on November 17, 2000, Georgetown County Courthouse, Georgetown, South Carolina.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Grace L. Hurley, CVR-CM
Official Reporter

November 30, 2000.

1350 3548

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN
IN THE COURT OF COMMON PLEAS

HERMAN LEE HUGHES

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. 98 -CP- 9 - 101

MICHAEL MOORE, COMMISSIONER et al.

DEFENDANT(S)

CHECK ONE:

[ ] **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[X] **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] **ACTION DISMISSED** (*CHECK REASON*): [ ] Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ] Other _____.

[ ] **ACTION STRICKEN** (*CHECK REASON*): [ ] Rule 40(j) SCRCP; [ ] Bankruptcy; [ ] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other _____.

IT IS ORDERED AND ADJUDGED: [ ] See attached order; [X] Statement of Judgment by the Court:

APPLICANT'S REQUEST FOR POST-CONVICTION RELIEF IS DENIED BY JUDGE PAULA H. THOMAS' ORDER OF DISMISSAL DATED 12-8-00.

Dated at _____, South Carolina, this _____ day of _____, 20____.

PRESIDING JUDGE

This judgment was entered on the 11th day of Dec., 2000, and a copy mailed first class this 12th day of Dec., 2000 to attorneys of record or to parties (when appearing pro se) as follows:

JOHN H. BLUME III, ESQ.
P.O. Box 11744
COLA. 29211

ATTORNEY GENERAL'S OFFICE
RECEIVED 12-13-00
ADMINISTRATIVE INSTRUCTIONS:
FILE OPEN END
HAVE COPIES MADE
TRANSCRIPT

ATTORNEY(S) FOR THE PLAINTIFF(S)

DONALD J. ZELENKA
OFFICE OF ATT. GENERAL
P.O Box 11549
COLA. 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

SCRCP APP-24

SCRCP FORM 4 (Revised 5/00)

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

PAULA H. THOMAS
JUDGE

715 PRINCE STREET
POST OFFICE BOX 421270
GEORGETOWN, SOUTH CAROLINA 29442-1270
(843) 546-9618
FAX: (843) 527-8668

December 8, 2000

Honorable Donald J. Zelenka, Esquire
Office of the Attorney General
P. O. Box 11547
Columbia, S. C. 29211

Mr. John Blume, III, Esquire
P. O. Box 11744
Columbia, South Carolina 29211

Re: Herman Lee Hughes v. Michael Moore, Commissioner, et al
Case No: 98-CP-09-101

Gentlemen:

Enclosed please find a copy of the final order on the above mentioned case. Today I mailed the original order to the Honorable J. Keith Wannamaker, Clerk of Court for Calhoun County at 302 South Huff St., St. Matthews, S. C. 29135.

Thank you for your attention to this matter.

Yours truly,

Elaine H. Roberts

Elaine H. Roberts
Secretary to Judge Paula H. Thomas

Enclosure

ATTORNEY GENERAL'S OFFICE
RECEIVED 12-12-00
ADMINISTRATIVE INSTRUCTIONS
FILE OPEN END
COPIES MADE

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN	)	IN THE COURT OF COMMON PLEAS
Herman Lee Hughes, Jr., Applicant, v. **MICHAEL MOORE,** Commissioner, South Carolina Department of **CHARLES M. CONDON,** Attorney General, State of South Carolina, Respondents.	)	**98-CP-09-101** **ORDER OF DISMISSAL**

This matter comes before this Court by an Application for Post-Conviction Relief. The Applicant is currently represented by court-appointed counsel, John H. Blume, Cornell Law School, Myron Taylor Hall, Ithaca, New York 14853-4901 (607-255-9653) and Pamela A. Wilkins formerly of the Center for Capital Litigation, P.O. Box 11311, Columbia, South Carolina 29211 (803-765-0650).The Respondents are represented in this matter by Donald J. Zelenka, Assistant Deputy Attorney General, and Jeffrey A. Jacobs, Assistant Attorney General, P.O. Box 11549, Columbia, South Carolina, 29211.

This matter was assigned, pursuant to a May 8, 1998 Order of the South Carolina Supreme Court to this Court. A status hearing was held on May 26, 1998. On June 22, 1998, the Applicant filed an initial application for state post-conviction relief. The Respondents made a return and motion to make more definite and certain dated July 21, 1998. Subsequently, other amended applications were filed. An evidentiary hearing was convened in Horry County from October 11-13,

1999. The Applicant was present and represented by counsel. The Respondents were represented by Donald J. Zelenka. Evidence was presented in the form of testimony, depositions, and affidavits. Subsequent to the hearing further submissions were made. On May 17, 2000, the Applicants made their Post-Hearing Memorandum of Law In Support of the Third Amended Application For Post-Conviction Relief. The Respondents made a Memorandum Of Law In Opposition to the Application for Post-Conviction Relief on May 27, 2000. On July 31, 2000, this Court advised counsel of its intent to deny the Application and provided counsel with an outline of its reasoning. It further requested Respondents to provide this Court with a proposed order on September 7,2000 the proposed order of dismissal was submitted to this Court. On October 4, 2000 the applicant's objections to the proposed order was submitted. A hearing was held on November 17, 2000, in order to review the exceptions. Present at the hearing were the applicant and his counsel John Blume and the respondent's counsel Donald J. Zelenka. Upon review, this Court makes the following findings and conclusions of law pursuant to S.C. Code Ann. § 17-27-90.

I.

STATEMENT OF THE CASE

Herman Lee Hughes, Jr., #5018, is currently a safekeeper at the Lieber Correctional Institution pursuant to orders of commitment of the Clerk of Court for Calhoun County. On May 26, 1994, the Grand Jury of the Court of General Sessions for Calhoun County indicted the Petitioner, Herman Lee Hughes, Jr., for murder (involving the March 18, 1994 death of Kenneth Presley), assault and battery with intent to kill (involving the March 18, 1994 shooting in the chest and face of Kelly Hoffman), armed robbery (involving the March 18, 1994 robbery of the Blue Diamond Casino), and grand larceny of a vehicle (94-GS-09-0154, 0155, 0156). He was represented

by retained counsel, Phillip F. Newsom, of the Richland County Bar. The prosecution was handled by First Circuit Solicitor Walter M. Bailey, Jr.

The prosecution had previously filed petitions in the Family Court of Calhoun County on March 21, 1994 and March 24, 1994 requested the actions be transferred to the Court of General Sessions so that Hughes could be tried as an adult. A waiver hearing was held on April 8, 1994 before the Honorable Maxey G. Watson, Family Court Judge. On April 28, 1994 Judge Watson entered a written order waiving jurisdiction to the Court of General Sessions.

On October 31, 1994 the Solicitor served his notice of intent to seek the death penalty, notice of aggravating circumstances, and written notice of evidence in aggravation of punishment.

The Honorable Edward B. Cottingham was assigned to handle the matter. Pre-trial motions were heard on August 22, 1995. The matter was called for trial on September 5, 1995. At the outset, a competency hearing was held and the court entered a written order on September 7, 1995, finding Hughes competent to stand trial. Jury selection concluded on September 7, 1996.

The guilt phase began on September 7, 1996. The Petitioner was present and represented by retained counsel Newsom. In the opening statement, counsel for the Petitioner conceded that "Mr. Hughes does not deny involvement" in the matter. R. p. 808, ll. 5-7.[1] Counsel for the defense further stated in his opening:

> This young man, you will find the evidence, is involved. His guilt under the law ... you will hear about the felony murder rule. HIS GUILT IS CLEAR. It does not matter who had the gun. It does not matter who pulled the trigger. If you combine to

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[1] The "Record on Appeal" before the Supreme Court of South Carolina is designated as "R.".

commit a crime and people's lives are taken, you're guilty.

R. p. 809, ll. 10-16. (Emphasis added). Counsel further stated that they had entered a plea of "not guilty" in order to have an opportunity to have a jury decide the case rather than a judge. R. p. 807, l. 15 - p. 808, l. 7; p. 809, ll. 17-19.

(a) Summary of the Guilt Phase Evidence

During the guilt phase of the trial, evidence was presented that Hughes' fingerprints were found on pieces of paper in the cash drawer of the Blue Diamond Casino. R. p. 116, ll. 2-13. The critical testimony was presented by Kelly Hoffman, a survivor of Hughes' violent assaults on March 18, 1994. She testified that Kenneth Presley, the decedent, had been her boyfriend for a number of years. On March 18, 1994, she went with him to his job at the Blue Diamond Casino to keep him company. R. pp. 1153-1154. They arrived there at 10 til 8 p.m. in Presley's grey Mazda RX-7. R. p. 1154. Judy Osborne was still there working when they showed up. Hoffman described seeing a person that she identified as Herman Hughes enter the store alone. R. p. 1158. He asked Presley how to play the poker machines, and he gave him a demonstration. R. p. 1159. He then told Ken he was going outside to get some money. R. pp. 1159-60. Ten (10) minutes later, Hughes returned when Hoffman was sitting behind the desk on the telephone. R. p. 1160. Hughes then asked Presley for change for a fifty-dollar bill. R. p. 1162. Ken opened the cash drawer and when Kelly looked up, Hughes had his gun pointed at them and said, "get off the phone." R. p. 1162. Hughes then said, "give me the money" and Ken said, "O.K., no problem," and started setting the money on the desk while the gun was pointed at him. R. p. 1163. Hughes then asked for the car keys and Ken set them on the desk. Next, as Ken was reaching back in the drawer to get more money, Hughes shot Presley in the head. R. p. 1165. He fell to the floor and Hoffman said, "Oh, my God," and Hughes turned

and shot her in the chest. R. p. 1165. Hughes then returned a few steps back to where Ken was and shot him a second time while he was lying on the floor. R. p. 1166. As Kelly was slumped over, Hughes walked back over to her and shot her again, this time in the face. R. p. 1167. Ms. Hoffman then described that Hughes then went over and shot Presley again. She thought that Hughes was going to shoot her again, but he stood a few seconds, gathered up his things and cut off the lights and then left. R. pp. 1167-1168. She was clear that Hughes was the only person inside the Blue Diamond. R. p. 1168.

Hoffman testified that Hughes was a total stranger to her. She was positive that Hughes shot her and Presley. R. pp. 1169, 1175, ll. 13-25. She further declared Hughes shot all five (5) shots. On cross-examination, she acknowledged that she had given a statement at the hospital. Further, she went to school with Kelsey Pearce, but did not know him. R. p. 1181.

The record also revealed that Hughes had gotten the gun he used from Kelsey Pearce's uncle, Henry Owens, after Pearce had gotten the keys to the trunk from Owens where the gun was located. R. pp. 828-830. The state's version had Pearce and Hughes then going to the Blue Diamond Casino together. According to Owens, Pearce stated that he remained outside the store when Hughes first went in, then came out and borrowed some money from Pearce. R. p. 840. Pearce watched as Hughes re-entered the store and pulled out the gun, asked Hoffman to get off the telephone, asked for the car keys, and then heard shots. R. pp. 850-51. They then stole Presley's Mazda RX-7. See also Statement of Owens, R. pp. 1069-1074.

Evidence revealed that while Hoffman survived the assault, Ken Presley died on March 18, 1994. R. pp. 882-83. Presley had three (3) gunshot wounds to the head which had exited the left side of the head. R. pp. 892-899. The gunshot wounds to the brain were the most probable cause

of death. R. pp. 896-97. Two (2) of the wounds were fatal and the injury from the third shot was potentially fatal. R. p. 899.

The evidence revealed that when help came to the store, they could not enter because the door was locked. No money remained in the cash register except for some change, and there should have been between $400-$450. R. pp. 939-40. Testimony was also received that co-defendant Kelsey Pearce was the first suspect because he had been indicted in several auto thefts. R. p. 949. Pearce was also described as being more of a talker and more aggressive than Hughes. R. pp. 950-951. Philip Wright testified that Herman Hughes told him that he was not in trouble and Hughes told Wright that "Kelsey said in the Waffle House that he's the one that did the crime." R. p. 1038, ll. 714.

Hughes did not testify at the trial. The trial judge declared co-defendant Pearce "unavailable to testify." R. p. 1235, ll. 6-8. Hughes was found guilty of all four (4) charges.

(b) Summary of the Prosecution Penalty Phase Evidence

On September 11, 1995, the sentencing hearing began. In the penalty phase, the State presented various witnesses on aspects of Mr. Hughes' character. Virginia Hill, an administrative assistant at John Ford Middle School in Calhoun County, testified about Hughes' school records. R. 1322-28. The records revealed that Hughes was suspended on February 2, 1994 for the remainder of the school year and expulsion was recommended. R.p. 1327. While conceding other students have disciplinary problems, none are any worse than Hughes. R.p. 1328.

Myrtis Sally, the custodian of Special Education, records and put into evidence the psychological testing of Hughes dated January 7, 1986 (second grade) and May 5, 1991. R.p. 1330-31. (Exhibits 45, 46). She testified that in second grade he was placed in one learning disability

class only for that year. Testing also revealed that when Hughes was thirteen (13) years old and six (6) months, his "mental age" was nine (9) years old and his Schlossen screening test revealed in 1986 a full scale IQ of 80 as administered by a school psychologist and in 1991 a full scale IQ of 74. R. p. 1336-37.

Kala Byrd testified that in December 1992, she saw Hughes in front of her house with others and heard a gunshot and Hughes was under the shed. She stated that she had seen Hughes in possession of a gun before a couple of times. R. p. 1341.

Capers Wannamaker testified that he saw Hughes in December 1992 in his role as Deputy Sheriff. R. p. 1346-47. He removed a pistol from Hughes that day. R. p. 1347-48. He declared he filed an incident report on the matter and referred it to D.Y.S. R. p. 1348-49.

Anthony Brown of the Calhoun Detention Center testified that he observed Hughes on December 14, 1994 at 1:35 p.m. hitting the door lock with a broom handle. He stated that when he told Hughes to stop Hughes stated "it was going to take more than just me to put him in his room" and placed Hughes in lock-down for three (3) days. R. p. 1354. On cross-examination, he described Hughes as quiet and keeps to himself, although he has been attached. R. p. 1355. Further, he denied that Hughes was a dangerous inmate, but was childlike and mischievous. R. p. 1355.

J. D. McCord, a detention officer, testified about the November 27, 1994 jail incident between inmate Duane Beckett and Tyrus Glover who were in a fight. He stated that after Beckett was locked in his cell, Hughes was caught attempting to open the cell with a toothbrush and placed on lock-down for five (5) days. R. p. 1358-59.

Steven Derrick of SLED testified and presented crime scene photographs from the Blue Diamond Casino. R. p. 1361-67. Exhibit 56 showed an indention on the side of a refrigerator

consistent with bullet contact. Exhibit 51 showed a bullet found on the floor consistent to the area of the indention mark on the refrigerator. R. p. 1368. Exhibit 50 showed a shell casing on the floor in the same area. Exhibit 54 showed 2 shell casings. Exhibit 52 shows the area where the first shell casing and bullet was found. Exhibit 55 showed a pool of blood on the desk the and presence of a victim and blood also on the calculator on the desk. Exhibit 53 showed the refrigerator base with blood running down. R. p. 1369.

Gary Presley, the father of victim Kenneth Presley, testified about his family, his divorce, and the time he spent with his son. R. pp. 1374-75. He stated that after his divorce, his ex-wife retained custody of the children and moved from Michigan to South Carolina. He would speak with his children by telephone a number of times and Kenneth spent a year with him in school in Michigan when he was 13. R. p. 1374-75. He described his son as an average student and that he did normal things with him. R. p. 1375. He stayed with him again when he was 15. He stated they did a lot more things at that time such as ball games and go to work with him. Gary Presley was an electrician and his son showed an interest in it. R. pp. 1376-77. He described his son dropping out of school, then getting a GED and enlisting in the Navy for two (2) years. R. pp. 1377-78. Exhibit 49 a photograph of his boot camp graduation was introduced. After he joined the Navy, his father found that his son had matured, becoming very responsible, and outlined his goals in life to go to college. R. p. 1379. He also introduced a letter Kenneth left when he was 15 giving his father some advice and encouragement. R. pp. 1380-81. The last time he saw him alive was in December 1992 when he was helping his grandmother. R. p. 1381. He learned that Kenneth had died from his ex-wife and found the news has made him an angry person, and affected the way he looked at things.

R. pp. 1381-82. The hardest part of the loss is "the way that he died" and that he never had a chance to have a life and do the things he wanted to do. R. p. 1382.

James Presley, the victim's older brother, testified about his relationship with his brother which became closer as they got older. He stated he was in the process of getting to South Carolina when his brother was killed. He described the loss as hard to put into words, sending flowers to the grave, the birth of his daughter who cannot know Kenneth, but was named after him. He stated he felt anger and cheated wondering why it happened. R. pp. 1385-86.

Lynell Williamson, the victim's mother, testified that he had lived in Calhoun County since 1977 after the divorce. Kenneth was her youngest and was 4 years old and lived with her. She described him as "her sweetheart" who was initially picked on by his older sisters who eventually started to look out for after him. She testified they were a close family. R. p. 1388. She said in high school, Kenneth would listened to music, work in the yard, ask to do things for her or others. Kenneth dropped out of school because he was bored. R. p. 1389. It was his dream to join the Navy and become a Navy seal. R. p. 1390. He worked to get himself into shape so he could be accepted. R .p. 1390. He signed up for a 2 year stint. She introduced various photographs including 1990 family picture for the church (R. p. 1391), a picture of their last Christmas together, photos of him in the Navy, and a picture with her before he went up to Michigan. R. pp. 1394-95. She also introduced letters he wrote to her when they were apart from 1984, 1991, and while he was in the navy. R. pp. 1395-1403. Also a letter of appreciation from the Navy was published. R. pp. 1403-05. She stated he got out on December 31, 1993 and intended to go to U.S.C. on a military grant. Kenneth moved in with her daughter's fiancé and he worked part-time for her husband in construction and part-time at the Blue Diamond Casino. He was working for school money, car

insurance. She described Kenneth telling her that he sometimes felt fear and he thought about getting a gun. She said that he would probably get hurt and he agreed. R. p. 1407.

Ms. Williamson said she learned of her son's death after her husband received a call from her son-in-law. She was told there had been an accident and to go to the hospital where she learned they had been shot. R. pp. 1409-1410. When she was sent to the counseling room, she learned of his death. She said it will always affect her, that she was in a fog and could not concentrate and would hear his voice. She said that since his death, her marriage is suffering, her children are suffering and she suffers with them. R. pp. 1409-10.

© The Defense Case In Mitigation

The defense called Dennis Jones, James McKinney, Kathy Link, Lucille Hughes, Dr. Harold C. Morgan, Dr. John DeWitt, and Annette Boette as witnesses. Sheriff Dennis Jones of Calhoun County testified that on March 18, 1994, he spoke with Hughes. He went with Hughes' mother and picked up Hughes. At a conference in his mother's presence, Hughes confessed and stated that he went with Kelsey Pearce to the Blue Diamond Casino, walked inside and asked for money and shot the woman while Kelsey stood outside and looked. R. p. 1427. He further testified that from information Hughes provided he recovered the weapon and placed him under arrest. He did not get statements from the other co-defendants. R. pp. 1426-27.

James McKinney, guidance counselor at Ford Middle School testified that Hughes attended school there in the 6th grade and was two (2) years behind and was a quiet, cooperative, well-mannered student. R. p. 1429. He had difficulty in reading and math. He testified he found his IQ to be low. He was cooperative, tried hard in class, and appeared to be a follower and loner. R. pp. 1430-33. He was in a remedial and chapter one class at Ford. R. p. 1432. The next year after he

was held back in 6th grade, his behavior was more aggressive, hostile and disrespectful toward teachers with poor classroom performance. R. p. 1434. In 1994, he was in the eighth grade when the incident occurred. He also testified on cross-examination that Hughes was expelled after a history of infractions including destruction of school property, cursing, disrespect to teachers, and sexual misconduct. R. pp. 1439-40.

Kathy Link, a 6th grade teacher at Ford Middle School, found that Hughes had difficulty in subjects and recommended that he be tested with the Schlossen IQ screening test. R. pp. 1442-43. He was described as a quiet, not disrespectful student who was a follower. She was not surprised that he was found to be a slow learner. R. p. 1444.

Lucille Hughes, Hughes' grandmother, testified that she adopted him when he was 3 years old. R. p. 1449. She agreed to raise him when he was in the 6th grade, his mother did not want him to go to counseling because he was not crazy, but he was having problems learning. R. p. 1451. She said he was not a bad boy, quiet and easy. Her husband had a stroke when Hughes was 12 and he helped take care of him. R. p. 1453-54. She found Herman to be sweet. Herman's father would call often and his mother was able to see him. R. p. 1455. She said she got along with Herman's mother and he would stay with her on the weekend. Lucille said she would go to school often about the counseling Herman needed. There were more problems in school when he was kept in the 6th grade. She asked the police to talk to Herman when he was running with the wrong people. R. p. 1458. Herman was never disrespectful or violent to her. He also had no problem with his father.

She described a gun incident where a boy was beating little Charlie, who was 9, and Herman went and got a pistol and shot it. The police investigated the shooting, but Herman was not arrested. R. p. 1460. She described Herman as not lying to her, that she had not had any problem with the six

(6) children she raised, but he got in with the wrong crowd. R. p. 1461. On cross-examination, she declared that Hughes had plenty of love and support from the family. R. p. 1462.

Dr. Harold Morgan, a forensic psychiatrist, testified that He evaluated Hughes on August 21, 25 and September 4. He studied medical records, school records, and Ms. Boette's social history report. He learned that Hughes had a normal birth, was raised by his grandparents who adopted him at age 4. He found the reports to reveal that Hughes was "right on the borderline of retardation." R. p. 1472. He found school records to show observations of attention deficit and hyperactivity disorder. R. p. 1473. He had problems paying attention in class, had nuisance behavior, resulting in expulsion. The consistent father figure was his grandfather until the stroke. R. p. 1474. Herman's behavior took a downward spin the same time the grandfather was placed in a nursing home.

Dr. Morgan found Hughes to not show much feeling and flat. His mental slowness was the main observation, but he also found him to probably have a personality disorder. R. pp. 1475-76. He found him to be sensitive and passive, but he drank too much. R. p. 1476. He found mental retardation or borderline mental ability, the learning disability, attention deficit, hyperactivity disorder, the personality disorder, and potential alcohol problem. R. pp. 1476-77. Dr. Morgan further described his opinion as to how his mental status impacted on the March 18, 1994 events. R. pp. 1477-1482.

Dr. John DeWitt, another psychiatrist, testified generally consistent with Dr. Morgan's findings. He found intellectual limitations, possibly attention deficit disorder, and traits of passivity and dependency. R. p. 1511. These traits could lead a person in stressful situations to be influenced by another and alcohol would lower his ability to analyze the situation and become impulsive. R.

p. 1513. He found that Hughes has the ability to conform his behavior, but the traits would lead him in some circumstances to act impulsively. R. p. 1515.

Annette Boette, a social worker, testified about her psycho social assessment of Hughes. R. pp. 1525-33. She described her interviews of the Applicant, his mother Miranda, father Herman, Sr., grandmother Lucille, and grandfather Charles. She also interviewed Dr. Morgan and Dr. DeWitt, and the penalty phase investigator. R. p. 1535. She summarized the documents she reviewed. She described his normal birth with both parents involved. Herman then lived with his parents until he was four (4) years old. R. p. 1537. The mother was unhappy in the marriage and Herman was adopted by the grandparents in 1981. He had a sister ten (10) months after he was born who died four (4) months after her birth and another brother, Charlie, who was 14 at the time of the trial. The real parents remained in an out of his life, although there was disagreement on how the adoption happened; whether the mother was tricked or willing to give up the child. R. p. 1539. In the second grade, Hughes had "severe problems" and developed an individualized lesson plan. He was determined to be in need at that time of placement in a learning disabled classroom where he remained the rest of the semester. R. p. 1541. Ms. Boette found deterioration of skills from testing in 1986 to 1991. His middle school scores were found to not improve and suggested a consistent pattern of failure, acceleration of some infractions, and being expelled three (3) times after Christmas. R. p. 1543. In the eighth grade she found a significant number of infractions leading up to being expelled again in February 1994. R. p. 1544.

Ms. Boette's conclusions were:

(I) The first conclusion is that Herman Junior was born into a family with very little formal schooling and very few skills and being able to meet the needs of a child with the limitations that he had.

(II) The second one is that Herman Junior's family, and particularly the two mothers, bickered over the adoption and never allowed him to resolve the trauma of this kind of open adoption.

(III) Number three, Herman Junior has borderline intellectual ability.

(IV) Number four, there was a failure on the part of the education system to intervene and meet his needs.

(V) Five, the context of the crime shows a rapidly deteriorating situation. He had been expelled from school again. His grandfather, adopted father, had a stroke and required nursing care.

(VI) ..., the sixth one is really a composite of all of these. Because of his many intellectual impairments, Herman Junior was easily influenced by others and fell prey to those who did not have his best interest at heart. Herman Junior was a child who went along with others for approval and a sense of belonging, and he was unable to judge who was safe and who was not.

R. p. 1544-45. Ms. Boette said Miranda Hughes, the birth mother, has unresolved conflict about the adoption and is in denial and the adoption is not seen as a positive move by Miranda Hughes. R. pp. 1546-47. She saw the school records revealed Hughes never scored above 84 on IQ testing. She considered the expulsion from school in December 1993 and stroke of his grandmother combined to put him on the streets. R. p. 1548. She also found that he would be more influenced by people who are older and do not have his interest at heart. R. p. 1549.

(d) The Prosecution's Reply.

On reply, Dr. Richard Frierson, the Hall Institute forensic psychiatrist, testified that he evaluated Hughes. He found the physical examination revealed no evidence of physical abnormality. R. pp. 1567-68. He did have a blood test that was positive with an exposure to syphilis. R. p. 1568. He opined that his review of tests scores and examination revealed that Hughes does not suffer from mental retardation. R. p. 1570. He found Hughes had a good capacity to concentrate, that he did

not suffer from attention deficit disorder, that he had capacity to distinguish right from wrong and had capacity to conform his conduct. R. p. 1573. Dr. Frierson did conclude, however, that he had a "conduct disorder" that is based on his history of prior misconduct. R. p. 1573.

Dr. Lester Finuf, a psychologist with the Department of Disabilities and Special Needs, testified that he examined Hughes and found that he was competent to stand trial, criminally responsible, no evidence of attention deficit disorder, and had normal attention span. R. pp. 1586-87.

After the presentation of testimony in aggravation and mitigation, closing arguments were heard from the prosecution, defense, and the Petitioner.

The judge instructed the jury on three (3) statutory aggravating circumstances:

1. The murder of Kenneth Presley was committed while in the commission of robbery while armed with a deadly weapon;

2. The murder of Kenneth Presley was committed while in the commission of larceny while armed with a deadly weapon; and

3. The offender, by his act of murder of Kenneth Presley, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

R. p. 1596, ll. 5-21; p. 1693, l. 25 - p. 1694, l. 10. Then he charged the following mitigating circumstances:

1. Defendant has no significant history of prior criminal conviction involving the use of violence against another person;

2. Murder was committed while defendant was under the influence of mental or emotional disturbances;

3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;

4. The age or mentality of the defendant at the time of the crime;

5. The defendant was below the age of eighteen at the time of the crime;

6. The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly sub-average general intellectual functioning existing with deficits in adaptive behavior and manifested during the developmental period;

7. The defendant acted under duress or under the domination of another person; and

8. Furthermore, you may consider any other mitigating circumstances which are supported by the evidence in this case.

R. p. 1596, l. 22 - p. 1597, l. 21; p. 1698, l. 15 - p. 1700, l. 12. After deliberations, the jury found the existence of all three (3) submitted statutory aggravating circumstances and sentenced Hughes to death. R. pp. 1710-1711. After the jurors were polled, Judge Cottingham found as an affirmative fact the death sentence was appropriate. R. p. 1713. After providing Hughes the opportunity to express why the sentence should not be pronounced, Hughes was sentenced to death for murder, twenty-five (25) years consecutive for armed robbery, twenty-five (25) years consecutive for assault and battery with intent to kill, and five (5) years concurrent for grand larceny. R. p. 1714.

(e) The Appeal before the Supreme Court of South Carolina

The Petitioner made a timely appeal to the Supreme Court of South Carolina. In the appeal, current counsel before this Court raised the following question presented:

> The judge erred by refusing to require co-defendant Kelsey Pearce, whose involvement in the crimes was the key defense issue at trial, to assert his privilege against self-incrimination before the jury, a procedure mandated by firmly established state law. In particular, this ruling denied appellant the opportunity to present relevant evidence in mitigation of punishment under the Eighth Amendment and S.C. Code § 16-3-20 and to rebut the state's case under the due process clause of the Fourteenth Amendment.

Final Brief of Appellant, p. 3. After briefing of this issue, the Supreme Court of South Carolina entered its order affirming the judgment of the trial court, over dissent, on October 27, 1997. The Supreme Court held that a witness may not be called by either the state or the defense solely for the sake of having the witness invoke his or her Fifth Amendment privilege against self-incrimination, for the purpose of permitting the jury to infer wrongdoing from the assertion; prospectively modifying State v. Perry, 279 S.C. 539, 309 S.E.2d 9 (1983). 493 S.E.2d at 823-24. The state appellate court then further concluded that any error in the trial court's refusal to do so in this case was harmless beyond a reasonable doubt. 493 S.E.2d at 824-825. A Petition for Rehearing was denied on November 20, 1998.

The Petitioner next made a Petition for Writ of Certiorari to the United States Supreme Court. The Petition was docketed as Hughes v. South Carolina, No. 97-8043 on February 24, 1998. In the Petition, Hughes, through appellate counsel Savitz raised the following issue:

> Does the harmless error standard South Carolina applies to the exclusion of mitigating and rebuttal evidence from capital sentencing comport with Chapman v. California, 386 U.S. 18 (1967)?

The Respondents made a Brief in Opposition on March 26, 1998. On April 27, 1998, the United States Supreme Court entered its Order denying the Petition for Writ of Certiorari. Hughes v. South Carolina, 523 U.S. 1097, 118 S.Ct. 1674, 140 L.Ed.2d 798 (U.S. April 27, 1998).

II.

ALLEGATIONS IN THE APPLICATION FOR POST-CONVICTION RELIEF

In the initial Application dated June 22, 1998, Hughes made the following allegations through counsel as to why he believes he is being held in custody unlawfully:

I. 9(a) Applicant was denied the effective assistance of counsel at the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution. (Ineffective assistance of counsel - Guilt Phase Investigation and Presentation).

10(a) Applicant's trial counsel failed to conduct an adequate and independent investigation of applicant's case in order to develop and present evidence to create a reasonable doubt as to applicant's guilt, to effectively cross-examine the state's witnesses, or to contradict the state's theory of the case. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(b) Applicant was denied the effective assistance of counsel at the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution. (Ineffective assistance of counsel - Sentencing Phase Investigation and Presentation).

10(b) Defense counsel failed to thoroughly investigate and present evidence in mitigation of punishment although such evidence was available. Counsel failed to adequately prepare for the sentencing phase and failed to prepare and present adequate defenses to the

aggravating circumstances presented by the state. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9© Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law in that counsel failed to object to the trial court's sentencing phase charge which effectively prohibited the jury from properly considering mitigating circumstances. (Ineffective assistance of counsel - Penalty Phase - Failure to object to instructions).

10© 1) During the sentencing phase charge, the trial court instructed the jury that mitigating circumstances could be considered only if "the Defendant has proven [the existence of statutory mitigating circumstances] by any evidence." ROA at 1698. 2) The court then instructed that statutory mitigating circumstances are only those which reduce the "degree of moral culpability for the commission of the act of murder." ROA at 1698. 3) Moreover, the trial court diminished the important role of non-statutory mitigating circumstances by charging the jury that "a non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the Defendant claims served the same purpose; that is, to reduce the degree of his punishment for the offense." R. at 1700 (emphasis added). 4) In addition, the trial court's written instructions refer only to statutory mitigating circumstances. 5) These instructions effectively prevented the consideration of applicant's mitigating evidence in violation of the Eighth and Fourteenth Amendments. See Skipper v. South Carolina, 476 U.S. 1 (1986); State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 484 U.S. 1020 (1988).

After subsequent allegations, the Applicant, through current appointed counsel made the following allegations in the **Third Amended Application** dated October 7, 1999 prior to evidentiary hearing:

9(a) Applicant's family court waiver hearing did not comport with minimum standards of procedural and substantive due process of law, in violation of South Carolina law and the Fourteenth Amendment of the United States Constitution.

10(a) Although South Carolina law in 1994 required a "full investigation" prior to a decision to transfer a juvenile from family court to General Sessions Court, the State arbitrarily failed to comply with this statutory obligation. Hicks v. Oklahoma. Additionally, the hearing itself did not satisfy minimum standards of due process as delineated in Kent v. United States, 381 U.S. 902 (1965). The defects in the waiver hearing include, but are not limited to, the following:

> (1) The Family Court lacked information concerning Applicant's mental retardation/borderline intellectual functioning and other cognitive limitations.
>
> (2) The Family Court heard no evidence about Applicant's potential for rehabilitation within the juvenile system, yet concluded (without any evidentiary basis) that the Applicant could not be rehabilitated within the juvenile justice system.
>
> (3) The Family Court heard incomplete and inaccurate information concerning the facts of the offenses and the Applicant's degree of culpability.
>
> (4) The Family Court based its decision to transfer the Applicant to General Sessions Court based on impermissible considerations, such as the desire to "send a message" to other juveniles.

9(b) Applicant was denied the effective assistance of counsel at the family court hearing determining whether he would be waived to General Sessions Court, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.

10(b) Applicant's counsel at the Family Court waiver hearing failed to provide adequate representation. Counsel's deficiencies include, but are not limited to, the following:

> (1) Counsel failed to secure necessary records and testimony to demonstrate Applicant's mental retardation or borderline intellectual functioning and to show Applicant's potential for rehabilitation within the juvenile justice system. See, e.g., State v. Bryant,

567 A.2d 212 (N.J. Super. Ct. App. Div. 1988)(finding counsel at waiver hearing ineffective for failing to introduce evidence regarding potential for rehabilitation), rev'd in part on other grounds, 569 A.2d 770 (N.J. 1989).

(2) Counsel's failure to adequately prepare and secure records prevented counsel from effectively cross-examining the State's witnesses, who testified (wrongly) that Applicant had never been in special education.

(3) Counsel failed to present evidence that Kelsey Pearce, not Herman Hughes, planned and was the primary perpetrator of the crimes.

(4) Counsel failed to make a timely motion for an evaluation by the Department of Juvenile Justice.

(5) Counsel also failed to object to the Family Court's improper reasons for transferring Applicant to General Sessions Court, which included the desire to "send a message" to other young people and the belief that DJJ "provides no rehabilitation."

Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9© Applicant was denied the effective assistance of counsel at the hearing to determine his competency to stand trial, in violation of south Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.

10© Despite evidence that Applicant was both mentally retarded and developmentally immature, trial counsel conceded, without presenting any argument or testimony, that Applicant was competent to stand trial. State v. Johnson, 395 N.W.2d 176 (Wis. 1986)(affirming 374 N.W.2d 637 (Wis. Ct.App. 1985))(finding counsel ineffective for failing to raise viable issue concerning defendant's competence to stand trial). Counsel's concession was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(d) Applicant was denied the effective assistance of counsel during jury selection, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.

10(d) Trial counsel failed to conduct an adequate *voir dire*. Counsel's deficient performance includes, but is not limited to, the following:

> (1) Counsel failed to challenge for cause (*or use a peremptory challenge*) a number of jurors who were acquainted with the families of the victims and who had actually spoken with them about the crimes and about their loss. See Morgan v. Illinois, 504 U.S. 719 (1992)(defendant has right to impartial jury).(*Involves juror William Barron and Brenda Wise as stated in October 10, 1999 Letter from Counsel Wilkins*)
>
> (2) Counsel failed to rehabilitate a number of jurors who expressed reservations about the death penalty, see Witherspoon v. Illinois, 391 U.S. 510 (1968)(jurors with reservations about death penalty may not be excluded for cause if they are able to fulfill their oath as jurors), and failed to challenge for cause jurors who indicated that they were unable to consider mitigating circumstances or would automatically vote for death upon a finding of guilt. See Morgan v. Illinois, 504 U.S. 719 (1992)(jurors who would automatically vote for death are excludable for cause).
>
> Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(e) Applicant was denied the effective assistance of counsel at the guilt-or-innocence phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments.

10(e) Applicant's trial counsel failed to conduct an adequate and independent investigation of Applicant's case in order to develop and present testimony to create a reasonable doubt as to

Applicant's guilt, to effectively cross-examine the State's witnesses, or to contradict the State's theory of the case. Counsel's deficient performance includes, but is not limited to:

> (1) Counsel failed to adequately prepare and present evidence impeaching the credibility of Henry Daniel Owens, Jr. Steinkuehler v. Meschner, ___ F.3d ___, 1999 WL 274826 (8th Cir. May 6, 1999), Williams v. Washington, 59 F.3d 673 (7th Cir. 1995).

> (2) Counsel failed to adequately prepare and present evidence regarding Kelsey Pearce's planning of, and involvement in, the offenses. Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995).

> Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(f) Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

10(f) Applicant's trial counsel failed to adequately develop and present expert and lay testimony in mitigation and in rebuttal to the aggravation evidence presented by the state. In addition, counsel failed to object to the State's introduction of inadmissible evidence, failed to object to prejudicial portions of the State's closing argument and to certain aggravating circumstances submitted by the State, and failed to ensure that the jury was properly charged. Counsel's deficient performance includes (*all allegations set forth concerning guilt phase issues of ineffective assistance according to the October 10, 1999 letter from counsel Wilkins*), but is not limited to:

> (1) Counsel failed to adequately prepare and present evidence to the retained defense experts in order to ensure a competent, complete, and thorough evaluation, an accurate diagnosis, and adequate preparation for their testimony. See, e.g., Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S.Ct. 1856 (1998).

(2) Counsel failed to secure necessary expert testimony supporting Applicant's developmental, mental, and social impairments. Adbur' Rahman v. Bell, 999 F.Supp. 1073 (M.D. Tenn. 1998)(finding counsel ineffective for failing to seek needed expert assistance).

(3) Counsel failed to present evidence that Applicant's school failure stemmed, in large part, from the school system's failure to provide appropriate special education remediation.

(4) Counsel failed to adequately cross-examine the State's witnesses or to object to the admission of Applicant's school disciplinary records.

(5) Counsel failed to object to, or move to limit, the excessive and otherwise inadmissible victim impact evidence presented by the State.

(6) Counsel failed to object to the solicitor's prejudicial and inflammatory closing argument during the sentencing phase of trial. Christy v. Horn, 27 F. Supp. 2d 307 (W.D. Pa. 1998)(finding counsel ineffective for, *inter alia*, failing to object to solicitor's improper arguments during sentencing).

9(g) Applicant was denied the effective assistance of counsel under South Carolina law and the Sixth and Fourteenth Amendments by trial counsel's failure to argue that international treaties and customary international norms binding upon the United States forbid the execution of juvenile offenders.

10(g) Article 6(5) of the International Covenant on Civil and Political Rights 9ICCPR), a treaty which the United States ratified in 1992, bans the use of the death penalty for those under the age of eighteen at the time of the crime. Moreover, international customary norms binding upon the United States ban the execution of juvenile offenders. Despite this binding international law, which applies to the States through the Supremacy Clause of the United States Constitution, trial counsel failed to raise the illegality of the death penalty for Applicant. Counsel's omission

was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(h) Applicant's death sentence violates international treaties and customary international norms binding upon the United States.

10(h) Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), a treaty which the United States ratified in 1992, bans the use of the death penalty for those under the age of eighteen at the time of the crime. Moreover, international customary norms binding upon the United States ban the execution of juvenile offenders.

9(I) Applicant was denied the effective assistance of appellate counsel in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

10(I) Appellate counsel failed to raise on appeal any proportionality argument concerning the propriety of a death sentence for a sixteen year old defendant with mental retardation or borderline. Appellate counsel's failure was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(j) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law in that counsel failed to object to the trial court's sentencing phase charge which effectively prohibited the jury from properly considering mitigating circumstances.

10(j) During the sentencing phase charge, the trial court instructed the jury that mitigating circumstances could be considered only if "the Defendant has proven [the existence of statutory mitigating circumstances] by any evidence." ROA at 1698. The court then instructed that statutory mitigating circumstances are only those which reduce the "degree of moral culpability for the commission of the act of murder." ROA at 1698. Moreover, the trial court diminished the important role of non-statutory mitigating circumstances by charging the jury that "a non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the Defendant claims served the same purpose; that is, to reduce the degree of his punishment for the offense." R. at 1700 (emphasis added). In

addition, the trial court's written instructions refer only to statutory mitigating circumstances. These instructions effectively prevented the consideration of applicant's mitigating evidence in violation of the Eighth and Fourteenth Amendments. See Skipper v. South Carolina, 476 U.S. 1 (1986), State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 484 U.S. 1020 (1988).

9(k) Applicant was denied the effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by appellate counsel's failure to appeal the trial court's ruling that the South Carolina Constitution permits the imposition of the death penalty upon a defendant who was a juvenile at the time of the alleged crime.

10(k) Trial counsel moved to bar the State from seeking the death penalty against Applicant, arguing that imposition of the death penalty for a crime committed while the defendant was a juvenile violates both the United States Constitution and the South Carolina Constitution. After hearing oral argument, the trial court concluded that "the appropriate case law, including that of South Carolina, does not suggest that one...who was sixteen at the time of the alleged commission of the crime cannot suffer supreme penalty if a jury of 12 find it is warranted." (Emphasis added). Appellate counsel failed to appeal the trial court's finding on the state constitutional issue, despite the lack of any controlling South Carolina Supreme Court decision concerning the issue. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(l) Alternatively, in the event the court finds that the issue concerning the South Carolina Constitution in Ground 9(k) was not preserved for appeal, Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and relevant South Carolina law by trial counsel's failure to obtain a ruling regarding whether the imposition of the death penalty upon a person who was a juvenile at the time of the crime violates the South Carolina Constitution.

10(l) Although trial counsel's written Motion to Bar Imposition of the Death Penalty against Applicant relied, in part, on state constitutional grounds, Applicant failed to argue the state

constitutional issue at the hearing on the motion. Furthermore, by failing to obtain a ruling from the trial court, he did not preserve the issue for appellate review. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(m) Applicant was denied his statutory right to the appointment of two attorneys to represent him at his capital trial.

10(m) Despite Applicant's indigence, the trial court failed to appoint a second lawyer to assist in his representation, as required by S.C. Code Ann. § 16-3-26 and Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

9(n) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and South Carolina law by trial counsel's failure to move for the appointment of a second attorney and by the court's failure to appoint a second attorney.

10(n) Because of his indigence, Applicant was entitled under S.C. Code Ann. § 16-3-26 to the appointment of a second attorney. Nevertheless, upon information and belief, Applicant's trial counsel failed to move for the appointment of a second attorney, and the court did not appoint a second attorney. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984), see also Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

9(o) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to object to the trial court's instruction on accomplice liability.

10(o) The trial court instructed the jury that "[w]hen several people pursue a common design to commit an unlawful act and each takes a part agreed upon or assigned to him in an effort to ensure the success of the common understanding, the act of one is the act of all, and all are presumed to be present and guilty." ROA at 1255. This charge failed to include all the elements of accomplice liability, see, e.g., Gore v. Leeke 261 S.C. 308, 199 S.E.2d 755 (1973), and also suggested to the jury that it must

presume guilt even absent proof beyond a reasonable doubt of all the elements of the crime. Cf. In re Winship, 397 U.S. 358 (1970)(prosecution must prove all essential elements of crime), Sandstrom v. Montana, 442 U.S. 510 (1979)(invalidating instruction that arguably shifted burden of proof away from prosecution). Trial counsel failed to object to this charge. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(p) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to request a specific jury instruction regarding accomplice credibility.

10(p) Accomplice Daniel Owens testified at the guilt phase of Applicant's trial, stating, *inter alia*, that Applicant had admitted shooting both victims. Mr. Owens was a relative of another alleged accomplice, Kelsey Pearce, and also had been offered a deal by the State in exchange for his testimony against Applicant. Despite these facts, trial counsel failed to request a specific cautionary instruction concerning the assessment of accomplice credibility. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(q) In violation of the Sixth and Fourteenth Amendments to the United States Constitution, Applicant was denied effective assistance of counsel at his sentencing trial by counsel's failure to object to the State's introduction of Applicant's school disciplinary reports as evidence in aggravation of punishment.

10(q) Pursuant to S.C. Code § 16-3-20(B), "[only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible." With respect to Applicant's background, the Notice of Evidence in Aggravation of the Punishment alleged that the State would seek to introduce

> evidence as to the defendant's character, mentality, background, prior adult and juvenile acts of violence, adult and juvenile violations of laws, rules, regulations and/or ordinances, prior criminal adult and juvenile records and nature of said crimes, propensity to commit or attempt to commit acts of violence or bodily harm as

> an adult and a juvenile, propensity for violence and unlawful conduct as an adult and juvenile, disregard for peace and good order as an adult and a juvenile, and other similar characteristics of the defendant, as an adult and a juvenile, by the testimony of victims, witnesses, police officers, statements by the defendant and other relevant testimony, photographs, and exhibits. ROA 1904.

At the sentencing phase, the State sought to introduce disciplinary reports and school records and the corroborating testimony of records custodians to show that Applicant behaved poorly during middle school. See ROA 1332-47. The disciplinary reports detailed a series of infractions for disruptive and disrespectful conduct and consequent suspensions. See ROA 1920-35. Defense counsel raised no objection and the evidence was subsequently admitted.

The State's Notice makes no mention of school disciplinary records. The Notice's references to juvenile violations, propensity for unlawful conduct and disregard for peace and order are vague. Those categories, as well as the others, are so broad in scope that they failed to provide Applicant with reasonable notice that the State sought to introduce Applicant's middle school disciplinary records. Applicant, therefore, was not "given a fair and complete opportunity to respond to each factual allegation used the State as a justification for a sentence of death." See State v. Riddle, 353 S.E.2d 138, 141 (S.C. 1987). Accordingly, introduction of the evidence of Applicant's middle school disciplinary records violated S.C. Code § 16-3-20(B) and deprived Applicant of due process of law. Ibid.; see Gardner v. Florida, 430 U.S. 349 (1977).

Defense counsel, therefore, should have objected to the introduction of the school records as evidence in aggravation. Further, counsel should have and failed to object to the admission of the school records on hearsay grounds, see Evidence Rule 803(6), as well as on the ground that an improper foundation had been laid for the admission of the records under state law, see S.C. Code § 19-5-510. The introduction of the school records was particularly damaging to Applicant because, as a result of the lack of notice, the information was offered in an effectively irrebuttable manner. Although the records custodians presented by the State

may have been able to authenticate the records, without notice Applicant was unable to call witnesses to verify the accuracy of the information contained within those records. Defense counsel's failure to object to the introduction of the evidence was, therefore, both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(r) Applicant did not knowingly or intelligently waive his right to present a case in defense of his innocence and was thereby denied due process of law as guaranteed by Article 1, § 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

10(r) Prior to opening statements, defense counsel announced to the court that, as a matter of strategy, the defense would admit to Applicant's involvement in the crime, but not to Applicant's guilt of the charged offenses. ROA 761-63. The trial judge then asked Applicant whether he had been informed of and agreed with defense counsel's strategy to admit his "involvement in the affair"--"that [he] was in, around, upon and a part of it" - and Applicant answered affirmatively. ROA 765.

Insofar as there was an understanding between Applicant, defense counsel, and the court with respect to admitting involvement but not guilt, defense counsel betrayed that arrangement during opening remarks to the jury. During the opening statement, defense counsel announced to the jury that Applicant was not only involved in, but also guilty of the crimes charged:

> This young man, you will find the evidence, is involved. His guilt under the law - you'll hear about the felony murder rule. His guilt is clear. It does not matter who had the gun. It does not matter who pulled the trigger. If you combine to commit a crime and people's lives are taken, you're guilty. ROA 809.

Based upon the colloquy that took place between the trial court and Applicant, it is evident that the waiver was secured upon an erroneous premise. Although Applicant responded affirmatively to the trial judge's question as to whether Applicant agreed to admit his involvement, Applicant was never asked whether he wished or agreed to admit his guilt of the charged

offenses, and there is no evidence that he understood the court's questions as such. Given that Applicant is mentally retarded and was only sixteen years of age at the time of the waiver, it is especially unlikely that Applicant would have understood such subtlety in the proceedings. See State v. Orr, 403 S.E.2d 623, (S.C. 1991)(recognizing that scrutiny of waivers of rights is heightened in instances where the defendant may have limited mental ability, such as mental retardation; see also Butler v. State, 397 S.E.3d 87, 88 (S.C. 1990), State v. Arthur, 374 S.E.2d 291, 293-94 (S.C. 1988).

Defense counsel's opening remarks, therefore, effectively deprived Applicant of the right to present a defense. Waiver of a constitutional right must be competent, intelligent, and on the record. Taylor v. Louisiana, 414 U.S. 17, 19-20 (1973), Johnson v. Zerbst, 304 U.S. 458, 465 (1938). Because Applicant did not make a knowing, voluntary, and intelligent waiver, see State v. Cooper, 439 S.E.2d 276 (S.C. 1994), State v. Charping, 437 S.E.2d 88 (S.C. 1993), State v. Orr, 403 S.E.2d 623 (S.C. 1991), State v. Reed, 362 S.E.2d 13 (1987)(S.C. 1987), this error constitutes a violation of Applicant's Sixth and Fourteenth Amendment rights.

9(s) Applicant was denied due process of law in violation of the Sixth, Eighth, and Fourteenth Amendments in that the state elicited testimony during direct examination of a witness that the solicitor either knew or should have known to be false.

10(s) During direct examination of State's witness Henry Daniel Owens, Jr.--who was facing charges of misprision of a felony, accessory before the fact of murder, and accessory before the fact of armed robbery relating to the same incident for which Applicant was charged – the solicitor elicited testimony from the witness with respect to his plea agreement. The witness divulged that he pled guilty to misprision and had agreed to testify in exchange for the State's dismissal of the other charges against him. ROA 823. The witness further stated that for the misprision charge he was facing "up to fifteen" years in prison. ROA 823. Specifically, the following colloquy occurred:

> Q. Would you tell the jury what that plea agreement is?

A. I plead guilty to misprision [sic], and they won't charge me with the accessory charges.

Q. All right. And do you know how much time you're facing on the misprision charge?

A. Up to 15.

Q. Okay....

ROA 823.

The solicitor knew or should have known that the witness was not facing up to fifteen years for the offense of misprision of a felony. Misprision of a felony is a common law offense, adopted in South Carolina pursuant to S.C. Code § 14-1-50. See State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980). As codified by federal statute § 18 U.S.C. 4 (1994), the offense is a misdemeanor not punishable by more than three years in prison. Although, under state law, the offense may give rise to a prison term of up to ten years, see State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)(noting that defendant's sentence, originally eighteen months imprisonment, was adjusted to a ten year term), the witness's claim that he was facing "up to fifteen" as a result of the guilty plea is clearly inaccurate, see Transcript of Record (Guilty Plea), State v. Henry Daniel Owens, Jr., (court asking Owens, "do you understand that for misprision of a felony I could put you in jail for ten years"; Owens responding, "(yes, sir").

By not only eliciting but affirming the witness's misstatement, the solicitor improperly and intentionally created a false and misleading impression and, thereby, denied Applicant due process of law. See Miller v. Pate, 386 U.S. 1, 6-7 (1968), Napue v. Illinois, 360 U.S. 264 (1959), Mooney v. Holohan, 294 U.S. 103 (1935), see also Johnson v. Mississippi, 486 U.S. 578 (1988).

9(t) Applicant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution by counsel's failure to object to the solicitor's elicitation of false testimony during the direct examination of a witness.

10(t) The relevant facts in support of this claim are set forth in 10(d) above. Defense counsel raised no objection to the solicitor's elicitation and affirmance of the false testimony. Defense counsel's failure to object to the introduction of that evidence was both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court is constrained, upon review of the trial record, the hearing record, the exhibits, and the testimony to make the following findings of fact and conclusions of law pursuant to § 17-27-80, Code of Laws (1976).

Ineffective Assistance of Counsel - General Standards

To prove a constitutional claim of ineffective assistance of counsel, a petitioner must show that his counsel's representation was deficient and that he was actually prejudiced by the deficiency. Williams v. Taylor, 120 S.Ct. 1495 (2000); Strickland v. Washington, 466 U.S. 668 (1984); Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). The review of counsel's performance under Strickland is highly deferential and there is a "strong presumption that counsel's performance was within the wide range of professionally competent assistance." Id. at 689. Stated another way, there is a presumption that counsel rendered adequate assistance and exercised reasonably professional judgment in making all significant decisions in the case. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). See also, Roe v. Flores-Ortega, 120 S.Ct. 1029 (2000).

The burden of proof is on the applicant in state post-conviction relief cases. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The applicant must show that his counsel's performance fell below an objective standard of reasonableness, and, but for counsel's errors, there is a reasonable probability that the result at trial would have been different. Strickland, supra, Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1977). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Johnson v. State, supra. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Mazzell v. Evatt, 88 F.3d 263, 288 (4th Cir. 1996).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

> . . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 978 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to a burden of showing "deficient" performance, counsel must also prove "prejudice" under the Sixth Amendment. See, Roe, supra, Williams v. Taylor, supra. The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice", an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Recently in Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998) , the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently re-weighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824. Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the

mitigating evidence seems insufficient to shift the balance in Plath's favor."). This Court finds that Herman Lee Hughes is unable to satisfy this burden under Strickland.

Issues Concerning Family Court Transfer - Grounds 9(a) and 9(b) - Applicant's Memorandum, pp. 9-20

9(a) Applicant's family court waiver hearing did not comport with minimum standards of procedural and substantive due process of law, in violation of South Carolina law and the Fourteenth Amendment of the United States Constitution.

9(b) Applicant was denied the effective assistance of counsel at the family court hearing determining whether he would be waived to General Sessions Court, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.

The Family Court, upon motion of the prosecution, transferred jurisdiction on the charges of murder, assault and battery with intent to kill, armed robbery, and grand larceny to the Court of General Sessions. This decision was made after a detention hearing and after a hearing, summarized below, on the specific issue of transfer consistent with South Carolina law. Relying on the factors of Kent v. U. S., the Family Court determined in the exercise of its discretion that transfer was appropriate. This determination was proper as a matter of state and federal law.[2]

The Applicant now comes before this Court to assert two arguments challenging the determination. First, he contends it was a "due process" violation under § 20-7-430 and the mandates of Hicks v. Oklahoma, 447 U.S. 343 (1980) because the Family Court failed to do a "full

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[2] The trial record reveals that prior to selection of the jury, trial counsel Newsom challenged the jurisdiction of the General Sessions Court based on the transfer order of Family Court Judge Watson. Particularly, counsel Newsom asserted deficiencies in the order in that it did not address the background and life or a complete investigation of Hughes and that there were no interviews done of family witnesses and no evaluation done by D.Y.S. (DJJ) and asserted that the court lacked jurisdiction. R. 760-761. Judge Cottingham stated that he reviewed the order and concluded that it met the statutory requirements and under the order and the findings of Judge Watson that the Court had jurisdiction. R. 761. No appeal of this denial of the jurisdictional argument was taken to the Supreme Court.

investigation" of the matter, implicitly because it failed to independently request or require a recommendation and evaluation from the Department of Juvenile Justice.[3]

His second allegation is a claim that appointed counsel failed to adequately prepare and present mitigating evidence for the juvenile transfer hearing and object to certain reasons for denying transfer. For the reasons set forth below, each of these grounds lack merit for state post-conviction relief.

(a.) Juvenile Transfer Hearing.

On April 4, 1994, a juvenile transfer hearing pursuant to S.C. Code § 20-7-430 (1976) was held before Family Court Judge Maxey G. Watson. R. pp. 1720-85. Hughes was present and represented by his original appointed counsel, Martin Banks, the Calhoun County Public Defender. The State was represented by Reddick Bowman, of the Solicitor's Office. A petition for the transfer of Hughes dated March 23, 1994, from Family Court to General Sessions had been filed on March 24, 1994, for the crimes of murder, assault and battery with intent to kill, armed robbery, and grand larceny of a vehicle arising from the Blue Diamond Casino incident on March 18, 1994.[4]

The record reveals that testimony was presented at the hearing by the prosecution to support the transfer. First, Detective Earl Rhudy testified generally about his investigation of the death of Ken Presley, the assault of Kelly Hoffman, and the robbery of the Blue Diamond Casino on March

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[3] As will be set forth below, neither the prosecution, defense, nor court requested such an evaluation to be done prior to the transfer hearing. At the conclusion of the hearing, defense counsel made a request which was implicitly denied. R. pp. 1780-81.

[4] A detention hearing was also held before Judge Watson on March 21, 1994. As a result of that hearing, Hughes was ordered detained until the transfer hearing. "Order of March 23, 1994," filed March 24, 1994. Counsel Banks participated at this hearing also.

21, 1994. R. pp. 1723-33. He testified that Ms. Hoffman was shot in the cheek, as well as in the chest area. R. pp. 1733-34. Fingerprints matching the Applicant's were found "inside the cash drawer." R. pp. 1735-36. Subsequently, the stolen vehicle was found. Hughes gave a statement to the police, in his mother's presence, after Miranda warnings that:

> On Friday night Kelsey Pearce and myself went into the Blue Diamond. I walked in and asked for the money and shot the woman. Kelsey was looking through the window and he came in and got the gun and shot the man. We got the money and took the car to Daniel's house and put the money on the bed. We divided up the money and left the house. We drove the grey car to the Ebony Club and left it there.

R. p. 1739, ll. 11-19. Later, the surviving witness, Kelly Hoffman, identified Hughes from a photographic lineup. R. pp. 1740-41. Det. Rhudy opined that the matter should be transferred to General Sessions Court "due to the seriousness of the crimes," that Hughes was involved in all crimes, and that Hughes was "close to his seventeenth birthday." R. pp. 1741-42.

On cross-examination by Banks, Det. Rhudy stated that Hoffman had told him that she had read press reports of the crime and called Hughes by his first name and that he had gone to school with her little sister, but he did not see how that could taint the lineup. R. pp. 1746-48.

Department of Juvenile Justice employee Dolly Zeigler, a community specialist, testified about Hughes' school record. R. p. 1749. She stated that he was last enrolled at John Ford Middle School in the eighth grade and had been suspended in February. She said from November 12, 1993, until January 31, 1994, Hughes had twenty-one (21) absences from school and twenty-one (21) disciplines; including disrespect to teacher (18), disrupting class (1), profanity (1), and leaving class without permission (1). R. p. 1750. She testified that Hughes had been in juvenile detention custody since March 23, 1994. R. p. 1751. His juvenile history includes (1) pointing a firearm - March 1993

- dismissed; (2) runaway - February 15, 1994; (3) possession of stolen vehicle - March 8, 1994 (pending - scheduled for intake March 23, 1994); (4) petty larceny of a gun - March 21, 1994 - pending. R. pp. 1752-53.

Ms. Zeigler also testified that Hughes was in regular classes at school. Also, on February 15, 1994, her records reveal that Hughes' mother and grandmother filed an "incorrigibility" complaint seeking alternative placement. R. pp. 1754-55. However, the materials were not completed. R. p. 1756. Her understanding was that Hughes had resided with his maternal grandmother for the last twelve years.

Ms. Zeigler stated that she had "no opinion" on the likelihood of Hughes' rehabilitation within the juvenile justice system or whether he should be waived to Family Court. R. p. 1757. She stated that no DJJ pre-waiver evaluation had been ordered. R. p. 1757.

On cross-examination, it was developed that the school "disrespect" complaints involved three (3) different teachers. R. p. 1758. She said that the pointing a gun charge had been dismissed and the stolen vehicle charge was still pending. R. p. 1758. She also testified that the attorney can request an evaluation by DJJ and if it was ordered by the Court it would be completed. R. pp. 1759-60.

Sheriff D. C. "Bing" Jones testified that he also went to the scene of the robbery. R. p. 1762. He stated that when he arrived Ms. Hoffman was sitting in the chair, conscious, and that she was trying to tell the deputies what happened, but then asked them to stop questioning her because she was tired. R. pp. 1764-65. He further described taking Hughes' statement on March 20, 1994, when he went with Hughes' mother to pick up Hughes in Columbia. He stated that Hughes admitted shooting Kelly Hoffman in his mother's presence, that he then took a taped statement, and that his

mother returned and that she wrote down his written statement. Sheriff Jones acknowledged that Hughes confessed to shooting Hoffman, taking money from the Blue Diamond, participating in taking the car to Orangeburg, except that he asserted his co-defendant shot Presley. R. pp. 1766-67.

On cross-examination, Sheriff Jones clarified that Hughes told him that he took the money from the cash drawer and that Kelsey drove the car. R. p. 1768. He also stated that he overheard Kelly say at the scene that "somebody came in and shot them." R. pp. 1769-70. He stated that it indicated to him that she did not know who shot them. R. p. 1770.

On reply, he clarified that her comments did not mean she could not identify who shot them and that with her wound, he was surprised that she was conscious. He also stated that Hughes admitted dividing the money. R. p. 1771. He also stated that he had learned that Hughes and Kelsey Pearce had come into the store, went back to a house and got a gun, returned to the store and Hughes requested instruction on how to play a video game, went outside to get some money, and came back with a $50 dollar bill and shot the woman. R. p. 1772.

No further witnesses testified. The prosecution urged transfer. He stressed the seriousness of the offenses; armed robbery and murder, grand larceny of an automobile, and assault and battery warrant the transfer. He further pointed out the violence revealed at the scene, the premeditation and planning, and the joint culpability of the participants. R. pp. 1774-75. Furthermore, the strength of the prosecution's case reveals an identification of Hughes by the victim, the fingerprint on the cash drawer, and his own admissions. R. p. 1776. The prosecution contended there would be "judicial economy" of having both cases disposed of in General Sessions. He argued that Hughes was sixteen, but "near his seventeenth birthday," "very sophisticated individual," and "street smart."

He pointed out that he had a history of a firearm charge that was dismissed. Further, his school record of suspension and disrespect led to his expulsion. R. p. 1777. The prosecutor noted that Hughes was in the "regular academic career" track and not in either special education or emotional handicap classes. R. p. 1777. The prosecution closed with the assertion that protecting society from Hughes is best served by transfer, stating the particular planned brutality of this incident. R. p. 1778.

Defense counsel Banks argued that the adult (Pearce) was the leader who is more deserving of culpability than his client. R. pp. 1778-79. He sought to defeat the "judicial economy" claim by the swiftness of the Family Court system and the fact that the co-defendants would not be tried together. R. p. 1779. He claimed that the disrespect charges may have another side to it. Further, he noted that Hughes was "innocent" of the gun charge despite what the prosecutor stated and similarly stands innocent of the vehicle charge. R. pp. 1779-80. He described the incident as "an adult leading juvenile into no good" and that transfer should not occur.

Counsel Banks asked, because of the time constraints, that the result of the hearing be delayed:

> If you decide that you need more information and delay your decision until we request an evaluation from the team at DJJ. I kind of think we are kind of in a bubble in this case but at least if you see yourself leaning toward siding against us that you ought to have at least that input based on the time constraint that was placed on me in this matter. . . .

R. p. 1780, l. 19 - p. 1781, l. 3.

The Family Court Judge entered an oral order and then a written Order transferring jurisdiction. R. pp. 1781-85; 1985-88. In his oral order, Judge Watson found the existence of

probable cause to believe Hughes had committed the crimes and that the prosecution has "a very good case of murder, armed robbery, theft of a vehicle. . . ." R. p. 1781. Noting the signed confession admitting the shooting of the woman, theft of the car, identification by Hoffman, the evidence satisfied probable cause. R. p. 1781. Further, "the hand of one, hand of all" concept where he said after he shot the woman and then turned the gun over to Pearce who shot the other makes him "as guilty as the person who shot. . .," "shares in the responsibility and revealed a very strong case." R. p. 1782.

Judge Watson compared it with lesser crimes that could have occurred, but did not where no shooting would have occurred in the robbery. R. p. 1782. He described this incident as "cold-blooded."

Relying upon the Kent factors, the court found this was "a serious crime." He stated that assuming no prior record and no prior adjudication, "the question is whether or not he could be rehabilitated in the juvenile justice system." R. p. 1783, ll. 5-8. The Court found that he was "almost seventeen," a serious premeditated crime and "there is no rehabilitation in the juvenile justice system for this young man for that type of crime." R. p. 1783, ll. 10-11. "Juvenile justice provides no rehabilitation.[5] R. p. 1783. He found that General Sessions can deal with the matter for whatever time is appropriate for detention and rehabilitation, whereas the Family Court would be limited to indeterminate detention not to exceed his twenty-first birthday. R. p. 1783. As the Family Court found: "I just don't believe that this young man could be rehabilitated under those

[5] Respondents note that the period of juvenile disposition and custody is set forth in 1994 at § 20-7-1330(b) (disposition) and § 20-7-2170 (commitment to DYS). Both statutes were repealed in 1996.

circumstances by our juvenile justice system." R. p. 1784, ll. 2-4. The Court found his maturity and sophistication weighed in favor of transfer. He found that he was almost seventeen and intended to use the powerful gun, rather than a child thinking a gun is unloaded and it fires and kills someone. The Court found that Hughes had the level of maturity and sophistication sufficient to be held accountable for his actions. R. p. 1784. The Court determined that these type cases involving juvenile crimes of violence need to be tried in public to show the State is doing something about it and that the act will be a deterrent to others, as well as incarceration will be a deterrent to him. R. p. 1785.

In the written Order, dated April 28, 1994, and filed May 3, 1994, Judge Watson summarized the testimony presented at the hearing. R. pp. 1985-87. Particularly, the Family Court concluded:

> Based on the information presented to this Court, I find that the state has established probable cause to believe that the minor defendant, Herman Hughes, committed the offenses of murder, assault and battery with intent to kill, armed robbery and grand larceny of a vehicle. The state presented testimony that the minor committed a serious, violent, cold-blooded crime against a person that involved physical violence against a person with a weapon. The leading authority is Kent v. United States [383 U.S. 541 (1966)], which sets forth the criteria for waiver. Based on the criteria, and testimony received, the Court finds that the minor should be transferred to the Court of General Sessions. . . .

R. p. 1987, ll. 10-22.

No appeal was taken to the Supreme Court concerning the waiver to the Court of General Sessions, although defense counsel Newsom raised the alleged deficiencies and failure to have a D.J.J. evaluation as grounds for why the General Sessions Court lacked jurisdiction that was denied. R. 760-761.

(b) Law on Transfer (Waiver) From Family Court to Circuit Court

In 1994, § 20-7-430(4), (6) provided for waiver of Family Court jurisdiction for sixteen (16) year old who are charged with a felony if committed by an adult if the court "after full investigation, deems it contrary to the best interest of such child or of the public to retain jurisdiction. . ." and in the case of murder charges may transfer the child to General Sessions Court.

In making its motion to transfer jurisdiction, the State relied on S.C. Code Ann. § 20-7-430(4) and (6) (1985). Section 20-7-430(4) provides that the family court may transfer jurisdiction if that court finds "it contrary to the best interest of such child or of the public to retain jurisdiction." After conducting a hearing on the State's transfer motion, the family court ordered jurisdiction over Hughes' case be transferred to the Court of General Sessions. The family court found it was in the best interest of Hughes and the community to have Hughes tried as an adult. R. p. 1781-85, 1985-88. The family court's findings were explicitly based primarily upon criteria established in the appendix to the United States Supreme Court case of Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). R. p. 1987.

In Kent, the Court established the following criteria for determining whether jurisdiction should be waived under the District of Columbia Juvenile Court Act:

(1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

(2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.

(3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

(4) The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

(5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

(6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

(7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

(8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

The waiver hearing was extensive and the family court's order reflects that the evidence presented at the hearing was duly considered. R. p. 1782-85, 1985-88. See State v. Kelsey, 331 S.C. 50, 65, 502 S.E.2d 63, 70-71 (1998) ("It is the responsibility of the family court to include in its waiver of jurisdiction order a sufficient statement of reasons for, and considerations leading to, that decision."). Moreover, the family court specifically considered the Kent factors, which in previous cases the South Carolina Supreme has implicitly approved as appropriate criteria. See State v. Avery, 333 S.C. 284, 289 n. 3, 509 S.E.2d 476, 479 n. 3 (1998); Kelsey, 331 S.C. at 65 n. 4, 502 S.E.2d at 70 n. 4.

South Carolina Code Ann. § 20-7-430(6) (1985) authorizes the family court to determine whether it is appropriate to transfer a juvenile charged with murder to the general sessions court.

The appellate court will affirm a transfer order unless the family court has abused its discretion.[6] Sanders v. State, 281 S.C. 53, 314 S.E.2d 319 (1984); State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977). Regardless of the procedural aspects of the transfer proceedings, the Supreme Court in a direct appeal reviews the merits of a transfer order for an abuse of the family court's discretion. Avery, 333 S.C. at 292, 509 S.E.2d at 481; Sanders, 281 S.C. at 56, 314 S.E.2d at 321; State v. Wright, 269 S.C. 414, 419-20, 237 S.E.2d 764, 767 (1977). The term 'abuse of discretion' has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support. Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996); South Carolina State Highway Dep't v. Sharpe, 242 S.C. 397, 402, 131 S.E.2d 257, 259 (1963). The Court notes, however,

> it is not always easy to determine when and if a trial judge has abused his discretion. Overly simplified, abuse of discretion involves the extent of disagreement. When an appellate court is in agreement with a discretionary ruling or is only mildly in disagreement, it says that the trial judge did not abuse his discretion. On the other hand, when the appellate court is in substantial or violent disagreement, it says that there has been an abuse of discretion.

Rish v. Rish, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App.1988).

In evaluating whether the family court abused its discretion, the appellate court would consider the Kent factors. The Supreme Court has consistently emphasized that the serious nature of the offense is a major factor in the transfer decision. Avery, 333 S.C. at 292, 509 S.E.2d at 481; Kelsey, 331 S.C. at 65, 502 S.E.2d at 71; Sanders, 281 S.C. at 56, 314 S.E.2d at 321. Furthermore,

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[6] A family court order transferring jurisdiction over a defendant to the Court of General Sessions is interlocutory and not subject to immediate appeal to the appellate courts. State v. Lockhart, 275 S.C. 160, 267 S.E.2d 720 (1980).

"the best interests of the public or of the juvenile may require the juvenile be held accountable as an adult for his criminal conduct." Avery, 333 S.C. at 293, 509 S.E.2d at 481.

Recently, in State v Corey D., 339 S.C. 107, 529 S.E.2d. 20 (S.C. S.Ct. March 6, 2000), the Court found "the family court's decision to deny the transfer motion was not reasonably supported by its own factual findings. The family court found, and the evidence supports, that these horrible, shocking crimes were willfully committed and there was probable cause to believe respondent participated actively in all aspects of the crimes. The fact that these crimes were violent, premeditated, and committed against elderly women clearly indicates their serious nature. While murder will always be considered "serious," the heinousness of these particular crimes is beyond dispute."

Additionally, the family court in Corey D. found indictment by a grand jury likely and that it would be easier for the state to proceed against all defendants in the same court. Nonetheless, the family court waived his co-defendants to general sessions court while retaining jurisdiction of his case. Though the family court did find that respondent's intellectual abilities were superior to those of his co-defendants and that respondent was more susceptible to rehabilitation than his co-defendants, the Supreme Court found that under the circumstances of this case these considerations do not overcome the overwhelming amount of evidence which militates in favor of transferring the murder charges to a court of general sessions for Corey D . The Court concluded that the lower court abused its discretion in failing to transfer jurisdiction to Circuit over the murder charge.

In Sanders, the PCR applicant alleged error in the denial of post-conviction relief. The Court found no error under our standard of review in these cases. "Any evidence" of probative value to

support the court's finding of facts is sufficient to uphold those findings on appeal. Griffin v. Warden, 277 S.C. 288, 286 S.E.2d 145 (1982). Specifically he asserted that his court-appointed attorney provided him ineffective assistance of counsel by his failure to preserve an objection to the transfer. The Court agreed with the post-conviction hearing judge that trial counsel's failure to except in the record, in order to secure his right to appeal, did not render his assistance ineffective.

However, since the objection was not properly preserved, the state asserted that the Supreme Court could not consider the propriety of transfer. The Court disagreed and reviewed the transfer record under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Sanders could not have untimely appealed the transfer alone. However, his appeal from the denial of post-conviction relief is properly before this Court. Furthermore, appellant did not knowingly and intelligently waive his right to appeal the transfer order. See Bonnette v. State, 277 S.C. 17, 282 S.E.2d 597 (1981). Nevertheless, a White v. State review revealed that the family court judge did not abuse his discretion in transferring the case.

The jurisdiction of the family court over juveniles is a privilege rather than a matter of right. The best interests of the public or of the juvenile may require that the juvenile be held accountable as an adult for his criminal conduct. Sanders, supra.; In the Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980). Sanders was charged with two counts of murder. Had the case remained in family court, the maximum sentence appellant could have received was an indeterminate period of confinement not to extend past his twenty-first birthday. The circuit court could, in contrast, impose an adult term sentence. The Supreme Court concluded that the family court judge did not abuse his discretion in binding appellant over to circuit court.

As stated before, the serious nature of the offense is a ***major*** factor in the transfer decision. See State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (transfer upheld where defendant was charged with murder); Sanders v. State, supra (transfer upheld where defendant was charged with two counts of murder and two counts of assault and battery with intent to kill); State v. Wright, supra (transfer upheld where defendants were charged with armed robbery and assault and battery with intent to kill). The best interests of the public or of the juvenile may require the juvenile be held accountable as an adult for his criminal conduct. In the Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980).

"It is the responsibility of the family court to include in its waiver of jurisdiction order a sufficient statement of the reasons for, and considerations leading to, that decision. Conclusory statements, or a mere recitation of statutory requirements, without further explanation will not suffice. The order should be sufficient to demonstrate that the statutory requirement of full investigation has been met and that the question has received full and careful consideration by the family court. The salient facts upon which the order is based are to be set forth in the order." In re Sullivan, 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980).

© The Relevant State PCR Testimony

At the PCR hearing, the Applicant presented various witnesses on the issue of whether the Family Court should have waived jurisdiction. The first witness, Dr. Marty Beyer, an expert in child development and juvenile justice issues and a psychologist, testified that she performed an evaluation of Hughes for purposes of the state PCR hearing. PCR Tr. p. 8. She opined that sixteen year olds are not able to function as adults due to cognitive skills and are less culpable; that Hughes, because of his intellectual limitations, trauma, and alcohol abuse, was less mature than a normal

sixteen year old and less culpable; that he should have been continued in Family Court jurisdiction and had doubts about his competence at trial. PCR Tr. pp. 9-11. She determined that he had a lower IQ than typical adolescents (PCR Tr. p. 18), that he had a simplistic way of thinking (PCR Tr. p. 19), lacked planning (PCR Tr. p. 19), and took risks without considering the consequences, such as the dangerousness of carrying a gun. (PCR Tr. p. 19). In terms of his moral development, Dr. Beyer opined that he knew hurting people was wrong, but because he was drunk he was unable to use his moral values. PCR Tr. p. 22. She stated that he was unable to initially feel for the victims although he had empathy for others in his life. She said that his simplistic thinking and loyalty to friends may have led to his participation in the crime. PCR Tr. p. 22. She found that Hughes did not have a stable sense of identity of himself. He had struggled in school, in sports, and lacked job goals. Further, he found that his role as a class clown led to disrespect from teachers. PCR Tr. p. 24. She found that Hughes suffered from trauma from the school's failure to meet his needs and not remedying his learning disability through special education despite the indicators. PCR Tr. p. 25. Further, vocational education was not done that may have supported his functioning. PCR Tr. p. 26. She found that he was placed in "regular classes" and permitted to fail, rather than provided special classes. PCR Tr. pp. 26-27. Further "trauma" was found when his grandfather had a stroke and led to Hughes losing interest in life. PCR Tr. p. 28. Further, his grandmother did not provide limits and allowed him to get away with things in his adoptive home. PCR Tr. pp. 28-31. The grandfather was his nurturer. His school disciplinary problems began when his grandfather's illness occurred. PCR Tr. p. 30.

Dr. Beyer concluded that Hughes did not function as a normal sixteen year old and was more immature. PCR Tr. p. 32. Dr. Beyer stated that she made recommendations to the courts on

development and amenability to rehabilitation. She said that she would have recommended retention in Family Court because of his intellectual deficits, his immature cognitive, moral, and identity development. PCR Tr. p. 33. She found he was not a chronic juvenile offender and had not received adequate treatment in the juvenile system. Further, she opined that he did not receive alcohol treatment or appropriate education that suggested to her that he would benefit in juvenile court. PCR Tr. p. 34.

On cross-examination, she stated that in 1993 and 1994, she opined that the South Carolina juvenile justice system had many deficiencies in the mental health, education, and other facilities. PCR Tr. pp. 38-39. She further opined that a sixteen year old who is functioning like a sixteen or seventeen year old should not be sentenced to death. PCR Tr. pp. 39-42. She declared her disagreement with South Carolina law.

Dr. Beyer testified about the circumstances of the crime that Hughes told her during the recent interview on October 6, 1999. She was told that he had a six-pack of high alcohol beer that he received from Pearce. PCR Tr. p. 43. She said he told her that Pearce borrowed the gun from one of Pearce's relatives and came up with the idea of the robbery that surprised him. PCR Tr. pp. 44-45. He told her that he had gone to the Blue Diamond previously that day and a different person was working there, an older woman. PCR Tr. pp. 45-46. He told her that he did not know Ken Presley or Kelly Hoffman but that Pearce did and that he could not go into the store. PCR Tr. p. 46. She acknowledged that Hughes told her that he knew there was going to be a robbery, that he would be involved, and that he had to go into the store to rob it after he had been in there before. PCR Tr. p. 47. She said that he had visited the store earlier that day, then went back and came back out, unable to carry out the robbery, that his co-defendant "belittled" him and he went back in and shot the

individuals. He recalled the gun went off, which surprised him, being startled by the keys being thrown down. PCR Tr. p. 48. Dr. Beyer was not aware of the statement Hughes had told his attorney that he shot twice or that he feared being recognized by Hoffman. PCR Tr. pp. 48-49. Further, she acknowledged that Hughes attempted to withdraw from the robbery, but that he could not explain why he continued it because this was inconsistent with him. PCR Tr. p. 54. She acknowledged that Hughes got expelled from school for fighting. Further, she described Hughes assisting the grandmother in care taking of the stroke victim. Further, she admitted that Hughes attempted to join the Job Corps to learn welding, but left because he was unhappy. PCR Tr. pp. 57-58.

Dr. Beyer further stated that he was a weekend alcohol user and periodic marijuana user. PCR Tr. pp. 59-60. She further acknowledged that she was not employed by DJJ to do evaluations in 1994-1995. PCR Tr. p. 63. Importantly, Hughes never told her that Pearce told him to go into the store and shoot either Kelly Hoffman or Kelsey Pearce. PCR Tr. p. 64.

On reply, despite counsel's math, Dr. Beyer maintained that Hughes told her "he described his drinking a six-pack." PCR Tr. p. 65. Further, Dr. Beyer admitted that Hughes described the events to her in 1999 different than he described the event to counsel Newsom. PCR Tr. p. 73.

His original appointed counsel, Martin Banks, testified that he was appointed to represent Hughes as one of his first juvenile appointments. PCR Tr. p. 236. He acknowledged that prior to the transfer hearing, he did not have Hughes evaluated by a mental health professional, nor obtain his school records or DSS records. PCR Tr. p. 237. He declared that Hughes was in Columbia, but that he had talked with family members and was prepared to present a defense as to why he should not be treated as an adult. PCR Tr. p. 237.

Counsel Banks stated that in the past, he had received a pre-evaluation report, but one was not done in this case. PCR Tr. pp. 238-39.

On cross-examination, Banks acknowledged that he had earlier participated in the "detention" hearing where similar testimony was presented by an officer, the DJJ counselor, Dollie Zeigler, on March 21, 1994, before the April 8, 1994, transfer hearing. PCR Tr. pp. 244-45. He admitted that he asked the Family Court judge to defer consideration, seek more information, and have a DJJ evaluation, but that the judge chose not to and ordered a transfer. PCR Tr. p. 247. Counsel Banks stated that he had expected that an evaluation would have been done.[7] Banks stated that prior to the hearing he had spoken with at least one officer, talked to Hughes' family and learned "what type of individual he was and what problems he had." PCR. Tr. p. 249. He learned about Hughes' age, his school problems and his family problems. PCR Tr. p. 250.

Dr. Jonathan Venn is a clinical psychologist, formerly employed at the Department of Juvenile Justice (DJJ) from 1989 through 1997. PCR Tr. pp. 253-54. He stated, at Hughes' current counsel's request, he performed an evaluation of Hughes consisting of interviews of Hughes and his school principal at John Ford Middle School, administered psychological tests, and reviewed records from Hall Institute, school records and DJJ records. Although he later admitted that he would not have done the assessment in 1994 (PCR Tr. p. 273), he opined that Hughes should have been retained in Family Court. PCR Tr. p. 259. He stated that he believed Hughes could have been rehabilitated in the juvenile justice system because it was his first time in court and he had no record

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[7] It is unclear where the authority for DJJ to complete pre-transfer recommendations develops from. See S.C. Code, §§ 20-7-3210, -3220, and 20-7-630. Compare § 20-7-7215 (recommendation on detention); § 20-7-7405. Cf. State v. Avery, supra.

of anti-social or aggressive behavior. PCR Tr. p. 260. Further, he looked at Hughes' "locus of control" (who do people blame for their behavior). PCR Tr. p. 261. In his current interview, he found that Hughes accepted responsibility for his behavior and stated although it was someone else's idea, he went along with it. PCR Tr. p. 262. Dr. Venn opined that Hughes was not a "sophisticated" twenty-two year old. PCR Tr. p. 263. On the Jesness (JI) scale, he found Hughes had an "average risk of re-offending." Further, his current SCC record did not have documented misbehavior. PCR Tr. pp. 264-65. Dr. Venn found the seriousness of the offense (murder) is hard to measure, but opined that most juveniles who commit homicide do not get into trouble again. PCR Tr. p. 265.

Dr. Venn did admit to finding negative factors. In one test, WURS, he found problems with hyperactivity, inattention, and impulsivity. PCR Tr. p. 266. He also found negative factors in his marijuana and alcohol abuse, his school problems and limited intellectual functioning. PCR Tr. p. 266.

[On cross-examination, however, Dr. Venn revealed an important bias – he is morally opposed to the death penalty and "would obviously be opposed to an individual that was sixteen or seventeen years old being sentenced to death." PCR Tr. p. 268.] He admitted that people who blame others for their problems are more likely to re-offend, but he was not aware that Hoffman testified that Hughes had shot both, rather the situation he was told. PCR Tr. pp. 268-69. Dr. Venn acknowledged that he does have "external locus of control" that would be one more negative factor. PCR Tr. p. 269. Dr. Venn also could not define an "average risk to re-offend." PCR Tr. pp. 269-70. He admitted that under today's law, Hughes would automatically be in General Sessions for these crimes. PCR Tr. pp. 271-72.

Dr. Venn admitted that he would not have been the DJJ psychologist who would have evaluated Hughes in 1994. PCR Tr. pp. 273-74. Despite his earlier statements about lack of violent acts (PCR Tr. p. 260), Dr. Venn admitted that the principal had told him that there were several fights. PCR Tr. p. 274. Dr. Venn was also aware that Hughes possessed a weapon previously. PCR Tr. p. 275. He also considered the weapon possession a "negative factor." PCR Tr. p. 276.

a) Law/Analysis.

9(a) Due Process.

In the first allegation, 9(a), Hughes claims that there was a due process violation because the Family Court did not do a "full investigation." The record reveals the State presented evidence about his culpability in the crimes, his admissions to law enforcement, a briefing on his school record and history with the Department of Juvenile Justice. Although a request at the conclusion of the transfer hearing was made by counsel for a delay to have a pre-transfer evaluation by DJJ, no claim was made that the Family Court judge did not comply with "full investigation," set forth in § 20-7-430. Ground 9(a) is a free-standing "due-process" claim.

In Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), the Court reaffirmed the doctrine enunciated in Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), that errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. S.C. Code Ann. § 17-27-20(b) (1985) of the Uniform Post-Conviction Procedure Act provides that post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed

on direct appeal. Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981); see also Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973). Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel. Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983).

In 9(a), he claims the Family Court erred in rejecting any potential for rehabilitation in the juvenile justice system when no evidence was presented, heard inaccurate information about the facts of the crime, and impermissibly considered factors such as "send a message" to other youth. These claims, as presented, as a "due process" violation are not appropriate for state post-conviction relief under the Drayton-Simmons doctrine. These are matters that could have been raised at the hearing and then in the direct appeal. His due process claim, relying upon Hicks v. Oklahoma, is, therefore, barred from consideration in this state post-conviction relief action.[8] This Court notes that this does not prevent a similar claim set forth as a Sixth Amendment violation from being raised as in 9(b). Foye v. State, 335 S.C. 586, 588, 517 S.E.2d 265, 266 (1999).

9(b) Ineffective Assistance - Transfer Hearing.

In this claim, he must show that his counsel was deficient prior to and during the transfer hearing and that there is a reasonable probability that but for counsel's deficient performance, the result of the transfer hearing would have been retention in the Family Court. The "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Respondents submit

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[8] However, when asserting a violation of a constitutional right or other errors in a proceeding, the PCR applicant must generally frame the issue as one of ineffective assistance of counsel to be cognizable in state PCR. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (S.C. S. Ct., Feb. 14, 2000).

that Hughes has failed in his burden of proof in showing either deficient performance or prejudice under Strickland. Foye, supra. This Court finds that Hughes ha failed in his burden of proof.

The focus of the Applicant's Sixth Amendment argument is based upon the alleged failure of defense counsel Martin Banks to request an evaluation and recommendation from the Department of Juvenile Justice. Here, the Family Court concluded that the seriousness of the offenses that Hughes was charged with, the strength of the prosecution's case, and the fact that Hughes was almost seventeen required him to use his discretion to transfer jurisdiction to the General Sessions Court. As stated above, the South Carolina Supreme Court, relying upon the Kent factors, determined in Corey D. that transfer was required, emphasizing the "serious nature of the offense" as a major factor in a transfer and that "the best interests of the public or of the juvenile may require the juvenile be held accountable as an adult for his criminal conduct."

As in State v. Kelsey, Hughes was determined by the Family Court to have less chance of rehabilitation in the juvenile justice system because his sentence under that system would be brief.[9] As in In Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980), the Family Court received information from DJJ about Hughes' schooling and criminal history sufficient to comply with the "investigation" requirement of § 20-7-430.

First, applicant asserts counsel was constitutionally deficient in failing to request a discretionary "Preadjudicatory Transfer Evaluation" by the Department of Juvenile Justice prior to the hearing. Under Hughes' theory, minimally competent counsel must always request for such an

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[9] In Kelsey, the court found that if convicted of murder in Family Court, Kelsey would get only twenty-four to fifty-four months – "this was not in the community's best interest due to the seriousness of the crime." 331 S.C. 50, 66, 502 S.E.2d 63, 71.

evaluation. This is not the correct standard. Such evaluations are not mandated either by state statute or the Constitution. There is no per se ineffective assistance in failing to request one prior to the hearing.

Second, under these circumstances, taken from counsel's perspective at the time, he acted competently in making the request for the evaluation (and the request to delay) during the transfer hearing. R. pp. 1780-81. Counsel, at the transfer hearing, stated that the quick time constraints in setting the hearing worked in favor of delay and the evaluation. Id. The Family Court, aware that DJJ was not making an affirmative recommendation, rejected the need for any delay and proceeded to order the transfer. There is no showing that the Family Court would have ordered the DJJ evaluation if requested earlier by counsel. To the contrary, when presented with the matter, the Family Court chose to proceed without it. Counsel cannot be deemed constitutionally deficient in making the request at the time of the hearing. See PCR Tr. pp. 272-73 (request for transfer evaluations come in court orders).

Assuming arguendo that the request to DJJ would have been granted prejudice under Strickland has not been shown. Assuming a presentation similar to the testimony of Dr. Venn would have occurred it is reasonably likely that transfer would have occurred under the Strickland test. First, Dr. Venn's findings of no prior adjudications in Family Court was already known by the Court. Although the Court did not know that at one time he was placed in a special education class and the school concluded he was not learning disabled, the Court correctly knew that he had been attending regular classes prior to his expulsion. However, certain additional negative factors were found by Dr. Venn that included Hughes' low IQ, failure to perform well in school, behavior problems in school, history of running away, abuse of marijuana and alcohol, and conduct problems and

hyperactive attention deficient disorder. Although Dr. Venn had an opinion that Hughes would not re-offend, he admitted that his testing suggested an "average risk of re-offending."

Further, it was developed at the PCR hearing that Hughes' version of the crime to Dr. Venn was different than the versions expressed by Hughes to his trial counsel in 1994 (admitted shooting three times) (PCR Tr. pp. 423-25) [Presley, Hoffman, then Presley again] or the version revealed at court where Ms. Hoffman testified. Contrary to that earlier testimony, Hughes presented a new version to Dr. Venn that attempted to remove blame from him for the shootings and place it solely on his co-defendant. Even under Dr. Venn's version, this would suggest that transfer would be more appropriate based upon the "locus of control." PCR Tr. pp. 261-62, 268-69. As Dr. Venn stated: "if, in fact, he does have external locus of control, then that would be one more negative factor. PCR Tr. p. 269. Further, information was revealed through Dr. Venn that not only did Hughes have possession of a gun previously that he carried a weapon to protect others that he also considered a negative factor. PCR Tr. pp. 275-76.

In viewing whether transfer should occur, the Family Court determined the following were important factors:

- Existence of probable cause that Hughes committed the offenses in a cold-blooded manner.
- Strong evidence of guilt, including his admission to shooting Hoffman.
- Being almost seventeen, with the intent to use the gun.
- Level of maturity and sophistication sufficient to be held accountable for his actions.

- More adequate time in General Sessions for detention and rehabilitation compared with limited time in Family Court not to exceed his twenty-first birthday. R. p. 1783.

R. pp. 1781-85. Although Dr. Venn listed some "positive" factors, combined with his new negative factors, this Court finds that "prejudice under Strickland has not been proven by this alleged deficiency.[10] Therefore, even if it is assumed counsel was deficient, post-conviction relief is not required. As noted in Corey D., the transfer court was focused on the serious criminal nature of the event - here a planned robbery and the violent assaults on two individuals. Further, one of the individuals was necessarily in General Sessions court. The factors the Family Court relied upon were not undermined by the presentation in this Court.

Further, prior counsel was challenged in the transfer hearing for not accumulating school records that revealed his low IQ and substandard test scores. Although this can be done, the record reveals that the DJJ counselor at the transfer hearing revealed that information about Hughes' educational background, as well as the fact of his expulsion and the school disciplinaries. Further, Dr. Venn opined that the low IQ, that was not specifically revealed, was a "negative" factor weighing in favor of transfer.

Respondents argue that the problem the Family Court was faced with was this case based upon the crime committed and Hughes' role in it required it to be in the jurisdiction of General Sessions Court as much as it was required in the situation of Corey D., supra. Further, Respondents

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[10] Respondents submit that Dr. Venn's post-death sentence recommendation that Hughes should be retained in Family Court is an irrebutable product of his own personal moral bias - his moral opposition to the death penalty. Dr. Venn conceded as much in his declaration that he was opposed to sixteen or seventeen year olds being sentenced to death. PCR Tr. p. 268. As such, his opinion must be discounted.

note the dichotomy where the testimony of Dr. Marty Beyer revealed that DJJ, in 1994, was deficient in education and mental health services. PCR Tr. pp. 38-39. The fact that the Family Court concluded that indeterminate commitment until twenty-one (or a mere 24-52 months as revealed in Kelsey) was inadequate to provide the necessary detention or rehabilitation that was required under Hughes' acts. The Respondents stated that the Applicant has ignored the Kent factors in the argument. Each of the eight (8) Kent factors continues to weigh in favor of the exercise of General Sessions jurisdiction.

(1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver. YES - THEN AND NOW.

(2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner. YES - THEN AND NOW.

(3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted. YES - OFFENSE AGAINST PERSONS.

(4) The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney). YES - THEN AND EVEN GREATER NOW.

(5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the (ADULT COURT). YES - KELSEY PEARCE TRIED IN ADULT COURT.

(6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living. YES - THEN; CHALLENGED NOW - *But evidence reveals his*

understanding of the event and his role in it through the testimony of his counsel.

(7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions. *Revealed no prior adjudications, only charges THEN AND NOW.*

(8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court. *Rejected by COURT based on his age (16) and the limited detention law related to juvenile in 1994. NOW - same concerns must exist despite expert opinion that juveniles can be rehabilitated, the question remains whether it can be done in 24-52 months or until he is 21.*

This Court finds that while the Applicant has made a presentation of evidence and opinion that was not specifically revealed to the Family Court, under the facts of this case, he has failed to show "prejudice" under Strickland. He has failed to show a reasonable probability that if counsel had provided this information the result would have been to remain in the Family Court. This allegation must be dismissed.

In summary, as to allegations 9(a) and 9(b), this Court concludes that Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show a reasonable probability that but for the errors on the part of trial counsel, the Family Court would not have transferred the Applicant to General Sessions.

S.C. Code § 20-7-34 governs the transfers from Family Court to Circuit Court. § 20-7-430(6) authorizes the Family Court to determine whether transfer is appropriate. Kent v. United States, 383 U.S. 541 sets forth the criteria for determining whether or not transfer is appropriate. "Any" evidence of probative value to support the court's findings is sufficient to uphold the findings on appeal. Griffin v. Warden, 277 S.C. 288 (1982).

This Court finds that:

1. Family Court did not abuse its discretion in ordering a transfer in this case, that a transfer is reasonably supported based upon an application of the *Kent* factors to the factual findings in the case. State v. Corey, 2000 WL 254026 (S.C. S.Ct. March 6, 2000).

2. This Court finds that transfer was appropriate in that Applicant was 16 years old, charged with a felony and that the transfer was made after a full investigation including inspection of Applicant's school records and criminal history.

3. The Family Court's order reflects the evidence presented and that the evidence was duly considered by the court prior to its determination that transfer was appropriate. Judge Watson specifically considered:

   (a) Applicant made a signed confession that he shot Hoffman and stole the car;

   (b) Hoffman identified him as the shooter;
   © "hand of one = hand of all";
   (d) Applicant committed a "serious" crime based on the *Kent* factors;
   (e) General Sessions is more appropriate for detention and rehabilitation where the Family Court is limited to indeterminate detention and where Applicant needs more rehabilitation than Family Court could provide;

(f) Applicant has a level of maturity and sophistication necessary to be held accountable for his actions; and

(g) trying this type of criminal case in public is a matter of public interest.

4. Evidence sufficient to uphold the Family Court's order exists in this case.

5. Applicant failed to show a reasonable probability that but for counsel's performance, the result of the transfer hearing would have been a retention in Family Court.

6. Applicant further failed to show any prejudice to the Applicant caused by counsel's performance.

Issue Related to Competency to Stand Trial and IAC - Ground 9© - Applicant's Brief, pp. 20-28.

9© Applicant was denied the effective assistance of counsel at the hearing to determine his competency to stand trial, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.

In allegation 9(c), Hughes contends that his counsel erred in conceding that Hughes was competent to stand trial rather than having the court-appointed mental health experts, Dr. Richard Frierson of the Department of Mental Health and Dr. Lester Finuf of the Department of Special Needs and Disabilities, present to testify. Hughes essentially contends that this was error because trial counsel Newsom had doubts of his competency. Respondents respectfully submit that the Applicant has failed in his burden of proof to show counsel alleged deficiencies in the presentation at trial concerning Hughes' competency to stand trial was a Sixth Amendment violation under Strickland v. Washington, 466 U.S. 668 (1984).

a.) **Law on Competency to Stand Trial and Ineffective Assistance.**

The test for determining whether a criminal defendant is competent to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. State v. Nance, 320 S.C. 501, 466 S.E.2d 349(1996). The test is not whether the defendant is actually cooperating with his lawyer, but rather if he has the mental capacity to do so. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987). The trial court's determination of competency will be upheld if it has evidentiary support and is not against the preponderance of the evidence. State v. Nance, supra. State v Reed, 332 S.C.35, 39, 503 S.E.2d 747, 749 (1998). State v. Kelly, 331 S.C. 132, 502 S.E. 2d 99(1998).

For a petitioner to be granted Post Conviction Relief as a result of ineffective assistance of counsel, he must show both (I) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective assistance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1094, 106 S.Ct. 869, 88 L.Ed.2d 908 (1986). In Wolfe v. State, 326 S.C.158,163, 485 S.E.2d. 367,369 (1997), the Court found that to show prejudice stemming from the late continuance motion for a competency evaluation, Wolfe would have to demonstrate that (1) the trial court would have abused its discretion in refusing to grant a continuance motion so that Wolfe could get a private competency evaluation, and (2) *such*

a competency evaluation likely would have affected the ultimate result of the competency hearing. Wolfe presented no medical evidence at the PCR hearing suggesting he had been incompetent to stand trial or to participate in his defense. Given the absence of such evidence, the Court found that Wolfe had failed to demonstrate he was prejudiced by the trial court's failure to grant a continuance.

In Jeter v State, 308 S.C.330, 417 S.E.2d 594 (1992), the Court initially found that counsel was not deficient under the facts in failing to request a competency evaluation. Under this second prong of Strickland, the petitioner need only demonstrate a "reasonable probability" that he was incompetent at the time of the plea or trial. Further, as to the petitioner's competency to stand trial, although under an ineffective assistance of counsel claim the petitioner does not bear the burden of the preponderance of the evidence standard of Dusky, *he must still show there is a reasonable probability he would have been determined to be incompetent.* Strickland, supra. (*Emphasis added*). In Jeter as here, he failed also to meet that burden.

Ineffectiveness claims for failure to show the defendant's incompetency to stand trial have been found deficient for failure to show the defendant's inability to consult or understand. Alexander v . Dugger, 841 F.2d 371, 375 (11th Cir. 1988). The federal court's have also rejected claims where there was no showing that the defendant was incompetent in fact. Theriot v. Whitley, 18 F.3d 311,313 (5th Cir 1994); Hatch v. Oklahoma, 58 F3d 1447, 1458 (10th Cir . 1995).

Recently, in Holliday v. Haley, 2000 Westlaw 40047 (11th Cir. 2000), trial counsel in capital murder case were not ineffective in failing to provide family history records to the psychiatrists and psychologist constituting the "lunacy commission" which evaluated defendant for competency to stand trial, where counsel did not have the records in question at that time, and defendant was unable to prove that the provision of these records would have changed the evaluation, in that the

commission would likely have discounted earlier mental tests because the test it administered would be considered more accurate, and defendant spent more than a month in residence at medical facility, giving the mental health experts ample opportunity to complete a thorough evaluation. In Hull v. Kyler, 190 F.3d 88 (3rd Cir 1999), a murder defendant was prejudiced by counsel's failure to express doubt regarding his competency by cross-examining the government's single witness at competency hearing or presenting any of the large body of evidence in support of defendant's incompetence, and thus was denied effective assistance, in case in which not only had defendant previously been found incompetent to stand trial, but numerous evaluations of his mental condition indicated that he remained incompetent, opinion of government expert witness was not based on defendant's condition on the date of the hearing, but on witness' evaluation more than three months earlier, and defendant was found incompetent on three different occasions near the time of the hearing, including twice after government witness' evaluation and before the competency hearing.

b.) Fact - Analysis.

The record reveals that a hearing was held on competency to stand trial pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981). R. pp. 140-43. It was revealed to the trial judge that the examiners' reports finding Hughes competent to stand trial by Dr. Frierson and Dr. Finuf were entered into evidence consistent with State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995) (report of competency evaluation is admissible).

In the report of Dr. Frierson, he concluded that Hughes was competent to stand trial although suffering from a conduct disorder and borderline intellectual functioning. In his report, he described various factors supporting this determination, including the ability to read the Miranda warnings, restate them in his own words, describe the offenses he was charged with, "appreciate the

seriousness of the charges and understands that he could go to prison for life or receive a death sentence." The report further revealed his ability to understand the roles of the solicitor, his defense counsel, the style of execution, that he trusts his attorney and will tell him everything he knows about the charges, his awareness of the role of the judge and jury, his ability to state the evidence that he might be able to present in the penalty phase, his awareness of pleas, his ability to solve a hypothetical about the courtroom and state a desired outcome in his case. Dr. Frierson concluded his report that Hughes had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and that he had a rational as well as a factual understanding of the proceedings.

Dr. Lester Finuf, of DDSN, was involved because of the testing but revealed a borderline intellectual level. Dr. Finuf opined in his report of August 30, 1995, that Hughes was "able to communicate sufficiently with his attorney to assist in his own defense." In support of this opinion, Dr. Finuf noted Hughes' ability to state the charges against him, his articulation of the function of key judicial officers and their roles, his knowledge of basic legal terms, an appreciation of the seriousness of the charges, and his ability to differentiate between time units and distinguish between the severity of the acts. He further found that Hughes did not present any evidence of "thought disorder."

During the Blair hearing, counsel Newsom waived his right to cross-examine the examiners. R. pp. 140-41. The trial court then made an oral finding of competency to stand trial, including that the defendant is capable of understanding the nature of the charges and capable of assisting counsel in his own defense. R. pp. 142-43. Subsequently, Judge Gottingham entered a written Order on

September 7, 1995. R. pp. 1918-19. At the hearing, counsel Newsom stated that the evaluation was completed over his objection. R. pp. 142-43.[11]

During the state PCR proceeding, counsel Newsom testified about his reasons for not challenging Hughes' trial competency. Newsom stated that there was a question about whether he was competent and that was why he retained Dr. Morgan and Dr. DeWitt. PCR Tr. pp. 326-27. Newsom stated that "none of our experts told me he was incompetent to stand trial." PCR Tr. p. 327, ll. 14-19. He stated that under their theory Hughes was competent, but he had his own doubts in his day-to-day dealing with him. PCR Tr. 327. Newsom further stated that Hughes was not capable of being a good witness. PCR Tr. 330, ll. 18-20. Counsel further stated on cross-examination that Dr. DeWitt and Dr. Morgan had advised him that their conclusions would be one of competency to stand trial, rather than incompetency. R. p. 414. Counsel conceded that he had no evidence then to contradict the competency findings and conclusions. "Nobody was able to suggest to me that we had a chance in getting him ruled incompetent, so I didn't pursue it." PCR Tr. 415. Newsom stated, though, that he thought Hughes was impaired by his limitations. PCR Tr. pp. 458-59.

Further, counsel's testimony reveals that, although counsel's assessment was that Hughes would be a poor witness, it revealed that Hughes had the capacity to communicate and assist in his defense. The record revealed Hughes made initial admissions to him that he shot Hoffman, asserted Pearce was a triggerman and described Pearce's fear that Hoffman would identify him. PCR Tr. pp.

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[11] The Applicant was initially sent for evaluation on January 31, 1995, until February 13, 1995. The evaluation was not completed at that time because Hughes did not participate in the formal forensic interview without his counsel's permission. Pursuant to court order, he was re-evaluated in August 1995, resulting in the finding of competency.

314-18. Subsequently, although under truth serum according to Newsom, Hughes revealed his further involvement in the incident by revealing shooting more times in the incident. PCR Tr. p. 316, ll.16-20. Counsel Newsom further described his initial meetings with his client and his description of the planned robbery but denied knowing Hoffman at that time. PCR Tr. pp. 421-22. He described in details the day of the incident, the plan to rob, the change in plans when Pearce recognized Hoffman, and Hughes' decision after entering the store to withdraw until Pearce made comments to him. PCR Tr. p. 422. Further, that Hughes went back into the store (but Pearce did not tell him to shoot anyone). PCR Tr. p. 423. Counsel Newsom described the inquiry he had with his client and Dr. Harold Morgan while Hughes was under truth serum and admitted shooting three times. PCR Tr. pp. 423-24. Counsel further stated that Hughes discussed with him where he got the gun from Mr. Owens. PCR Tr. pp. 425-26. He stated that Hughes told him that he was going to pay for the gun from the proceeds of the robbery. PCR Tr. p. 426. Counsel Newsom further described Hughes' version to him about Pearce going into the store and firing two more shots (after Hughes' three shots), taking the keys to the car and later dividing up the money, going to a club and staying out all night. PCR Tr. p. 428. Further, at some point of time, Hughes also told him he was afraid Hoffman could recognize him because he had seen her at a friend's house. PCR Tr. p. 438.

The Applicant relies upon the testimony of Dr. Marty Beyer and Dr. George Woods to support his claim. Dr. Beyer testified that she had "questions" about his competency to stand trial, but that she was unable to give an opinion on whether he was competent to stand trial. PCR Tr. pp. 10-11, 35-37. Unlike the versions given to trial counsel contemporaneous to the trial that she was not aware of, she claimed that Hughes suggested to her in 1999 that the crime was an "accident"

because he was drunk, that he was a "simple thinker" and that his difficulty in planning may have made it difficult to plan for court hearings. PCR Tr. pp. 35-37.

On cross-examination, however, Dr. Beyer conceded that she had no evidence that Hughes did not have an understanding of the proceedings in 1994, and was able to express to her a factual understanding of the circumstances of the crime. PCR Tr. pp. 53-54. Further, Hughes described to her the various circumstances surrounding the crime, including his version of intoxication. PCR Tr. pp. 65-66.

Dr. George Woods, a psychiatrist, evaluated Hughes for the PCR proceedings in 1999, similarly was unable to give an opinion that Hughes had been incompetent at the time of his 1995 trial, but thought there were suggestions that he was unable to rationally assist in the preparation of his defense and would understand matters on a very simplistic level given his neurological impairments and found that it would be hard to believe he could "follow ballistics information or be able to provide information on the psychological testimony." PCR Tr. p. 118. Dr. Woods, however, revealed the breadth of information about the family history, crime and trial that Hughes revealed to him in 1999. PCR Tr. p. 153 (friends he grew up with), p. 157 (relationship with his father); pp. 159-63 (description of facts of the crime); p. 167 (whether Hoffman could identify him); pp. 170-71 (comments about lack of knowledge about what happened to co-defendants).

Respondents submit that this record conclusively shows that Hughes has failed in his burden of proof under Strickland. He was able in 1994-95 and remains today able to rationally discuss the circumstances of the crime and the roles of the various parties. Respondents further contend that the record further reveals that at no time has he been psychotic nor have thought disorders that impaired his abilities. They assert that counsel was not deficient because he took appropriate steps to resolve

the issue of trial competence by consulting with his independent experts, Dr. Morgan and Dr. DeWitt, who never indicated to him, after their mental evaluations, concerns about his competency to stand trial, areas in which both possessed prior expertise. The ability of Hughes to reveal to counsel in 1995 with "a reasonable degree of rational understanding" is evident. Trial counsel performed reasonably, not deficiently, in choosing not to challenge the reports of the examiners.

The Respondents contend that Applicant's comparison of counsel's conduct in this case is strikingly different than the deficient conduct found in Hull v. Kyles, supra. In Hull, there were multiple evaluations that suggested he remained incompetent and had previously been found to be incompetent to stand trial. In Hughes' case, however, there were only conclusions of competence presented to the Applicant's counsel and his own experts did not contradict those conclusions. Further, there was no indication that Hughes suffered from an active mental illness that had decompensated since the evaluations to suggest any need for re-evaluation.

It is Respondents' position that instead, counsel was presented with a client who, due to his level of intellectual functioning, would not make a good witness, but was able to rationally recount his versions of the crime to his counsel in preparation for the trial. Hughes was rationally aware of the charges and the potential punishment. Hughes was rationally aware of the role of his counsel (as revealed by the reversal to complete the initial evaluation without his counsel's consent) and the other participants in the judicial process. Under Jeter v. State, supra, deficient performance has not been shown. Similarly, Hughes has failed to show a "reasonable probability" that he was incompetent at the time of trial.

c. Conclusions of Law and Findings of Fact

Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show a reasonable probability that but for the errors on the part of trial counsel, the Applicant would have been found incompetent to stand trial. The test of whether or not a defendant has the present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational and factual understanding of the proceedings against him. Dusky v. U.S., 362 U.S. 402 (1960).

Applicant relies on the testimony of Dr. Marty Beyer and Dr. George Woods in support of his claim that he should not have been found competent by the trial court. This Court finds:

1. Applicant has failed to show that trial counsel's performance was deficient.

2. Applicant has failed to show a reasonable probability that absent counsel's performance, he would have been determined incompetent.

3. The testimony of Dr. Marty Beyer and Dr. George Woods may have questioned the competency of Applicant, but neither expert was able to offer a conclusive opinion as to the Applicant's level of competency at the time the crime was committed.

4. The record supports that Applicant displayed a reasonable degree of rational understanding of the crime, the roles of the various parties, the charges, the potential punishment, and the role of his counsel and other judicial participants.

Issue Concerning IAC and Jury Selection - Issue 9(d) - Applicant's Brief, pp. 28-44.

9(d) Applicant was denied the effective assistance of counsel during jury selection, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.

In this issue, the Applicant challenges counsel Newsom's voir dire and selection of two jurors who were acquainted with the victims, particularly Brenda Wise and William Barron. Additionally, he challenges counsel's failure to re-explain concepts of aggravation or mitigation. Respondents submit that he has failed in his burden of showing either deficient performance or prejudice under Strickland, supra.

a.) General Law on Jury Selection and IAC.

As stated in Strickland, counsel is presumed to act competently. Courts have found that counsel routinely make tactical decisions about juror voir dire that are not subject to challenge in collateral attack. Spencer v. Murray, 18 F.3d 229, 233 (4th Cir. 1994) (upheld counsel's failure to voir dire on issue of race); Sawyer v. Butler, 848 F.2d 582, 589 (5th Cir. 1988) (failure to question jurors on views on death penalty where questioned by state, no prejudice shown, and no showing rehabilitation of the jurors was possible); Frank v. Brookhart, 877 F.2d 671, 674 (8th Cir. 1989) (tactical decision not to question about the effects of publicity); Gustave v. U.S., 627 F.2d 901, 906 (9th Cir. 1980) (decision whether to request certain voir dire questions was a strategic decision of the attorney and his failure to do so, even against his client's wishes, was not IAC).

As a general matter, courts have held that voir dire is not required on general legal principles which will be covered by instructions, as distinguished from specific questions probative of juror bias. Guam v. Palamo, 35 F.3d 373 (9th Cir. 1994). See U.S. v. Baldwin, 607 F.2d 1295, 1298 (9th Cir. 1979).

The failure to strike a juror, however, requires a showing of "actual bias" by the juror against the defendant. Goeders v. Handley, 59 F.3d 73, 75-76 (8th Cir. 1995); Smith v. Phillips, 455 U.S. 209, 215-17 (1981). In U.S. v. Quintero-Barraza, 78 F.3d 1344, 1349-50 (9th Cir. 1995), the court found no ineffectiveness based on the juror's oath even though on the record the record admitted to some bias. Where a juror's responses showed no bias, it had been held there was no ineffectiveness in failing to strike the juror.

The question of individual juror bias is a question of fact. Patton v. Yount, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 2891, 81 L.Ed.2d 847 (1984). But see Davis v. Singletary, 853 F.Supp. 1492 (M.D.Fla.1994) (petitioner failed to show counsel was ineffective in exercising peremptory strikes where counsel attempted to have venire men stricken for cause and used peremptory strike where motion to excuse was denied) and Odle v. Calderon, 919 F.Supp. 1367 (N.D.Ca.1996) (where there was an absence of evidence in the record of voir dire which would have caused a reasonable attorney to doubt that the venire man could be an unbiased juror, no attorney error in failing to strike venire man).

Applicant's argument reflects a lack of appreciation for the innumerable factors involved in the jury selection process. Using hindsight, it is easy to identify a juror that defense counsel should have stricken. However, during the jury selection process counsel had to determine who he would prefer to be on the jury, who he would prefer to be excused and organize each venire member in terms of the degree of that preference, while simultaneously estimating who the prosecution would seek to select and strike. While the this Court does not intend to suggest that an applicant could never have a valid ineffective assistance of counsel claim for the failure to use peremptory strikes,

it must find that the Petitioner failed to satisfy his burden of demonstrating attorney error rising to a 6th Amendment violation.

b.) **Fact - Analysis.**

1.) **Counsel's Voir Dire Strategy.**

In this portion of the argument, Hughes contends that his counsel failed to perform the function of voir dire in Hughes' trial for various reasons. Respondents submit that there was no Sixth Amendment violation.

a.) **Alleged Failure to Ensure Jurors Understood the Meaning of Legal Terms.**

Hughes contends that counsel is required under the Sixth Amendment to ensure the "pertinent legal concepts of murder, aggravation and mitigation." Applicant's Memo. p. 33. He relies upon Jeff Bloom's speculation that many jurors equate murder with homicide and that counsel should either ask the judge to define murder or do it himself. Bloom Deposition, p. 38. He further testified that concepts of "aggravators and mitigators" need to be explained to the jurors in the voir dire process in order for them to give appropriate answers. Further, Bloom determined that Newsom failed to ask some jurors, particularly Patricia Wise, R. p. 499, their opinion on the death penalty. Bloom Deposition, pp. 22-23, PCR Tr. p. 522. Defense counsel Mauldin testified that he felt defense counsel should not rely upon the trial court's questioning of the jurors' opinion on the death penalty. PCR Tr. pp. 606-08.

Counsel Mauldin, however, acknowledged that Judge Cottingham asked each juror their opinion on the death penalty. PCR Tr. pp. 579-80. Further, he acknowledged that no juror that was qualified stated that they could not consider a life sentence. PCR Tr. pp. 580-81. He also conceded

that there was information in the record on each juror that revealed their opinion on the death penalty. PCR Tr. pp. 588-89.

Counsel Bloom conceded similarly that Judge Cottingham inquired of each venire person of their opinion on the death penalty by using the three types of juror inquiry and follow-up. Bloom Deposition, pp. 63-64. He acknowledged that counsel Newsom did inquire of some jurors on their opinion on the death penalty and ability to consider mitigation. Bloom Deposition, pp. 65-70. He referred to juror Vernon's voir dire by Newsom asking about the death penalty and mitigation. (R. pp. 229-36), juror Atkins asking twelve question inquiry involving three (3) questions on the death penalty (R. pp. 258-64); juror Edwards asking five questions related to the death penalty (R. pp. 288-94); juror Hudson asking three (3) questions on the death penalty in terms of youth and an explanation of mitigators (R. pp. 356-66); juror Pound on which counsel asked no questions (R. pp. 366-72); juror Mary Gunter asking question on her church's stand on the death penalty (R. pp. 421-30); juror Cheeseboro asking five questions and two (2) specifically on the death penalty (R. pp. 434-49); juror Williams asking five questions but none specifically related to the death penalty (R. pp. 458-65); juror Patricia Wise asking ten questions, including what her views on the death penalty were, her church and its views on the death penalty and about alcohol (R. pp. 499-507); and juror Nu Vicker asking seven questions, including one on her church's position on the death penalty (R. pp. 509-18). Bloom Deposition, pp. 65-67. He also admitted that the voir dire on the alternates included defense questioning about the death penalty. Bloom Deposition, pp. 67-68.

The record also reveals that prior to the voir dire Judge Cottingham reviewed the allegations set forth in each of the indictments, including the specific elements of the murder charge. R. pp. 88-

91. The trial judge further described to the entire venire the sentencing proceeding, aggravating circumstances and mitigating circumstances. R. pp. 96-98.[12]

Counsel Newsom testified that prior to the trial he was aware of his right to individually voir dire the jurors. PCR Tr. p. 417. He testified that he did some research on the status of voir dire prior to trial. Counsel indicated that he could have asked the jurors more questions to see if he could rehabilitate some jurors, but he had some general information that the community did not feel strong about Hughes, might be afraid to be on the jury that could convict him and would do their best to try to get off. PCR Tr. p. 395. Counsel Newsom stated he had done research about the types of questions that could be asked and could not be asked on voir dire. PCR Tr. pp. 397-98. However, Newsom acknowledged that there may be some questions that he could have asked on voir dire in hindsight that he did not ask. PCR Tr. p. 397, ll. 13-21.

This Court finds that the inquiry of the jurors who were selected revealed adequate information about their ability to consider a life sentence and be fair and impartial. The mere fact another lawyer would have asked different questions or even that Newsom, in hindsight, may have asked different questions does not lead to a Sixth Amendment showing of either deficiency or prejudice.

Newsom had researched the law related to voir dire questioning of jurors. During the proceeding, he actively inquired of the jurors he chose to question based upon his own research and information in an attempt to resolve his own questions as to their ability to be qualified and his

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[12] It is also important to note that contrary to the allegations of Applicant, counsel Newsom sought early in the voir dire process to "explain what the law is." R. p. 202. The trial court denied the request stating that he "will tell them what the law is." Id.

discretion to select them or strike them. As stated previously, the individual questioning of jurors is a tactical decision that must be deferred to, particularly where the record reveals Newsom adjusted his inquiry on each juror based upon his individual knowledge, as well as the particular juror's responses. This Court is constrained to find that counsel was not "deficient."

Further, the complaint that counsel did not "educate" each juror cannot be deemed ineffective or even deficient. The trial judge described the particular elements of the murder during general instructions prior to voir dire, as well as the role of aggravation and mitigation in a sentencing proceeding. The trial judge, with each juror, inquired of their position on the death penalty, that was then followed-up with by the prosecutor. When Newsom deemed it appropriate or necessary, he made appropriate additional inquiry on the effect of the death penalty decision and the ability to consider mitigation following up on the court's earlier comments.

The Applicant has failed to show that there is a reasonable probability that, but for counsel's failure to ask jurors additional questions about the death sentence, aggravation or mitigation, that the result of the proceeding would have been different, i.e., a life sentence or not guilty. At the trial itself, the seated jurors were properly instructed concerning the elements of murder and in the sentencing proceeding were instructed on aggravation and mitigation. Even if there were an earlier Sixth Amendment requirement that competent counsel undertake this judicial function in voir dire, the trial court's instructions removed any possibility of Sixth Amendment prejudice. Accord, Guam v. Palamo, supra. Further, there is no showing that it was to a reasonable probability that such earlier inquiry by defense counsel would have led to disqualification of any juror. See Goeders v. Handley, supra. Each of these jurors were deemed qualified to sit based upon their responses to the court and

counsel's questions. The current speculation and style critique of trial counsel fails to rise to a level showing deficient performance or prejudice.

2.) **The Failure to Challenge For Cause or Use a Peremptory Strike to Remove Jurors Brenda Wise and William Barron.**

More specifically, Hughes asserts that jurors Brenda Wise and William Barron should have been further questioned, challenged for cause, or at least had peremptory challenges used to remove them as jurors. Because defense counsel Newsom revealed a strategic reason for retaining these jurors, the Applicant has failed to show either deficient performance or prejudice under Strickland, supra.

During the jury selection process Brenda Wise revealed that she had discussed the case with her daughter Sherry, who was a friend of the victim's sister, Amy. R. p. 194. She stated that she was told that he was killed and she (Amy) would come to Sherry's house and Sherry would try to console her. R. p. 194.[13] Ms. Wise then declared in response to the court's inquiry as to whether she could set aside the knowledge that she had heard from someone else and base the verdict on the evidence that "I think I could." R. p. 194, ll. 16-21. She responded "correct" that she could base her decision on what was heard in the courtroom. R. pp. 194-95. Counsel Newsom inquired of juror Wise on whether the friendship her daughter has with the victim's sister made her uncomfortable, and she declared "probably somewhat." R. p. 205. She stated that this was due to hearing things her daughter told her from the sister about "how much pain – the hurt" of the family, but not the

[13] During the PCR hearing, Amy Presley, the victim's sister, testified that she knew a Sherry Arrant who is around forty, PCR Tr. p. 516, but she stated she did not know who Mr. Wise is. PCR Tr. p. 515.

facts. R. pp. 205-06. Ms. Wise, however, responded that "I believe I could be fair," to consider a not guilty verdict, and opined that "I still think I have my own mind and I can use my own judgment" in response to whether it would make her more or less likely to return a death verdict because she knew of the family's pain and that her daughter knew the family. R. pp. 206-07. After this inquiry the State and counsel Newsom deemed her qualified. R. p. 208. Although Newsom used seven of his ten strikes, Brenda Wise was the first juror selected without the use of any strike. R. pp. 770-71.

The second juror that Hughes now challenges was jury foreperson William Barron. He acknowledged that he had read and heard something about the case in the newspaper. R. p. 296. He then stated that:

JURY VENIRE MEMBER: On the night that this incident happened, the murder victim's sister was out at our farm. And I do not know the murder victim's family and do not know this sister well either, but she was a friend of my son's and his wife. And Officer Woody Crowder, who is a police officer with the Town of St. Matthews, called out to the farm and got me at my house and asked if I would go over and notify this sister at my son's house, and I did so. And that really is what I wanted to say. At lunchtime today, I was reminded that my daughter-in-law, who is a friend of this sister, had worked at one point at this establishment where this incident occurred. That's all.

THE COURT: Well, I appreciate you calling that to our attention. Is there anything about what you have related to me that would impair your ability to reach a verdict based on the law and the evidence in this case?

JURY VENIRE MEMBER: No, sir.

THE COURT: Can you tell me under your oath that whatever your verdict is, it's not as a result of that incident but what you hear in this witness stand?

JURY VENIRE MEMBER: Yes, sir.

THE COURT: All right, sir. That's fine, then. The fact that that occurred, as long as you can dismiss it and base your verdict on what you hear in this courtroom under oath, is what we're interested in.

R. pp. 296-97. No further inquiry was made directed to this knowledge by the court, the State, or the defense. R. pp. 297-303. But see, R. p. 299, ll. 10-20 (general inquiry about putting aside knowledge and basing decision strictly on facts). Both the State and defense represented that juror Barron was qualified. R. p. 303. Barron was selected as the fifth juror seated while the defense had used only one of his peremptories at that point of the seven he eventually used. R. pp. 774-75.

Counsel Newsom explained his reasons why he chose to select juror Wise and Barron to be seated. Concerning juror Barron, Newsom stated that his background information was that Barron's wife was very religious and his daughter was a missionary. PCR Tr. p. 401. It was Newsom's opinion that the missionary element would be likely to be very forgiving and that if this daughter was the one talking with Presley's sister, he hoped the forgiveness part would impact. PCR Tr. p. 401. Further, Newsom learned from Elijah Nesbit, who provided juror information to him, that the juror was educated with a college education (more than most prospective jurors) and that he could be more receptive to the position that Hughes should not be sentenced to death when Pearce, the triggerman under the trial theory, had not. R. pp. 401-02, 404.

Counsel stated that juror Barron was more attractive to him because of the missionary information he had and the compassion that might lead to a life sentence. PCR Tr. p. 420. Also,

PCR Tr. p. 409. As counsel stated: "We wanted Mr. Barron in the trial." PCR Tr. pp. 408, 421. Concerning his selection of juror Wise, counsel Newsom stated (and the record supports) that he probably voir dired her longer than most of the other venire persons. R. pp. 402-03, 420. His juror information revealed two checks by her name (as a positive juror). PCR Tr. p. 409. In his questioning of her, counsel Newsom found her demeanor was sympathetic and sincere. PCR Tr. pp. 402-03, 420. Although she would not have been his first choice, "there was something about her that impressed us that she would listen." PCR Tr. pp. 404, 420.[14]

Counsel Newsom stated that he did not seek to strike the jurors for cause because he was not offended by the fact that they had some knowledge of Mr. Presley's family because they were hoping to put the blame on Kelsey Pearce. He acknowledged that he could have made a motion based on their extraneous information; he did not know that Judge Cottingham would have granted it. PCR Tr. pp. 407-08.

Counsel Mauldin opined that he disagreed with counsel Newsom's selection of the jurors, but conceded that he was not aware of the reasons Newsom stated he chose to select the jurors (PCR Tr. pp. 581-82) and had "no idea" what was done in this case concerning juror background investigation. PCR Tr. pp. 587-88.

Jeffrey Bloom opined that juror Brenda Wise had direct knowledge of victim impact information from her daughter and should have been stricken for cause or at least had an available

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[14] Solicitor Bailey testified that juror Brenda Wise, on different occasions, seemed to require a greater degree of proof than the reasonable doubt standard and he feared a "residual doubt" situation where she would demand 100% proof. He declared that he would have struck her if he had more than five strikes. PCR Tr. pp. 617-18. Solicitor Bailey recalled that juror Barron had a prolonged hesitation when he asked him the sixteen year old question. PCR Tr. p. 618. Bailey described the look on his face like he really didn't know if he could do it for someone that young. Id.

peremptory challenge used to remove her. Bloom Deposition, pp. 46-48. He was unaware of any strategic reason not to remove her. Id. p. 49.

Bloom similarly claimed that juror Barron could have been called as a victim impact witness and should have been removed for cause or have a peremptory challenge used. Id. pp. 50-54. Again, this witness was not aware of the strategic reasons for seating this juror.

This Court concludes that Hughes has failed to show deficient performance in the selection of jurors Brenda Wise and William Barron. These decisions were not the product of neglect or ignorance. Instead, the decisions to seat the jurors were based upon an expressed tactical decision with knowledge of the fact of the extraneous contact each juror had. Counsel Newsom expressed his strategic reason for having juror Barron was based upon his family religious and educational background and caused him to believe that Barron would strongly consider a life sentence and be swayed by the respective roles of Hughes, compared to Pearce. Counsel Newsom was clear – juror Barron was a juror that he definitely wanted. PCR Tr. pp. 408, 421. Counsel Newsom's strategic reason for selecting juror Brenda Wise after one of his more extensive questioning was that she would be sincere, sympathetic, and would listen to the evidence. It should be noted that the voir dire supports this assessment where she consistently stated that she would make her own decision based upon the evidence and could hold out against the majority of jurors (R. p. 205), that she would have to be 100% sure (R. p. 197), and believed that she could be fair (R. p. 206).

In Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999), the Court found that trial counsel was not ineffective in his selection of the jury, stating "in PCR proceedings, a defendant must provide credible evidence that the trial counsel's refusal to strike a juror (when requested by a defendant) prejudiced his defense."

As the Court stated:

> While this issue has not been addressed in South Carolina, other courts have held jury selection is a process that inherently falls within the expertise and experience of trial counsel. See, e.g., People v. McKenzie, 34 Cal.3d 616, 194 Cal. Rptr. 462, 668 P.2d 769 (1983); State v. Cosey, 873 P.2d 1177 (Utah Ct. App. 1994). 'The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities.' Romero v. Lynaugh, 884 F.2d 871, 878 (5th Cir. 1989) (emphasis added). In Commonwealth v. Sanders, 299 Pa. Super. 410, 445 A.2d 820 (1982), the Pennsylvania Supreme Court held:
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> Inherently, a jury trial requires that the defendant be secured the right to challenge potential jurors on the basis of cause or peremptorily. Those rights are adequately secured to an accused when they are exercised by defense counsel. The fact that an accused does not personally select the jury is not a deprivation of that right.
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> 445 A.2d at 824 (emphasis added). Moreover, this Court has held that a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997).

511 S.E.2d 68. Accord, Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (if counsel articulates a valid reason for employing certain trial strategy, such tactics will not be deemed ineffective assistance of counsel). Further, it has been recognized that there are some decisions of counsel that are so clearly strategic or tactical that overcoming the presumption of sound judgment is almost impossible, including a failure to challenge facially neutral jurors. Denham v. Deeds, 954 F.2d 1501, 1505 (9th Cir. 1992) (decision in some way may have been tactical). Here, Hughes has failed in his burden of proof to show deficient performance.

Further, this Court must conclude that Sixth Amendment prejudice cannot be shown. Each of the jurors disclosed the fact that they had had the contact and knowledge prior to the selection during the voir dire. Each of the jurors stated that they could set aside the information and render

a verdict based solely on the evidence. The trial judge, as well as the defense counsel, found these jurors to be sincere in their statements and concluded that they were qualified there is no evidence presented to the contrary.

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S. Ct. 229, 112 L.Ed.2d 183 (1990) (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, [328 S.C. 257] 853, 83 L.Ed.2d 841 (1985)); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), cert. denied ___ U.S. ___, 117 S. Ct. 1261, 137 L.Ed.2d 340 (1997). The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reviewable on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S. Ct. 2355, 124 L.Ed.2d 263 (1993). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. State v. Green, supra. The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him. The Court has found no error in qualifying jurors who knew of a defendant's previous conviction and death sentence which were reversed on appeal when they stated they could be fair and impartial. State v Patterson , 324 S.C.5, 482 S.E.2d 760 (1998); State v. Drayton, 287 S.C. 226, 337 S.E.2d 216 (1985); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990). In Drayton, supra, the Court approved the qualification of two prospective jurors who had read newspaper accounts of the case. Each stated she could put aside

the prior knowledge, follow the law as charged, and base her verdict upon the evidence presented at trial. 293 S.C. at 422-23, 361 S.E.2d 329.

The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors. Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). In Irvin, the United States Supreme Court addressed the issue of pretrial knowledge of facts by jurors where the appellant had been sentenced to death. The Court found that it was not required that jurors be totally ignorant of the facts and issues involved in a case. The Court opined that "it [was] sufficient if the juror [could] lay aside his impression or opinion and render a verdict based on the evidence presented in Court." Irvin, 366 U.S. at 723, 81 S. Ct. at 1643. Accord, State v. Bell, 302 S.C.18, 393 S.E.2d 364 (1990) (each of the jurors at issue stated that they could set aside any opinions garnered from their prior knowledge of the appellant's conviction and/or sentence of death for the murder of Shari Smith and would be able to give the appellant a fair and impartial trial.)

In Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 [302 S.C. 24] L.Ed.2d 589 (1975), the defendant, "Murph the Surf", notorious for his involvement in the 1964 theft of the Star of India sapphire, claimed that the jurors were biased because they knew about his previous convictions. The Court held that juror exposure to information about a defendant's prior convictions or to news accounts of the crime with which he is charged does not alone presumptively deprive the defendant of due process. The Court declined to find that the setting of the trial was inherently prejudicial, and declined to find prejudice in the jury selection process. Murphy, 421 U.S. at 803, 95 S. Ct. at 2038.

Our Court considered whether the trial court erred in not excusing four jurors who had heard of the case and some of its details in DeLee v. Knight, 266 S.C. 103, 112, 221 S.E.2d 844, 847

(1975), cert. denied, 426 U.S. 939, 96 S. Ct. 2658, 49 L.Ed.2d 392 (1976). Even though the jurors had some knowledge of the case, the Supreme Court found that each juror had not formed a conclusive opinion as to the guilt or innocence of the accused, and could render a just verdict based solely on the evidence presented at trial.

This Court finds that Juror Barron and Juror Brenda Wise were qualified to serve. They both indicated they would rely upon the evidence in their decision, not on what they had previously heard, and could be fair and impartial. Since they each were not subject to be stricken for cause, the discretion by defense counsel in selecting the jurors is reasonable trial strategy. There is no Sixth Amendment violation.

3.) Other Jury Claims.

The Applicant also contends that counsel should have attempted to more fully question jurors who asked to be excused because they were acquainted with the Applicant or his family. R. pp. 109-26. Counsel Newsom expressed his disappointment, but declined to attempt rehabilitation and concluded that his information from his sources was that the community did not feel strong about Hughes and were afraid to be on the jury. PCR Tr. p. 395. Although he acknowledged that he could have sought to rehabilitate them, he chose not to do so in light of their expressions of bias and inability to be fair.[15] Counsel Newsom declined to make inquiry of the potential jurors who sought to be removed due to impartiality except for Keith Mitchell, a friend of Hughes. R. pp. 122-23.

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[15] Friends and close neighbors (109); relation by marriage and cousin lives nearby (2) (109-10); defendant's father is his brother-in-law (111); known him all of my days (112) (already had been excused for other reasons); defendant's wife is her cousin (113); neighbor and friend of Hughes' grandmother (114); neighbor and friend of the family (115); I know him quite well and "I don't think I would be a good juror" (117); I know Herman personally, schoolmate and it may affect my judgment (120).

Clearly, counsel acted with knowledge of his ability to rehabilitate the potential jurors and chose not to do so. R. pp. 123-24. The Applicant has failed to show either deficient performance or prejudice where each of these potential jurors declared that the relationship with the victim's family would impair their ability to be a fair juror.

The Applicant further contends that counsel should have objected to the State's question about the ability of the juror to sentence a person to death who was sixteen at the time of the crime. See R. p. 197, ll. 12-19 (solicitor's question of juror Brenda Wise on whether she could impose a death sentence on a sixteen year-old at the time they committed murder). The Applicant contends that South Carolina law on jury selection prevents this inquiry of jurors, citing State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (disallowing hypothetical questions by defense lawyer in voir dire); State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985). Counsel Newsom testified that he did not object to the questions. PCR Tr. pp. 397-99. Expert Mauldin, however, acknowledged that if a prosecutor asked a juror if they could ever sentence a sixteen year-old to death, despite the facts or circumstances, and the juror stated that he could not, then he would be excludable for cause. PCR Tr. p. 592, ll. 14-23. Mauldin stated that it may have been the opinion of the trial judge that in order to qualify the jury in this case, that the question had to be asked. PCR Tr. p. 594. But he contended counsel should have objected.

This Court concludes that the solicitor complied with the South Carolina law and the trial judge did not err in allowing the "16 year old defendant" question to be asked. As acknowledged by the experts, if the question resulted in the potential juror stating they could never give the death penalty to a sixteen year-old regardless of the facts and circumstances presented, they would be disqualified as a matter of law.

Solicitor Bailey testified that he developed this question after reviewing State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993). PCR Tr. p. 619. In Longworth, the Court upheld the disqualification of a prospective juror, who stated that she could not impose the death penalty on a young person, on the grounds that her views would substantially impair her performance as a juror since, contrary to her views, age was not a bar to capital punishment in this case.

In State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), the Court concluded that disqualification was proper of a potential juror who unequivocally stated she would never impose the death penalty on a mentally retarded defendant, no matter how egregious the crime and how slight the mental retardation, where Davis was urging retardation. Implicitly in the right to an impartial jury is the right to determine if the juror can carry out the law as explained to him. In Davis, the mental retardation question was the same as the solicitor's question about the sixteen year-old. It revealed the inability to follow instructions to consider statutory aggravating factors. The question was proper under Davis and counsel was neither deficient nor was prejudice proven where a negative response could only eliminate jurors who had to be removed, as a matter of law.

Finally, he contends that there was a Sixth Amendment violation concerning the order of questioning of jurors in the voir dire. In his brief, he relies upon § 16-3-20(D), who authorizes defense counsel a right to voir dire jurors and State v. Plath, 277 S.C. 126, 284 S.E.2d 222 (1981). In Plath, the Court stated, however, that case law establishes the solicitor does have the right of voir dire in capital cases, citing State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980) (State's right to voir dire examination is discretionary with the judge). Here, the experts speculate that there is a strategic advantage in questioning potential jurors before the prosecution. Solicitor Bailey acknowledged that the custom in the over twenty cases that he had tried that in all but two cases, the

prosecution went first in asking the voir dire questions. PCR Tr. p. 617. He equated it with the burden of proof and that he would proceed first, except in two cases where the prosecution and defense alternated.

Here, the failure of the defense counsel to follow the particular strategy of Bloom and Mauldin does not create a constitutional violation. No statute sets forth the order of inquiry which is merely a matter of custom. It is difficult to speculate on how this negatively impacts on the ultimate selection of the jury or upon the verdict by properly qualified jurors. Neither deficient performance in seeking to vary the custom within the First Circuit nor prejudice has been shown.

4.) Summary of Findings of Fact and Conclusions of Law.

Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show a reasonable probability that but for the errors on the part of trial counsel, the jury would have found reasonable doubt as to the guilt of Applicant. Tactical decisions of trial counsel are not subject to challenge in collateral attack. Spencer v. Murray, 18 F.3d 229 (4th Cir. 1994), Sawyer v. Butler, 848 F.2d 583 (5th Cir. 1988), Frank v. Bookhart, 877 F.2d 671 (8th Cir. 1989), Gustave v. U.S., 627 F.2d 901 (9th Cir. 1980). Voir dire is not required on general legal principles which will be covered by instructions to the jury. Guam v. Palamo, 35 F.3d 373 (9th Cir. 1994), U.S. v. Baldwin, 607 F.2d 1295 (9th Cir. 1979). The question of whether or not an individual juror is biased is a question of fact.

This Court finds:

1. Trial judge described the elements of the crime, as well as the role of aggravation and mitigation, during his general instructions to the jury panel prior to voir dire.

2. The trial judge questioned each individual juror regarding their opinion of the death penalty and their responses were put on the record.

3. Counsel provided tactical reasons for his decision not to ask more in depth questions.

4. Counsel also provided tactical reasons for failing to use his peremptory strikes against jurors Brenda Wise and William Barron and for failing to strike these jurors for cause.

   a. Barron's wife was very religious and his daughter is a missionary. Barron himself was educated.

   b. Counsel found Wise to be more sympathetic and sincere.

5. Counsel acknowledged disappointment with the jurors' acquaintance with the victim's family, but provided a tactical reason for not attempting rehabilitation.

6. The mere fact that another lawyer may have questioned the jurors differently does not necessarily amount to ineffective assistance of counsel.

7. Applicant has failed to show any prejudice resulting from counsel's performance at voir dire.

Allegation 9(d) is denied and dismissed.

Ground Concerning IAC and Guilt Phase - 9(e) - Applicant's Brief, pp. 45-51.

9(e). Applicant was denied the effective assistance of counsel at the guilt-or-innocence phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments.

In allegation 9(e), the Applicant asserts that counsel should have challenged the State's proof in the guilt phase in a number of different ways to challenge the testimony of Henry Daniel Owens, Kelly Hoffman and present further testimony to support the theory that Kelsey Pearce was involved as a triggerman.

a.) **Henry Daniel Owens**.

During the trial, Henry Daniel Owens testified that he was the uncle of Kelsey Pearce and knew Herman Hughes. Owens testified that he had charges pending against him in this case which were:

- misprision of a felony;
- accessory before the fact of murder;
- accessory before the fact of armed robbery.

R. p. 823. He further stated that he had a plea agreement with the State that he pled guilty to "misprision of a felony" and they won't charge him with accessory and that he gave true testimony. He declared that he was facing up to fifteen years on the misprision charge.[16] Owens described seeing Hughes and Pearce at his house on March 18, 1994, with a "15 pack of Bull" that they drank. R. p. 826. They made plans to go to a bar that evening with Pearce. R. p. 827. Owens testified that he had a .380 Larson gun with a clip in his trunk. R. p. 828. Owens stated Hughes stated that he wanted to get the gun, then Owens said he would give it to him, and then they agreed upon $50. R. p. 830. Owens stated he gave the gun to Kelsey and Kelsey and Hughes left. R. p. 831. After they were gone for about 30-45 minutes, they returned to the house and Hughes, Pearce and Owens split

[16] The witness was actually facing up to ten years on the misprision of a felony charge. An issue about this response is raised in 9(s) and (t), herein, as a Brady violation.

up the money. R. p. 832. He left to go to the club, leaving Hughes and Pearce at his house. R. p. 833. He stopped for a car problem and saw police going toward St. Matthews. Subsequently, he saw two black males in a Mazda; one was wearing clothes similarly to Hughes'. R. pp. 835-38. Later, he was with Hughes and Herman shot the gun out the window. Owens said that Hughes was "pretty normal." R. pp. 839-40. Owens then described a conversation he had with Pearce and Hughes about the Blue Diamond, stating that Kelsey did not go in the casino and that Pearce said Hughes went in, came out and borrowed money, then went back in and asked for change, and Hughes pulled out a gun, told Kelly to get off the phone, asked for keys to the car, and as soon as the keys hit the floor, Kelsey heard gunshots. R. pp. 849-50. Kelsey then shut the door when Hughes came out and they got in the Mazda and went to Owens' house. R. p. 851. Owens stated that while Kelsey was describing the events, Hughes was shaking his head. The only thing Hughes said was "I bucked them down," meaning I shot the gun. R. p. 852. At this time, they had been drinking and Hughes was "kind of shaky" but "wasn't real bad off." R. p. 853. It was around 4:00 A.M. then. Owens then stated the next morning Ricardo Guiford dropped Pearce off at his house. On that morning, he found the gun in his car on the floorboard. He took it out and put it in a box. Later, Hughes asked him where the gun was.

On cross-examination, Newsom inquired why it took him until now to state the story. Further, he presented that the agreement was entered "last week." R. p. 859. Newsom sought to develop that Herman had been drinking beer (R. p. 861); that Herman was quiet (but not around Kelsey) (R. p. 862); that Kelsey was more outgoing, bigger and taller (R. p. 862); and that they were older than Hughes (R. p. 862). Newsom attempted to show that Hughes did not talk about buying the gun until later that evening and that they came to him so they could use it in a robbery. R. pp.

863-64. Owens stated that they split the money with him because Kelsey owed him "a lot of money" because he does things for him to keep him out of trouble, such as when he breaks windows that his father will not pay for. R. p. 865.

Newsom also sought to impeach Owens by showing the difference between his testimony and statements. He pointed out that Kelsey did not have money, but in his statement he said he had a 50 dollar bill. R. p. 865. He also pointed out that nothing in his statement said that he got part of the money. R. pp. 868-69. Owens denied that Hughes was too drunk to know what he was doing when he shot the gun through the car window. R. p. 870. Upon questioning, Owens denied he was drunk when he took the money. R. p. 871.

The Applicant criticizes counsel Newsom because he failed to point out the fact that the accessory before the fact charge would carry a life sentence to reveal the quality of the plea bargain, which exposed him only to a potential punishment of ten (10) years.[17] § 16-1-40 (punishment for accessory before the fact shall be punished as principals). State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980) (misprision of felony is a common law offense); § 17-25-20 (ten (10) year punishment maximum for felonies when not specifically provided for); § 16-1-110 (classification for common law felonies not assigned). Here, the plea bargain involving the dropping of the other charges was revealed to the jury as well as the new exposure in the mind of witnesses of fifteen (15) years (although legally it was ten). Defense counsel sought to impeach the witness by the fact that his version of providing the gun and receiving benefits of the robbery, yet claiming he was unaware that it would occur was not credible, that Hughes had to be more intoxicated than he claimed, that his

[17] During the PCR hearing, counsel Newsom testified that he did not recall why he did not bring out the penalty for accessory. PCR Tr. pp. 356-59.

testimony varied from his prior statement and suggested that his testimony was a new product of the plea bargain.

The failure to use more impeaching evidence has been rejected as ineffectiveness both under the performance prong of Strickland; U.S. v. Michaud, 925 F.2d 37, 43 (1st Cir. 1991), and the prejudice prong; Russell v. Collins, 944 F.2d 202, 206 (5th Cir. 1996). Generally, impeachment tactics have been held to be matters of trial strategy. Gustave v. U.S., 627 F.2d 901, 906 (9th Cir. 1980). If the failure to impeach would have little effect on the overall trial, there is no ineffectiveness because Strickland prejudice would not exist if it did not undermine confidence in the outcome. Foster v. Delo, 39 F.3d 873, 880 (8th Cir. 1994); Bergman v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (impeachment on collateral matter could not have changed result).

Here, this Court finds that counsel was not deficient in failing to point out the comparative punishments between his charges and the plea bargain. The jury was aware that the comparative potential difference between a death sentence that Hughes was facing and the fifteen (15) [or actually ten] year sentence that Owens was facing where Owens had supplied the weapon prior to the murder and shared in the proceeds after the murder. His familial connection to Kelsey Pearce was also exploited by Newsom revealing that he frequently had to come to his aid to "get him out of trouble." R. p. 864. Additionally, counsel was aware that they had already conceded guilt in the opening statement and that Hughes' statement that revealed he had participated in the robbery and shot Hoffman was admitted. Even if this Court were to find that counsel was required under the Sixth Amendment to also point out to the jury the punishment for accessory before the fact to murder, prejudice has not been shown. The Applicant has failed to show that there was a reasonable probability that had counsel advised the jury of this penalty, that the result of either guilt or penalty

would have been different. This was not a complete failure to impeach a witness at all; rather, it was a failure to provide the jury with additional evidence that could be used for that purpose. The allegation must be denied.

b.) **Kelly Hoffman.**

In this assertion, Hughes now claims Hoffman should have been impeached in a different manner than counsel Newsom impeached her during the trial. Counsel Newsom testified at the PCR hearing that he made a "conscious decision" not to go after Hoffman. PCR Tr. p. 332. He stated that this was based on the fact that Herman had shot her and opined that it would have been "disastrous." PCR Tr. p. 333. Counsel recognized that Hoffman had given a statement after the shooting while she was under the influence of medication. PCR Tr. p. 334. He noted that she gave a later taped statement that was consistent with Hughes' theory that she may not have seen Kelsey come in after she was shot. PCR Tr. p. 335. At the trial, Hoffman testified that she was certain that Hughes fired all the shots. PCR Tr. p. 336. In the PCR, it was pointed out that her later testimony in State v. Pearce was that she did not know if Pearce was in the casino or not. PCR Tr. pp. 338-39. Newsom admitted that he had received information that Officer Danny Kirkland heard Hoffman state on the night she was shot that she was shot by a tall black man and then on another occasion that she was shot by a short black man and then stated that there were "two." PCR Tr. p. 340. Newsom did not recall why he did not attempt to bring out this statement. PCR Tr. pp. 340-43.

Counsel Newsom declared that his strategy was to avoid going after her when he had admitted Hughes' involvement because it might alienate the jury. PCR Tr. pp. 343-44. He admitted that there were a number of inconsistencies in the details. PCR Tr. p. 344.

Further, counsel was aware of some information that Hoffman had been with Pearce and Gilmore some months prior and Hughes had seen them. PCR Tr. pp. 345-46. Counsel stated he could not put Hughes on the stand and did not know if Hoffman would admit it. PCR Tr. p. 346. Further, counsel, listening to the tape of the earlier statement, concluded that she was under the influence of pain medication when she spoke with Detective Rhudy. PCR Tr. p. 347. Counsel stated that at trial, he attempted to impeach her with portions of the statement. PCR Tr. p. 348.

On cross-examination, Newsom reiterated that he chose at trial not to be rough on her. He noted that he was rougher at the pretrial hearing when he found her to be feisty; but at trial she appeared to be more reserved and prepared as a witness. PCR Tr. p. 433.

Counsel stated that he did seek to impeach her on the prior statement given to Officer Kirkland about the "two" person version. PCR Tr. p. 434. R. pp. 1180-81. Counsel stated that he did have some background information that Hoffman had been romantically involved with Kelsey Pearce or one of his cousins. PCR Tr. p. 435. He noted that Hoffman stated that she went to school with Pearce, but really did not know him. PCR Tr. p. 437, R. p. 1181, ll. 9-12.

During the state PCR hearing, Kelly Hoffman Driggers testified that she had a boyfriend/girlfriend relationship with Ken Presley. However, she stated Pearce was a casual acquaintance. PCR Tr. p. 646. Although Pearce had called her once, she denied that she ever went places with him and found ridiculous his request at one time that he wanted to be her boyfriend. PCR Tr. p. 647.

She specifically stated that she lived with Presley at the time of the crime. Further, she denied that she tried to limit the testimony about Pearce's involvement in the crime based upon any alleged relationship. PCR Tr. p. 648. She specifically denied the existence of any sexual

relationship. PCR Tr. pp. 649-50. She admitted that she would have recognized him had he come into the Blue Diamond. PCR Tr. p. 650. She stated that she did not see Pearce in the Blue Diamond on that day. PCR Tr. pp. 659-60.

As with Owens, this Court finds that trial counsel was not deficient in his cross-examination of Hoffman. Newsom had previously examined Hoffman during a pretrial hearing. Prior to the trial, the strategy to concede guilt was made and a decision to go softer on her to avoid alienating the jury was made. However, as counsel noted, he did not abandon impeaching Hoffman; he only chose not to be aggressive in his style.

Hoffman testified that Hughes was the only one she saw inside the casino that night. R. pp. 1168-69. She testified that when she gave a taped statement that she was under medication and did not recall what she said. R. pp. 1169-70. On cross-examination, Newsom immediately attempted to impeach Hoffman with the prior statement she made to Officer Kirkland that there were two people, but she clarified that she meant her and Ken, not two perpetrators. R. p. 1180. She did not recall the descriptions she gave of the two men. R. p. 1181. She further stated that she went to school with Pearce, but did not really know him. R. p. 1181.

This Court finds that Hughes has failed to show either deficient performance or prejudice. Counsel strategically chose to point out the fact that different versions of the event was given by Hoffman on tape (that was played), to Officer Kirkland, and in court. His style in doing so is not challengeable as deficient performance. Whitehead, supra. Further, the Applicant has failed to prove the existence of any relationship between Hoffman and Pearce that would suggest she would only put blame on Hughes rather than Pearce. Counsel reasonably sought to challenge the State's

version of the facts, while acknowledging his own guilt. He cannot be deemed deficient on the basis of this record.

Assuming arguendo that he was required to take these additional steps, this Court finds that Sixth Amendment prejudice has not been shown. Hughes admitted shooting the victim. Hoffman, injured seriously at the time of the event and subsequently medicated, gave inconsistent statements. The jury had this information about her credibility and convicted him. Confidence in the outcome is not undermined by counsel's actions. See, Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (case where IAC found on a failure to challenge victim's statement).

c.) **Miscellaneous Matters**.

In this argument, he also contends counsel failed to present other testimony in the guilt phase, particularly Amy Presley, Ricardo Duane Gilmore, and Danny Kirkland.

The Applicant contends that the victim's sister, Amy Presley, should have been called to testify that she had seen Pearce at Hardee's a few days before the crime and that he asked her when she would be working again at the casino. PCR Tr. pp. 513-16. Apparently, he contends that this would suggest Pearce's advance planning for the robbery. Counsel Newsom testified that he was aware of the information from Ms. Hughes, but did not attempt to call Ms. Presley on the issue and hoped to inquire of Pearce about it if he testified. PCR Tr. pp. 405-07. Respondents submit that there was no Sixth Amendment violation. The jury was aware that Pearce was involved in the planning of the robbery from the testimony of Owens and Hughes' own statement. Prejudice under Strickland has not been shown even if counsel is found to have been required to put up this collateral evidence that speculates that the Pearce comment may have been part of a plan to rob.

Similarly, the failure to call Duane Gilmore about the alleged fact that Pearce had bragged about the shooting and considered fleeing was not a Sixth Amendment violation. Although counsel could not recall why they did not call him, he noted that this was inconsistent with their theory because Pearce did not shoot Kelly; Hughes did. PCR Tr. pp. 362-63. Respondents submit that the admission of involvement by Pearce in the robbery was not contested by the State at trial. As Newsom stated, "I think we got that out" that Pearce was more culpable. PCR Tr. p. 362. Even if counsel could have found and presented Gilmore at trial, under Jones v. State, supra, prejudice has not been proven.

Finally, the decision not to recall Officer Danny Kirkland about Hoffman's statement at the crime scene does not rise to ineffective assistance. As stated above, the matter was presented in Hoffman's cross-examination which she clarified or did not recall saying. The failure to further present inconsistent statements did not undermine confidence in the outcome. The allegation must be dismissed.

d. Summary of Findings and Conclusions

This Court is constrained to deny relief on allegation 9(e). Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show a reasonable probability that but for the errors on the part of trial counsel, the jury would have found reasonable doubt as to the guilt of Applicant. Failure to use more impeaching evidence has been rejected as ineffectiveness under the performance and prejudice prongs of *Strickland*. U.S. v. Michaud, 925 F.2d 37 (1st Cir. 1991), Russell v. Collins, 944 F.2d 202 (5th Cir. 1996), Gustave v.

U.S., 627 F.2d 901 (9th Cir. 1980). If failure to impeach would have little or no effect on the trial overall, the prejudice prong is not satisfied. Foster v. Delo, 39 F.3d 873 (8th Cir. 1994), Bergman v. McCaughtry, 65 F.3d 1372 (7th Cir. 1995). This Court finds:

1. Counsel attempted to impeach Henry Daniel Owens by questioning him about his plea bargain and inconsistencies in statements regarding his knowledge of the robbery.

2. Counsel is not deficient for failing to point out the comparative punishments between his charge and the plea bargain.

3. Applicant failed to show a reasonable probability that the outcome would have been different had the jury known of difference in penalties; this was not a complete failure to impeach, but a failure to provide additional information to the jury that could be used for that purpose.

4. With respect to Kelly Hoffman, counsel testified at the PCR hearing that he made the conscious decision not to "go after Hoffman" because he did not want to alienate the jury. However, he still attempted to impeach her with information that she and Kelsey (or 1 of his cousins) had a romantic relationship; Hoffman stated at trial that he was an acquaintance but denied any sexual relationship.

5. With respect to the inconsistent statements regarding 1 shooter or 2, Hoffman clarified under cross by counsel that she meant her and Ken Presley and not 2 shooters. Furthermore, Hoffman was seriously injured and medicated when she gave the inconsistent statement.

6. Counsel explained that he did not want Applicant to testify on the stand and did not know if Hoffman would admit that she had been with Kelsey months prior and that Applicant saw them.

7. Counsel was not ineffective for failing to call Amy Presley, the victim's sister, to testify that she saw Pearce at Hardees a few days before the crime and that Pearce asked her when she would be working at the casino. Counsel testified that he was aware of this information, but did not attempt to call Ms. Presley on the issue because he hoped to question Pearce about it.

8. Applicant's 6th Amendment constitutional rights were not violated because the jury knew that Pearce was involved in planning the crime based on the testimony from Owens and Applicant's statements.

9. Counsel not ineffective for failing to call Ricardo Gilmore who could testify that Pearce bragged about the shooting and had plans to flee.

10. Counsel could not remember why he did not call him, but said questioning Gilmore on the matter was inconsistent with his theory because

    a. Applicant shot Hoffman, not Pearce;
    b. Admission of involvement by Pearce in the robbery was not contested by the State at the trial;
    c. Counsel thought he had "got that out" at trial as to Pearce's greater culpability.

11. Applicant failed to show that confidence in outcome of the trial was undermined by counsel's actions and therefore failed to show prejudice.

The claim is denied.

Issues Concerning Penalty Phase Ineffective Assistance - Ground 9(f) - Applicant's Memorandum, pp. 52-85.

9(f) Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

10(f) Applicant's trial counsel failed to adequately develop and present expert and lay testimony in mitigation and in rebuttal to the aggravation evidence presented by the State. In addition, counsel failed to object to the State's introduction of inadmissible evidence, failed to object to prejudicial portions of the State's closing argument and to certain aggravating circumstances submitted by the State, and failed to ensure that the jury was properly charged.

A.) Introduction.

At his trial in 1995, counsel Newsom presented a thorough history concerning the defendant's cooperation after his arrest, the defendant's family and social background through school officials and his grandmother, evidence of his mental background from two expert forensic

psychiatrists, and concluded with evidence from a social worker concerning a psycho-social assessment that summarized Herman Hughes' character and the influences that led him to the tragedy he was involved in.[18] In Jones v. State, supra, the South Carolina Supreme Court was faced with similar arguments that evidence about mental impairments was not adequately present in the penalty phase. The Court found that even if counsel failed to present additional evidence at the sentencing hearing, he was not prejudiced under Strickland. The Court found that extensive evidence had been presented about his family and social background and bizarre behavior through his teacher, mother, aunts and uncle, that he suffered under mental retardation and had brain damage, that the jury was presented with several mitigating factors through which to consider his mental condition, and they were also presented with overwhelming evidence of his guilt and the callous manner he committed the crime. Applying the prejudice prong of Strickland, the Jones court concluded that he had failed in his burden of proof of showing that "there is a reasonable probability that absent the errors, the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death." See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (counsel in capital cases did not render ineffective assistance by alleged failure to present evidence of mild retardation and other witnesses concerning his character where, under Strickland, the evidence would not have affected the outcome).

For the reasons set forth in each subsection, this Court finds and concludes Hughes has failed in his burden of showing a Sixth Amendment violation under the Strickland test.

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[18] The Court has previously summarized the evidence in mitigation in this Order at pages 10-14. That portion is incorporated herein by reference.

B.) **Expert Testimony Concerning Hughes' Developmental, Mental, and Social Impairments.**

The Applicant contends that counsel Newsom was deficient because he failed to retain experts with expertise who could explain child development and mental retardation, failed to retain psychology experts who could retest and assess the adequacy of the prior testing. He claims that had this been done, the results of the proceeding would have been different. This Court finds that Hughes has failed in his burden of proof.

The 1995 jury, based upon defense counsel's presentation, knew many things about Herman Hughes. From his guidance counselor, it was learned that he had a low IQ, attended remedial classes, was held back, then became disrespectful and hostile towards staff with poor performance leading up to expulsion after a history of infractions. R. pp. 1431-40. His sixth grade teacher found that he had difficulty in subjects and was not surprised that he was a slow learner. R. p. 1444.

His grandmother, who raised him, described his learning problems. R. p. 1451. She further testified that she often went to school for counseling and described the fact that there were more problems when he was retained in the sixth grade R. p. 1458.

Dr. Harold Morgan, a forensic psychiatrist, described that his review of medical, school records and Ms. Boette's social history revealed that Hughes was "right on the borderline of retardation." R. p 1472. He further opined that there were observations of "attention deficit and hyperactivity disorder" (ADHD), noting class problems and behavior. Dr. Morgan described the downward drift after his grandfathers death and low mentality lead to a depression of his "not fitting in" and a need for acceptance led him to fall into the wrong crowd and more behavioral problems.

R. pp. 1477-78. He also opined that Hughes was most likely passive, but as a risk could become passive-aggressive. R. p. 1478.

Dr. John DeWitt, another forensic psychiatrist, testified similarly that he found "intellectual limitations" and indications of Attention Deficit Disorder with traits of passivity and dependence. R. p. 1511. He stated that these traits would lead to a person, in stressful situations, being influenced by a person with a more powerful personality to do things that they otherwise would not do. R. p. 1512. Further, he noted that alcohol made him more impulsive. R. p. 1513. He found that Hughes was a person who does not think through plans and was not very sophisticated. R. p. 1514. Dr. DeWitt opined that Hughes "has the ability to conform his behavior" and did not have an irresistible impulse to do something wrong." R. p. 1515. But, he opined that in certain circumstances he may act impulsively and act without thinking clearly about the consequences. R. p. 1515. Dr. DeWitt found that Hughes was slow, but did not meet the minimal criteria for mental retardation, but has limitations. R. p. 1521.

The jury also learned numerous things about Hughes from the psycho-social assessment of forensic social worker Annette Boette. R. pp. 1525-26. Ms. Boette's conclusions were:

> (I) The first conclusion is that Herman Junior was born into a family with very little formal schooling and very few skills and being able to meet the needs of a child with the limitations that he had.
>
> (II) The second one is that Herman Junior's family, and particularly the two mothers, bickered over the adoption and never allowed him to resolve the trauma of this kind of open adoption.
>
> (III) Number three, Herman Junior has borderline intellectual ability.
>
> (IV) Number four, there was a failure on the part of the education system to intervene and meet his needs.

(V) Five, the context of the crime shows a rapidly deteriorating situation. He had been expelled from school again. His grandfather, adopted father, had a stroke and required nursing care.

(VI) ..., the sixth one is really a composite of all of these. Because of his many intellectual impairments, Herman Junior was easily influenced by others and fell prey to those who did not have his best interest at heart. Herman Junior was a child who went along with others for approval and a sense of belonging, and he was unable to judge who was safe and who was not.

R. pp. 1544-45. Ms. Boette presented factual support for each of her conclusions within her testimony. R. pp. 1537-49.

With the defense presentation, Judge Cottingham charged the jury to consider the following statutory mitigating circumstances:

1. Defendant has no significant history of prior criminal conviction involving the use of violence against another person;

2. Murder was committed while defendant was under the influence of mental or emotional disturbances;

3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;

4. The age or mentality of the defendant at the time of the crime;

5. The defendant was below the age of eighteen at the time of the crime;

6. The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly sub-average general intellectual functioning existing with deficits in adaptive behavior and manifested during the developmental period;

7. The defendant acted under duress or under the domination of another person; and

8. Furthermore, you may consider any other mitigating circumstances which are supported by the evidence in this case.

R. p. 1596, l. 22 - p. 1597, l. 21; p. 1698, l. 15 - p. 1700, l. 12.

1.) **Child Development Specialist (pp. 55-61).**

Hughes initially claims that he should have retained an expert, like Dr. Marty Beyer, to testify about "child development." (Her testimony is summarized earlier in this Order, pp. 49-52, which is incorporated herein by reference.) Essentially, she testified that sixteen year-olds are not able to function as adults due to less developed cognitive skills and that Hughes, due to his intellectual limitations, trauma, and alcohol abuse, was even less mature than a normal sixteen year-old. PCR Tr. pp. 9-19. She testified that he had simplistic ways of thinking, lacked planning, and took risks without considering the consequences. PCR Tr. pp. 18-19. She further noted that due to his lack of cognitive abilities, these features were exacerbated by his use of alcohol at the time. PCR Tr. pp. 21-22.

At the PCR hearing, defense counsel Newsom testified that he did not consider retaining an expert on "child development" to testify in mitigation. PCR Tr. p. 381. He testified that he assumed that the psychiatrist would be capable of handling the issue. Further, counsel stated that "I'm not even aware a person like that existed. . . ." PCR Tr. p. 381. Newsom testified that he had consulted with the Center for Capital Litigation for advice and that a psychologist was not suggested either. PCR Tr. p. 382.

The Applicant contends that counsel should have retained such an expert or at least questioned his own psychiatric experts on "the effect of Hughes' youth." It cannot be challenged, with any credibility, that Hughes' youth was a central focus of the 1995 mitigation presentation and the argument of defense counsel. Counsel Newsom stated that one of the principal reasons in his strategy for a life sentence was his youth. PCR Tr. pp. 375, 380.

Counsel did present similar testimony through his expert in social work. Ms. Boette testified about the impact his youth had on his intellectual impairments. R. pp. 1548-49. She stated that "his mental age has not developed to the stage where he is a functioning adult, where he can make adult decisions without relying upon family." R. p. 1549, ll. 5-8. Further, she testified, "because of his many intellectual impairments, Herman was easily influenced by others and fell prey to those who did not have his best interest at heart. Herman was a child who went along with others for approval and sense of belonging and he was unable to judge who was safe and who was not." R. p. 1545. His grandmother and teachers spoke of his youth. The psychiatrists spoke of his impulsivity and inability to project for consequences of his acts. The trial court instructed the jury to consider the fact of his age and mentality, as well as his age below eighteen, as mitigating factors in assessing punishment.

Respondents submit that the evidence presented by Dr. Beyer was a common-sense understanding of the process of development reasonably known and understood by reasonable jurors already. The special influences that Hughes possessed with his limited intelligence and behavioral disorders were presented to the jury. Like the situation in Jones, the alleged failure of counsel Newsom to locate this type of specialist does not undermine confidence in the outcome of the

verdict. The jury was aware of Hughes' youthfulness and his impulsivity from their experts. He has failed to show "prejudice" under Strickland, assuming deficient performance.[19]

This Court finds that counsel have an obligation to conduct an investigation to allow a determination of what experts to consult. Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir. 1991). However, this Court also finds that counsel conducted a reasonable investigation. The essence of the testimony of Dr. Beyer merely reiterates what Dr. Morgan and Dr. DeWitt previously testified about Hughes' mental development specifically and corroborated their opinions and the opinion of the social worker generally, as well as the impressions of Lucille Hughes. The omission of this testimony specifically at the penalty phase did not amount to ineffective assistance of counsel. See Devier v. Zant, 3 F.3d 1445, 1453 n. 18 (11th Cir. 1993).

2.) Psychological Testing and Mental Retardation. (pp. 61-65).

The Applicant contends that counsel was ineffective because he should have retained an expert in "mental retardation" and failed to have his own experts explain the consequences of Hughes' intellectual functioning. This Court finds on the basis of this record, he has failed to show either deficient performance or prejudice under Strickland, supra.

To support his claims, the Applicant relies upon the testimony of Dr. Denis Keyes, an expert in mental retardation. In his testimony, he questioned the methods used to determine whether the

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[19] This Court also finds that Hughes failed in his burden to show that counsel was deficient. Newsom stated that he consulted with other counsel to locate witnesses. No one advised him to seek out a "child development" specialist, including his own retained experts in psychiatry and social work. He acted as reasonable counsel. Deficient performance was not proven by not presenting a "child development" expert generally and specifically, Dr. Marty Beyer from Washington, D.C..

Applicant did or did not suffer under mental retardation because the state experts appeared to limit themselves to the IQ score of 70 as the cut-off of the existence of mental retardation. PCR Tr. pp. 490-91. He stated that an accurate assessment must include a review of the individual's adaptive skills. PCR Tr. p. 491, 497. However, Dr. Keyes did not render an opinion that Hughes was mentally retarded. PCR Tr. p. 499, 509.

Counsel Newsom testified that he did not retain another expert in mental retardation because it was understanding from his own experts that Hughes would not qualify under most psychologists because his IQ was not at 70. PCR Tr. p. 378. Counsel sought instead to capitalize on lower test data they found, particularly the Schlossen test.

The record reveals the jury was well aware of Hughes' lower level of intellectual function prior to the sentence decision. His guidance counselor testified that he had been held back two years in school, but tried hard in class. R. pp. 1430-31. Further, he stated Hughes was in a "remedial" class in sixth grade and had been in a learning disabled class. R. pp. 1432-33, 1438. His sixth grade teacher, Kathy Link, found Hughes to have a difficult time with most subjects and recommended the Schlosson test to evaluate him. R. pp. 1442-43. It was determined that Hughes was a "slow learner."

Dr. Harold Morgan testified that he reviewed numerous records, as well as evaluated Hughes. R. pp. 1465-70. He assessed Hughes in the borderline range for mental retardation according to test data. R. pp. 1472-73. He found as a conclusion: "mental retardation or borderline mental ability." R. p. 1476, ll. 20-21. He further pointed out his test scores that suggested that 99 out of 100 students would perform better in class. R. p. 1481. On cross-examination, Dr. Morgan testified about his review of the test data on intellectual functioning and that the test data fell generally around the

borderline area. R. p. 1495. Dr. Morgan further stated that his opinion that Hughes suffered mental retardation was not based upon his IQ scores, but his performance was a pretty good indication of retardation, despite the test scores. R. p. 1504. He found that he could only plan "simple things" and thought "simply and concretely." R. p. 1504, ll. 14-24.

Dr. DeWitt testified that "he definitely has intellectual limitations." R. p. 1511, ll. 17-18. Dr. DeWitt testified that the testing data showed Hughes was above 70, but in the low 70's. R. pp. 1519-20. He found that he was "slow," did not meet the numerical IQ, but has limitations." R. p. 1521, ll. 12-16.

In reply to Dr. Morgan's testimony, Dr. Richard Frierson testified that in his opinion Hughes did not suffer from mental retardation. R. pp. 1569-70. He based his opinion not only on test data, but upon his history and the clinical interview. R. p. 1570. Dr. Lester Finuf, an expert in mental retardation, testified that to be mentally retarded, "they have to have an IQ of 70 or less, both in . . . all phases of intelligence, as well as adaptive behavior." R. p. 1583. Dr. Finuf testified that he was right at the borderline. R. p. 1592, ll. 12-14.

This Court finds that it must be clear that the Petitioner has the burden of proof of showing both deficient performance and prejudice under Strickland and it is a burden that he has not met in this case. The testimony presented at trial by the defense sufficiently suggested the existence of mental retardation, although disputed by the prosecution witnesses, to allow a statutory mitigating circumstance that correctly defined mental retardation to be given as well as instructions on mentality, "mental or emotional disturbances," and "capacity to appreciate the criminality of his conduct."

The Court notes that although Hughes' current mental retardation expert questioned the method used to reach the opinions, he has wholly failed to show that the earlier opinions were wrong.

During the trial, it is evident that the performance prong of the mental retardation definition was the focus of Dr. Morgan's opinion, as well as the focus of counsel Newsom's cross-examination of Dr. Frierson and Dr. Finuf. Simply put, he has failed to show that counsel was deficient in his approach at trial.

The Court finds that the failure to prove Strickland prejudice is also evident for the reasons set forth above concerning the juror's knowledge of Hughes' low intellectual function. When the experts revealed that Hughes had greater impulsivity and thought in simple, concrete terms, this addressed the same issue as a more general statement about hypothetical people with mental retardation. Hughes' lower intellectual functioning as impacting on his actual conduct was presented in the conclusions of the social worker, as well as the comments of his psychiatric experts. Although the manner it was presented could have been different, this does not rise to the level of a Sixth Amendment violation. Confidence in the verdict has not been undermined under the Strickland test.

3.) **Brain Damage (pp. 65-68).**

The Applicant contends that counsel was ineffective in not locating an expert who would testify that Hughes suffered from brain damage. This Court finds that he failed in his burden of proof of showing a Sixth Amendment violation.

The Applicant in this portion relies upon the testimony of Dr. George Woods, an expert in neuropsychiatry, who testified that he had evaluated Hughes and found the existence of a form of brain damage. Particularly, he opined that significant neurological impairments, along with an

extremely low IQ, are consistent with someone with developmental disabilities. PCR Tr. p. 81. He opined that Hughes suffered from a "mental disorder not otherwise specified," under the DSM IV. PCR Tr. p. 82. He considered that his full diagnosis would be on Axis I "mental disorder not otherwise specified - brain impairment; on Axis 2 developmental disability; on Axis 3, significant neurological impairments, neurosyphilis; Axis 4 - "family issues - disruption and chaos, school problems, substance abuse; and on Axis 5 having significant control and adaption problems. PCR Tr. pp. 86-87.

Dr. Woods opined that neurosyphilis (congenital) was a likely cause of the brain damage. PCR Tr. pp. 86-87, 108-11. Relying upon some test data performed by a psychologist, Dr. James Evans, he found that there may be damage to the frontal parietal, and temporal lobes of the brain. PCR Tr. p. 92. He testified that because frontal lobes are generally thought to be an inhibitor, it could cause a person to have trouble stopping behavior and have difficulty making plans. PCR Tr. pp. 102-03. Dr. Woods opined that this could impact even more on an adolescent since the brain would not be fully developed at that point. PCR Tr. pp. 90-91, 125-26. Additionally, he opined that alcohol, which disinhibits and impairs judgment, could also have an added effect. PCR Tr. pp. 125-26. Dr. Woods, however, conceded that this would not have caused Hughes to act "under an irresistible impulse." PCR Tr. pp. 149-51.[20] See State v. Wilson, 306 S.C. 498, 413 S.E.2d 19

[20] Dr. Woods stated at one point in his testimony that without the neurological impairments that Mr. Hughes would be able to control his behavior more effectively. PCR Tr. pp. 129, 151.

(1992) (South Carolina Supreme Court equates "irresistible impulse" test with statutory definition of "guilty but mentally ill").[21]

On cross-examination, however, Dr. Woods acknowledged that the prior neurological testing did not reveal the same impairment information that Dr. Woods suggests exists. He testified that the neurological testing at Hall Institute did not find the clonus or hyperreflexivity. PCR Tr. pp. 134-35. He admitted that they did not show the same results as Dr. Kraugh's recent report. PCR

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[21] At trial, the Applicant's expert, Dr. Harold Morgan testified that he did not meet the irresistible impulse test. R. 1501. Similarly, Dr. DeWitt testified that he knew right from wrong and had the ability to conform his behavior. R. p. 1515, 1520-21. Competent counsel is under no duty to shop for experts until he finds one to render a different opinion and can rely on the reports he received. It has been held that the Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate. See Harris v. Vasquez, 949 F.2d 1497, 1518 (9th Cir. 1990) ; Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir.1990). Furthermore, it would undermine the finality of state criminal convictions, which would constantly be subject to psychiatric reappraisal years after the trial had ended. Harris, 949 F.2d at 1517-18; Silagy, 905 F.2d at 1013.

The Fourth Circuit has consistently has "rejected the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness, rather than ineffective assistance of counsel." Pruett v. Thompson, 996 F.2d 1560, 1573 n. 12 (4th Cir.1993); see also Poyner v. Murray, 964 F.2d 1404, 1418 (4th Cir.1992); Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir.1989) (per curiam). For example, the defendant in Waye claimed that his psychiatrist had not performed adequately because he had failed to emphasize Waye's diminished capacity in his trial testimony. The Court rejected this claim and observed:

it will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another and to procure an affidavit to that effect from the second prospective witness. To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require.

884 F.2d at 767. Furthermore, the court examiners both concluded in 1995 that Hughes has the ability to conform and thereby did not meet the definition of GBMI. R. 1573, 1587. However, the Applicant in this proceeding is not claiming that this testimony should have been presented in the guilt phase of the trial, but is asserting it as a "penalty phase" issue. See 9(e) , 9(f).

Tr. pp. 133-36. He noted the report from hall stated "no abnormal neurological signs." PCR Tr. p. 138.

Further, he admitted that Dr. Kraugh's recent report stated "we would need to be able to demonstrate records precedent to 1995 revealing positive testing for syphilis before entertaining a firm diagnosis of congenital syphilis." PCR Tr. p. 139. Dr. Woods acknowledged that he had no information that prior to Hughes' Job Corps testing that he was ever found to have syphilis and was not aware of any records that supported the conclusion. PCR Tr. pp. 140-43. Further, he admitted that the later test (RPR) done at the Hall Institute was of a consistent level. PCR Tr. p. 142.

In Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995), the Court found counsel was not ineffective in failing to develop expert testimony about frontal lobe damage. Similarly, in Williams v. Calderon, 41 F. Supp. 1043 (D. C. Cal. 1998), the District Court rejected a showing, based upon similar testimony by Dr. Woods, that trial counsel's performance was neither deficient nor prejudicial under Strickland. See also Johnson v. Moore, 164 F.3d 624, 1998 Westlaw 708691 (4th Cir. 1998) (unpublished) (no IAC in failing to investigate or present brain damage evidence).

Here, as Dr. Woods admits, the evidence from Hall Institute did not reveal any neurological impairments. Similarly, neither of his own experts advised counsel of any need for further neurological testing. Simply put, counsel cannot be deemed ineffective for failing to pursue experts that his investigation and consultation did not suggest were needed. The only suggestion of a potential concern was the syphilis diagnosis. However, Dr. Frierson testified at trial that the exposure "did not cause any mental impairment." R. p. 1568. Dr. Frierson further testified that there was no evidence of neurological illnesses. R. pp. 1567-68. Counsel stated that he was aware of the syphilis finding and those records were provided to his experts, but he had no knowledge that his

mother had syphilis. . To the contrary, the information that they developed was that it was a normal pregnancy and birth. PCR Tr. pp. 384-85. Counsel was not ineffective in failing to present this information based on his reasonable investigation.

Further, this Court finds that "prejudice" has not been shown. Although the "source" of his problems was never asserted as "brain damage" at trial, plainly the jury was advised of Hughes' lack of judgment, simple thinking, inability to plan, tendency to act impulsively, and the additional effect of alcohol on his actions. With this information and the instructions by the Court, the additional information suggested by Dr. Woods (but disputed by the State's evidence at trial), would not have undermined the result under the Strickland test. His allegation must be dismissed.

C.) School's Failure to Provide Special Education and Remediation (pp. 68-69).

The Applicant contends that counsel should have presented further evidence how the school system failed to provide appropriate educational support for the needs of Hughes. This Court finds that he has failed to prove either deficient performance or prejudice under the Strickland test..

Hughes contends that testimony should have been presented that the system failed to comply with federal law and evaluated and placed Hughes in special education. PCR Tr. p. 510. He further asserts that testimony that there was a complete misunderstanding of the federally funded special education programs and that Hughes' testing indicated a reading and learning disability that should have been treated. PCR Tr. p. 27.

The record at trial included a plethora of information about Hughes' inability to succeed in school, various testing, as well as concerns by teachers of Hughes' special needs. It goes with saying that the school system did not succeed with Herman Hughes and vice versa. During the mitigation

testimony of social worker Boette, she opined that there was a failure on the part of the education system to intervene and meet his needs. R. p. 1545, ll. 3-4. This Court finds that this general information was presented to the jury.

Although specific testimony that suggests that some federal law had not been complied with at one time was not presented, the jury had to be aware of his educational deficiencies. This Court finds that counsel was not deficient in investigating the school system's federal law compliance and instead relying upon the teachers who actually assessed Hughes to testify in the matter. The presentation met the requirements of the Sixth Amendment.

D.) Examination of State Witnesses and Failure to Object to the Admission of School Disciplinary Records (pp. 69-74).

In this issue, the Applicant contends that trial counsel should have objected to the State's penalty phase introduction of Hughes' school disciplinary records. He contends that he had not been provided with adequate written notice under § 16-3-20(B). [This same issue is set forth in 9(r).] The Court concludes that the materials were properly admitted under state law.

§ 16-3-30(B) provides that "only such evidence in aggravation as the state has informed the defendant in writing before the trial is admissible." On October 31, 1994, Solicitor Bailey provided written notice, including the following:

> The State will present evidence as to the defendant's character, mentality, background, prior adult and juvenile acts of violence, adult and juvenile crimes and other unlawful conduct, prior adult and juvenile violations of laws, rules, regulations, and/or ordinances, prior criminal adult and juvenile records and the nature of said crimes, propensity to commit or attempt to commit acts of violence or bodily harm as an adult and a juvenile, propensity for violence and unlawful conduct as an adult and a juvenile, disregard for peace and good order as an adult and a juvenile, and other similar characteristics of the defendant, as an adult and a juvenile, by the

> testimony of victims, witnesses, police officers, statements by the defendant and other relevant testimony, photographs and exhibits.

R. p. 1904 (emphasis added). Counsel Newsom testified that at the time of the trial he was aware of Solicitor Bailey's intent and was not surprised by its introduction. PCR Tr. pp. 449-50. Further, counsel Newsom acknowledged that he also, even if the State had not put in the evidence, that he had to put in "some of that same stuff to show here was a child who had been passed by the system." PCR Tr. p. 452.

The record reveals that the school disciplinary records were presented by the prosecution, without objection. R. pp. 1325-26. In the defense presentation in mitigation, counsel Newsom relied upon Exhibit 44 (R. p. 1436), and the prosecution examined the defense school witnesses concerning the infractions concerning their own character testimony. R. pp. 1439-41. Similarly, his experts each relied upon the school records in completing their assessments of Hughes. R. p. 1470, 1511, 1535. Dr. Morgan specifically pointed to the records to support his assessment on ADHD. R. p. 1496, ll. 9-11. Social worker Annette Boette, however, specifically described the fact that she had reviewed the "infractions" from the school records and reported on the "significant number of" infractions and described those infractions. R. pp. 1544-45. Further, on cross-examination, Ms. Boette described her review of the school records using some blow-ups of the records. R. pp. 1553-58.

In State v. Riddle, 291 S.C. 232, 237, 353 S.E.2d 138, 141 (1987), the Court found that evidence in aggravation was not admissible unless the defense had a fair and complete opportunity to respond to the records and evidence. This Court concludes that the statutory mandate was satisfied. First, the written notice provided adequate notice of evidence of a violation of "rules" and

"disregard for peace and good order." R. p. 1904. Second, counsel Newsom was not surprised by the introduction of the evidence; in fact, he expected it. Correctly, in the penalty phase he saw no valid objection to make. This Court finds that he was acting as a reasonably competent counsel because there was no successful objection he could make.

Further, the record reveals that similar information about the school infraction was going to be part of their mitigation. Social worker Boette described the school infractions. Necessarily, these matters, independent of the earlier admission, were proper for cross-examination and later comment by the prosecutor in his argument under South Carolina law.

This Court must find counsel was not deficient in failing to object. Further, "prejudice," even if an objection was valid, cannot be shown where the defense intended to and presented evidence of the infractions. He has failed in his burden under Strickland, supra.

E.) Victim Impact Evidence (pp.74-78).

The Applicant contends that the defense erred in failing to seek to object or limit the presentation of victim impact evidence at the penalty phase of his trial. This Court finds the victim impact evidence was admissible and counsel did not perform unreasonably in violation of the Sixth Amendment.

Recently, in State v Hughey, 339 S.C.439, 529 S.E.2d 721 (S.C. S. Ct., March 27, 2000), the South Carolina Supreme Court rejected a similar challenge to the introduction of victim impact evidence. The Court held that victim impact evidence is admissible in the sentencing phase to demonstrate the "uniqueness" of the victim and the specific harm committed by the defendant. State v. Rocheville, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1993). In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 257, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that victim impact

evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. See also State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991).

In Hughey, the State called four members of Harris's family to describe their personal relationship with Harris and the unique impact her death had on their lives. The solicitor asked each family member one open-ended question that elicited a long, narrative response describing their relationship with the victim. Although given in narrative form, the testimony was routine victim impact testimony that did not evoke any prejudicial comments. The Court found that the witnesses' testimony was relevant and proper because it portrayed Harris as an unique individual and it demonstrated the specific harm caused by Hughey's actions. The Court specifically stated that The family members' testimony in this case is similar to other victim impact testimony permitted by the Court. See State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (admitting testimony from victim's mother concerning the impact of her son's death); Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) (admitting testimony of victim's stepdaughter concerning the victim's standing in the community, the victim's grandchildren, and the impact the crime had on her); State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (admitting testimony of victim's parents who testified about their families' reliance on their son's dreams and aspirations).

This Court finds that the following testimony was consistent with the standard for admissible impact evidence under Hughey and not objectionable under the same test.

Gary Presley, the father of victim Kenneth Presley, testified about his family, his divorce, and the time he spent with his son. R. pp. 1374-75. He stated that after his divorce, his ex-wife retained custody of the children and moved from Michigan to South Carolina. He would speak with

his children by telephone a number of times and Kenneth spent a year with him in school in Michigan when he was 13. R. pp. 1374-75. He described his son as an average student and that he did normal things with him. R. p. 1375. He stayed with him again when he was 15. He stated they did a lot more things at that time such as ball games and go to work with him. Gary Presley was an electrician and his son showed an interest in it. R. pp. 1376-77. He described his son dropping out of school, then getting a GED and enlisting in the Navy for two (2) years. R. pp. 1377-78. Exhibit 49 a photograph of his boot camp graduation was introduced. After he joined the Navy, his father found that his son had matured, becoming very responsible, and outlined his goals in life to go to college. R. p. 1379. He also introduced a letter Kenneth left when he was 15 giving his father some advice and encouragement. R. pp. 1380-81. The last time he saw him alive was in December 1992 when he was helping his grandmother. R. p. 1381. He learned that Kenneth had died from his ex-wife and found the news has made him an angry person, and affected the way he looked at things. R. p. 1381-82. The hardest part of the loss is "the way that he died" and that he never had a chance to have a life and do the things he wanted to do. R. p. 1382.

James Presley, the victim's older brother, testified about his relationship with his brother which became closer as they got older. He stated he was in the process of getting to South Carolina when his brother was killed. He described the loss as hard to put into words, sending flowers to the grave, the birth of his daughter who cannot know Kenneth, but was named after him. He stated he felt anger and cheated wondering why it happened. R. pp. 1385-86.

Lynell Williamson, the victim's mother, testified that he had lived in Calhoun County since 1977 after the divorce. Kenneth was her youngest and was 4 years old and lived with her. She described him as "her sweetheart" who was initially picked on by his older sisters who eventually

started to look out for and after him is the close family. R. p. 1388. She said in high school, Kenneth would listened to music, work in the yard, ask to do things for her or others. Kenneth dropped out of school because he was bored. R. p. 1389. It was his dream to join the Navy and become a Navy seal. R. p. 1390. He worked to get himself into shape so he could be accepted. R. p. 1390. He signed up for a 2 year stint. She introduced various photographs including 1990 family picture for the church (R. p. 1391), a picture of their last Christmas together, photos of him in the Navy, and a picture with her before he went up to Michigan. R. pp. 1394-95. She also introduced letters he wrote to her when they were apart from 1984, 1991, and while he was in the navy. R. pp. 1395-1403. Also a letter of appreciation from the Navy was published. R. pp. 1403-05. She stated he got out on December 31, 1993 and intended to go to U.S.C. on a military grant. Kenneth moved in with her daughter's fiance and he worked part-time for her husband in construction and part-time at the Blue Diamond Casino. He was working for school money and car insurance. She described Kenneth telling her that he sometimes felt fear and thought about getting a gun. She said that he would probably get hurt. R. p. 1407.

Ms. Williamson said she learned of her son's death after her husband received a call from her son-in-law. She was told there had been an accident and to go to the hospital where she learned they had been shot. R. pp. 1409-1410. When she was sent to the counseling room, she learned of his death. She said it will always affect her, that she was in a fog and could not concentrate and would hear his voice. She said that since his death, her marriage is suffering, her children are suffering and she suffers with them. R. pp. 1409-10.

At the PCR proceeding, counsel Newsom testified that he was aware of the intent of Solicitor Bailey to introduce this type of evidence and was unaware of anything that he could do to stop it.

PCR Tr. pp. 447-448. Particularly, he did not see anything during their testimony that caused him to feel a need to object. PCR Tr. p. 447. He stated that it was admissible in his opinion, although he did not like hearing the evidence. PCR Tr. p. 447.

This Court specifically finds under Payne, Johnson, Rocheville and Hughey, that this testimony was admissible and not excessive. Counsel was not deficient in failing to object. Similarly, the Applicant has failed to prove prejudice under Jones and Strickland. This matter must be dismissed as a ground for relief.

F.) Closing Argument (pp. 78-84).

The Applicant contends that Solicitor Bailey's penalty phase argument should have been objected to when he described the fact that if sentenced to prison he is cared for by the State and provided clothing and medical attention. R. p. 1651. Counsel testified that he did not identify this portion of the closing argument as something that he should have objected to. PCR Tr. pp. 452-53. See also PCR Tr. pp. 389-90. Solicitor Bailey testified that this portion of the argument was developed from counsel Newsom's cross-examination of the Orangeburg Correctional Officer in the penalty phase. PCR Tr. p. 625, ll. 5-12.[22]

The record reveals that during his lengthy closing argument (R. pp. 1625-59) Solicitor Bailey made the following comment:

> Let's look at life imprisonment for a minute as an alternative sentence to the death penalty. Is life imprisonment the appropriate, just punishment for the horror story that y'all have heard over the last few days? Herman Hughes gets life imprisonment, goes to prison.

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[22] The record reveals that Detention Officer Anthony Brown testified that Hughes would either be watching TV or in his room. R. p. 1355. Detention Officer McCord testified that the facility was minimum custody and that Hughes acted in a nice manner. R. pp. 1359-61.

> *He's cared for by the State of South Carolina. He's fed, he's clothed, he's given medical attention.* . . . Is that justice, a life sentence for what he's done?

Trial Tr. p. 1651 (emphasis added). Trial counsel did not object to this argument concerning the conditions of life imprisonment.

The Applicant relies upon the testimony of appellate counsel Savitz that if there had been an objection that he would have raised it on appeal because it suggests that the life sentence was a "light sentence." PCR Tr. p. 287. As the Applicant has conceded, however, the solicitor's comment was factually accurate. PCR Tr. p. 299. Applicant's Memorandum, p. 80.

This Court finds that there was no viable objection that could be made to this common sense comment by the prosecutor. See, Rodriguez v. Zavaras, 42 F. Supp. 1059, 1129 (D. Colo. 1999) (prosecutor's comments did not impermissibly suggest that the death penalty was cheaper than a life sentence). This was not a comment that depreciated a life sentence such as State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987) ("those bad life sentences"). Nor was it a comment that injected the "costs" of imprisonment versus a death sentence, such as Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995). Instead, it was merely a comment that in a life sentence the inmate is cared for by the State, a common sense fact known to all. This Court finds that the failure to object was not deficient. Further, the failure to object does not undermine confidence in the outcome of the sentencing proceeding. Strickland. Prejudice has not been shown. See, Clermont v. State, 704 A.2d 880 (Md. 1998) (state was allowed to attempt to persuade jury that death was appropriate sentence contrasted with a life sentence, by referring to food, shelter, clothing and health care aspects of prison life); People v. Emerson, 727 N.E.2d 302 (Ill. 2000) (same) (privileges in prison); Pace v. State, 524 S.E.2d 490 (Ga. 1999) (no error in free room and board comment); People v Dunlap, 975 P.2d 723

(Colo. 1999) (prosecutor's comments in penalty phase closing about defendant's ability to maintain communication with loved one's while in prison were based upon inferences drawn from the facts in evidence, such as activities he was able to engage in while in jail awaiting trial and did not constitute misconduct).

G. Cumulative Prejudice.

This Court further concludes, for the reasons stated above, there is no Sixth Amendment violation in any of the particulars. Similarly, absent any prejudice, relief is not warranted under Strickland. Accord, Huffington v. Nuth, 140 F.3d. 572 (4th Cir. 1998).

H. Summary of Findings and Conclusions on Ground 9(f).

This Court finds that Applicant's constitutional rights have not been violated. Applicant has failed to satisfy the *Strickland* standard of review for challenging a death sentence. Applicant has failed to show that trial counsel's performance during the sentencing phase was deficient. Even if trial counsel could be found ineffective (deficient), the Applicant has failed to show that absent any error on the part of trial counsel, the balance of aggravating and mitigating circumstances would not warrant the death penalty.

Applicant claims that counsel was deficient because he failed:

1. to retain experts who could explain child development and child retardation as well as experts who could address the adequacy of prior evaluations.
2. to retain an expert in mental retardation and have his experts fully explain Applicant's mental limitations.
3. to retain an expert to testify that Applicant suffered from brain damage.
4. to adequately present to the jury that the school system failed Applicant.
5. to object to the State's introduction of Applicant's school disciplinary records at the sentencing phase.

6. to object or to limit the presentation of victim impact information submitted to the jury.
7. to object to Solicitor Bailey's penalty phase closing argument when he described the State providing clothing and medical attention to Applicant if sentenced to prison.

Trial counsel has an obligation to conduct an investigation to allow a determination of what experts to consult. Caro v. Calderon, 165 F.3d 1223, 112 (9th Cir. 1991). Counsel's failure to pursue experts that his investigation and consultation deemed unnecessary does not amount to ineffective assistance of counsel. Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995), Williams v. Calderon, 41 F.Supp. 1043 (D.C. Cal. 1998), Johnson v. Moore, 164 F.3d 624 (4th Cir. 1998). Victim impact evidence is admissible in the sentencing phase to show the uniqueness of the victim and the specific harm caused by the defendant. State v. Rocheville, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1992). Victim impact evidence is relevant to assist the jury in determining defendant's moral culpability and blameworthiness and is inadmissible only if it is so unduly prejudicial that it results in a fundamentally unfair trial. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 257, 115 L.Ed.2d 720 (1991).

Applicant's grandmother testified about his learning difficulties. Dr. Harold Morgan testified that Applicant was "right on the borderline of retardation" based on his review of the medical records, school records, and Ms. Boette's social history. Dr. John DeWitt testified of Applicant's intellectual limitations, attention deficit disorder, slowness, but that he did not meet the minimal criteria for mental retardation. Dr. DeWitt also testified that he had the ability to conform his behavior and did not have an irresistible impulse to do something wrong.

Dr. Annette Boette testified that:

a. Applicant came from a family of very little formal schooling and few skills and who could not attend to his needs.

b. Applicant suffered trauma as a result of his mother and grandmother fighting over his adoption.

c. Applicant has borderline intellectual ability and the education system failed to ensure his needs were met.

d. Applicant could be easily influenced by others because of his limitations.

Dr. Woods testified that his evaluation of Applicant revealed evidence of brain damage. However, he also stated that alcohol would have an added effect in that it would further disinhibit and impair Applicant's judgment. He said this would not cause Applicant to act under an irresistible impulse. Dr. Woods acknowledged that records prior to 1995 would have to be reviewed to determine if Applicant tested positive for syphilis before diagnosing Applicant with congenital syphilis. He conceded that no neurological impairments were revealed by the Hall Institute's evaluations.

The record also reveals that Judge Cottingham instructed the jury that:

a. Applicant had no significant prior criminal record.

b. That Applicant was under the influence of mental problems at the time of the murder.

c. Ability of Applicant to conform his conduct to the law was substantially impaired.

d. Applicant was only 16 years old at the time of the crime.

e. Applicant was mentally retarded at the time of the crime and he went on to define mental retardation.

f. Applicant acted under the domination of another person.

g. The jury can consider any other mitigating circumstances.

This Court makes the following specific findings:

1. Counsel provided an explanation for his failure to retain a child development expert; he believed that the experts available could handle the issue and the Center for Capital Litigation offered no alternative suggestions when he consulted them for advice.

2. Counsel stated that Applicant's age was the principal reason for his strategy in pursuing a life sentence.

3. The trial court adequately instructed the jury to consider Applicant's age and mentality as mitigating factors.

4. Applicant's limited abilities, impaired intelligence, and impulsivity was adequately presented to the jury.

5. Counsel provided an explanation as to why he chose not to retain an expert in mental retardation. Specifically, he stated that he understood from his own experts that Applicant would not qualify because his IQ was higher than 70.

6. Counsel conducted a reasonable investigation a to what experts were needed at trial.

7. Although Applicant's impairments were never referred to as "brain damage," the jury was still informed of Applicant's limited intellectual functioning, his tendency to act impulsively, and the effect of alcohol on his judgment.

8. Counsel was not deficient in his investigation of the school system's compliance with federal laws, nor is he deficient in his presentation to the jury sufficient evidence to show that the education system failed the Applicant. The jury heard ample evidence as to Applicant's trouble with school and his limited academic abilities.

9. Counsel provided an explanation for his failure to object to the State's introduction of Applicant's school disciplinary records; he sated that he would rely on some of it himself in mitigation to show that Applicant had been failed by the system and that his experts relied upon those records in making their assessments of Applicant.

10. Counsel provided an explanation for his failure to object to the admission of the victim impact testimony presented by the State and in fact stated that it was his opinion that it was admissible. Counsel was not ineffective.

11. Counsel was not ineffective for failing to object to the Solicitor's closing argument on the State's care of Applicant in prison.

12. Applicant has failed to satisfy his burden of proof in showing that there is a reasonable probability that but for counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death penalty.

The entire allegation is denied

Issues Concerning International Law and the Death Penalty - Grounds 9(g) and 9(h). Applicant's Memorandum, pp. 85-98

9(g) Applicant was denied the effective assistance of counsel under South Carolina law and the Sixth and Fourteenth Amendments by trial counsel's failure to argue that international treaties and customary international norms binding upon the United States forbid the execution of juvenile offenders.

10(g) Article 6(5) of the International Covenant on Civil and Political Rights 9ICCPR), a treaty which the United States ratified in 1992, bans the use of the death penalty for those under the age of eighteen at the time of the crime. Moreover, international customary norms binding upon the United States ban the execution of juvenile offenders. Despite this binding international law, which applies to the States through the Supremacy Clause of the United States Constitution, trial counsel failed to raise the illegality of the death penalty for Applicant. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(h) Applicant's death sentence violates international treaties and customary international norms binding upon the United States.

10(h) Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), a treaty which the United States ratified in 1992, bans the use of the death penalty for those under the age

of eighteen at the time of the crime. Moreover, international customary norms binding upon the United States ban the execution of juvenile offenders.

The Applicant first alleges that his death sentence violates international law. This allegation does not state a claim for which post-conviction relief can be granted. This Court could only grant post-conviction relief where "the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state." S.C. Code Ann. § 17-27-20 (1985). This Court finds the allegation of a violation of international law is not cognizable in a post-conviction relief action. Furthermore, as alternatively shown below, the Applicant could or should have sought relief on this ground at trial or on direct appeal, not in a collateral attack on his conviction.

Furthermore, the Applicant cannot challenge his death sentence on the ground that it violates the state constitution's prohibition against cruel and unusual punishment. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). *See also* Drayton v. Evatt, Id. [Applying Simmons to death penalty case previously reviewed on direct appeal *in favorem vitae*]. Any issues that could have been raised at trial or on appeal cannot be asserted in a post-conviction relief application. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Drayton v. Evatt, Id. Since the Applicant could have raised this issue and the international law question on direct appeal, his failure to do so has waived these allegations as grounds for relief as related to ground 9(h). **This Court concludes that Ground 9(h) for relief must be denied and dismissed with prejudice.**

The ineffective assistance issue set forth in Ground 9(g) is cognizable in a state PCR action. Foye, supra. However, this Court concludes that reasonably competent counsel would not have

asserted the international law issue for the reasons set forth below. Similarly, this Court finds that Strickland prejudice has not been shown by counsel's failure to assert this issue at trial.

a.) **The International Covenant on Civil and Political Rights Does Not Bar the Applicant's Death Sentence.**

Hughes contends that his counsel should have asserted that his death sentence violates the Supremacy Clause of the United States Constitution because the International Covenant on Civil and Political Rights (ICCPR) prohibits the imposition of the death penalty on persons under the age of eighteen. This novel argument has gained recent popularity throughout the country among defendants sentenced to death, and has only recently reached the state courts of last resort. At least two state supreme courts have flatly rejected this argument, see Ex Parte Pressley, 2000 WL 356347 (Ala. Apr. 7, 2000); Domingues v. Nevada, 961 P.2d 1279 (Nev. 1998), cert. denied, 120 S. Ct. 396 (1999), and no court, in a published opinion, has accepted it. The United States Supreme Court has declined an invitation to address the issue.[23] One circuit court in this state, in a post-conviction relief

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[23]One state supreme court judge has written:

> I am aware that an order of the [United States] Supreme Court denying a petition for certiorari review is not to be taken as an expression of an opinion on the merits of the case. [H]owever, I am also aware that when a petition raises a substantial question, the Court sometimes "points out those concerns which, although unrelated to the merits, justify the decision not to grant review." How much more substantial can a question be than whether a person can be executed for a crime committed in his youth, when the ICCPR, a treaty to which the United States is a signatory, makes such an execution facially illegal? However, the Court did not point out concerns justifying the decision not to grant review that were unrelated to the merits. Therefore, I do not believe it is a quantum leap for me to assume that certiorari review was denied based on the merits of the case.

Pressley, 2000 WL 356347 at *7 (Houston, J., concurring in result) (citations omitted).

action, has already rejected this argument. See Conyers v. Moore, No. 97-CP-14-506, Am. Order at 73 (S.C. Cir. Ct. May 2, 2000) (King, J.).

In short, although the argument is novel, it fails. The Court joins in rejecting the claim.

1.) **Historical Background**.

In 1966, the United Nations General Assembly adopted the International ICCPR on Civil and Political Rights. 999 United Nations Treaty Series ("U.N.T.S.") 171. The ICCPR did not enter into force until it received the requisite number of ratifications in 1976. See id.

In 1977, the Carter Administration signed the ICCPR and forwarded it to the United States Senate with several proposed conditions. See Int'l Covenant on Civil and Political Rights: Hearing before the Comm. on For. Relations, United States Senate, 102nd Cong. at 14 (1992), reprinted in 31 International Legal Materials ("I.L.M.") 645, 649 (1992). In 1991, President Bush urged the Senate to consent to the ICCPR and a series of qualifying statements. 31 I.L.M. at 660. President Bush labeled five of the qualifying statements as "reservations," five as "understandings," and four as "declarations."

President Bush presented the following explanation for the reservation concerning the death penalty for persons under the age of eighteen:

> Article 6 limits the circumstances in which capital punishment may be imposed. Article 6 specifically prohibits the imposition of the death sentence for crimes committed by persons below 18 years of age and on pregnant women. The Administration accepted the obligation with respect to pregnant women. However, it proposed a reservation clarifying that the United States does not accept the prohibition on executing people for crimes committed while they were 16 or 17 years of age. The execution of people for crimes committed while they were under the age of 16 has been ruled unconstitutional by the Supreme Court. The reservation proposed by the Bush Administration is significantly narrower than that proposed by the Carter Administration.

31 I.L.M. at 651.

The Senate Foreign Relations Committee favorably recommended the ICCPR, the reservations, understandings and declarations to the Senate. See 31 I.L.M. at 649. On April 2, 1992, the Senate considered the ICCPR along with the conditions. By a two-thirds vote, the Senate consented to the ICCPR–conditioned upon the qualifying statements. See 138 Cong. Rec. S4783 (daily ed. Apr. 2, 1992).

On June 1, 1992, President Bush signed the instrument of ratification. President Bush stated that he "ratified and confirmed the said Convention, subject to the said reservations, understandings, and declarations." White House Statement on Signing the International Covenant on Civil and Political Rights, 28 Weekly Comp. Pres. Doc. 1008 (June 5, 1992). The United States submitted the following reservation with the ICCPR:

> That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

999 U.N.T.S. 171 (United States Reservations).

On June 8, 1992, the United States Ambassador to the United Nations deposited the ICCPR, the qualifying statements, and the instrument of ratification with the United Nations Secretary General. 3 U.S. Dep't of State Dispatch (no. 45), Nov. 9, 1992. The ICCPR came into force for the United States on September 8, 1992. See id. Since 1992, only eleven of the 114 party-states to the ICCPR have objected to the United States' reservations. 999 U.N.T.S. 171 (Objections to the United States Reservations).

2.) **Hughes Lacks Standing to Invoke the ICCPR to Challenge His Death Sentence.**

The first attached declaration deposited with the Secretary General said "the United States declares that the provisions of articles 1 through 27 of the ICCPR are not self-executing." 999 U.N.T.S. 177 (United States declaration No. 1). The political branches of the federal government clearly indicated that the United States' consent to the ICCPR did not create private rights of action: "The intent is to clarify that the Covenant will not create a private cause of action in U.S. Courts." 31 I.L.M. at 657 (reprinting Bush Administration's explanations of its proposed declaration).

"No private cause of action can ever be implied from a non-self-executing treaty." In re Estate of Ferdinand E. Marcos, 978 F.2d 493, 503 (9th Cir. 1992). The United States' declaration specifically states that the ICCPR is not self-executing, and the courts have agreed with that interpretation. See, e.g., Igartua de la Rosa v. United States, 32 F.3d 8, n. 1 (1st Cir. 1994), cert. denied, 514 U.S. 1049 (1995); Domingues v. State, 114 Nev. 783, 961 P.2d 1279 (Nev. 1998), cert. denied, ___ U.S. ___, 120 S.Ct. 396, 145 L.Ed.2d 309 (1999). Accordingly, the ICCPR provides no private cause of action, and Hughes lacks standing to raise its provisions to challenge his death sentence.

Furthermore, "while it is true that international treaties become the supreme law of the land, it is equally true that '. . . it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties.'" State v. Dansinger, 521 A.2d 685, 689 (Me. 1987) (quoting Skiriotes v. Florida, 313 U.S. 69, 73 (1940)) (emphasis added). Because the treaty obligations concern the United States' relations with other countries, not with its own citizens, the Applicant lacks standing to invoke the ICCPR to challenge

his death sentence. See Skiriotes, 313 U.S. at 73 ("The United States is not debarred by any rule of international law from governing the conduct of its own citizens . . . . With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government").

The ICCPR does not confer any rights upon Herman Hughes. This Court rejects this ground for relief.

3.) The United States' Ratification of the ICCPR Does Not Invalidate the Execution of Persons Sixteen Years or Older Under S.C. Code Ann. § 16-3-20(A) (Supp. 1999).

Even if Hughes had standing to invoke the ICCPR to challenge his death sentence, United States' treaty obligations do not bar South Carolina from seeking the death penalty for his crime.

The United States conditioned its participation in the ICCPR on the reservations, conditions and declarations submitted by the Bush Administration. Article 6 of the ICCPR proscribes the execution of offenders under the age of sixteen. Hughes argues that the United States' reservation to Article 6 of the ICCPR is invalid, apparently contending that the United States and South Carolina are bound by the ICCPR as if no reservation had been made. This contention has no merit.

a.) The Reservation to the Treaty is Valid.

Hughes contends that the Senate did not have the power to place conditions upon the United States' ratification of the ICCPR. He argues that such a power allows the Senate to "consent" to only those treaty provisions of which it approves, and thus to "'ratify' a treaty that is materially different from the one negotiated with, and accepted by, multiple treaty partners."

This argument rests upon the assumption that the Senate enacted the reservations to the ICCPR. This assumption is wrong. The president (President Carter, and then President Bush)

proposed the reservations, both to the international community and to the Senate. 31 I.L.M. at 649. The Senate did not enact the reservations; it consented the treaty with the president's reservations.

Reservations to treaties serve an important function in international law:

> Reserving disagreement not only informs the international community directly and unequivocally as to the position of the reserving country, it protects the reserving state from further international objections and demands for implementing legislation. Reservation, in the words of one commentator, "far from impairing the integrity of treaties, provides a satisfactory means of eliminating avoidable difficulties that might stand in the way of international co-operation." For instance, in a large multilateral treaty, there are certain to be articles with which some countries do not agree. These same countries may be important to the success of the treaty, but without the use of reservations would be unable to participate. Reservations provide the flexibility needed to reach consensus in large multilateral agreements.

Cele Hancock, The Incompatibility of the Juvenile Death Penalty and the United Nations' Convention on the Rights of the Child: Domestic and International Concerns, 12 Ariz. J. Int'l & Comp. L. 699,715 (1995) (quoting T.O. Elias, The Modern Law of Treaties 27-28 (1974)) (footnotes omitted).

The Restatement (3d) of Foreign Relations Law of the United States (1987) (hereinafter "Restatement") expressly contemplates reservations to treaties:

> (1) A state may enter a reservation to a multilateral international agreement unless
> (a) reservations are prohibited by the agreement,
> (b) the agreement provides that only specified reservations not including the reservation in question may be made, or
> © the reservation is incompatible with the object and purpose of the agreement.
>
> (2) A reservation to a multilateral agreement entered in accordance with Subsection (1) is subject to acceptance by the other contracting states as follows:
> (a) a reservation expressly authorized by the agreement does not require subsequent acceptance by the other contracting states;
> (b) where application of the agreement in its entirety among the parties is an essential condition to their consent, a reservation requires acceptance by all the parties;

> © where a reservation is neither authorized nor prohibited, expressly or by implication,
>
> > (I) acceptance of a reservation by another contracting state constitutes the reserving state a party to the agreement in relation to the accepting state as soon as the agreement is in force for those states;
> > (ii) objection to a reservation by another contracting state does not preclude entry into force of the agreement between the reserving and accepting states unless a contrary intention is expressed by the objecting state.
>
> (3) A reservation established with regard to another party in accordance with Subsection (2)(c) modifies the relevant provisions of the agreement as to the relations between the reserving and accepting state parties but does not modify those provisions for the other parties to the agreement inter se.

Id. § 313.

Hughes cites no authority for his position that the United States' reservations to the ICCPR are invalid. The Court must reject Hughes argument for the reasons set forth above.

b.) The Reservation to Article 6 of the ICCPR is Not Precluded by Article 4's Nonderogation Provision.

The United States Supreme Court has stated that "in interpreting an international treaty, we are mindful that it is 'in the nature of a contract between nations,' to which 'general rules of construction apply.'" Sosiete Nationale Industrielle Areospatiale v. United States District Court, 482 U.S. 522, 533 (1987). Accordingly, a proposed treaty is like an offer to accept a tentative agreement. The contracting states may (1) accept the tentative agreement without changes pursuant to their own domestic law; (2) reject it outright (i.e., the president refuses to send it to the Senate or the Senate refuses to ratify it); or (3) consent to the treaty on conditional terms. Under the third scenario, the potential party-state rejects the offered treaty, and proposes the conditions as a counteroffer. The counteroffer would become valid only if the other party states accept the condition. See Restatement

§ 313 cmt f (1987) ("If a reservation is attached at ratification, it constitutes in effect a rejection of the original tentative agreement and a counter offer of a new agreement").

Thus, in this case, the text of the original ICCPR was a tentative agreement. President Bush and the Senate modified the text of the ICCPR by adding reservations, understandings and declarations, effectively rewriting the ICCPR. When the United States deposited the ICCPR with the Secretary General of the United Nations, it constituted a counteroffer to the ICCPR's original text. The United States' counteroffer changed the text of article 6 because it deleted the proscription against the execution of persons under the age of eighteen. Therefore, as consented to by the United States, Article 6, ¶ 5 does not read "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." 999 U.N.T.S. 171. Instead, as modified by the reservation, the ICCPR as applicable to the United States now states that "imposition of the death penalty in the United States is subject to Constitutional constraints, but in no case may a pregnant woman be executed."

Article 4 of the ICCPR includes the following language:

> (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.
>
> (2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Under the modification to the ICCPR filed by the United States, Article 4 prohibits it only from derogating the version of Article 6 ratified by the Senate. The United States may not under any

circumstances derogate or suspend the prohibition against executing pregnant women or sentencing someone to death in violation of the Constitution. This provision is the counteroffer made by the President and the Senate to the ICCPR's 143 party states, and it is this provision that the United States agreed not to derogate. Of those 143 states, only eleven filed an objection to the United States' reservation to Article 6. All eleven of those states, except Germany, explicitly declared that their objections were not an obstacle to the entry into force of the ICCPR. See 999 U.N.T.S. 171. Even Germany did not state that it would not consider the United States a party state to the ICCPR because of its reservations to Article 6. See id.

The United States' reservation to Article 6 is not invalid under Article 4's nonderogation provision. The ICCPR did not prohibit reservations, nor did it contain any specific language permitting only certain reservations. See Restatement § 313(1)(a),(b). Therefore, Hughes's argument is meritless and this Court denies it as a ground for postconviction relief.

c.) The United States' Reservation to Article 6 is Not Incompatible With the Object and Purpose of the ICCPR.

Hughes argues that the reservation to Article 6 is invalid because it violates the ICCPR's object and purpose. This argument also fails.

In determining whether a particular reservation is compatible with the object and purpose of a treaty, this Court should consider the historic permissibility of reservations. "It was once widely considered that the unanimous consent of the other parties to a treaty was required to admit a reservation . . . ." Belinda Clark, The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women, 85 Am. J. Int'l L. 281 (1991) (hereinafter "Clark"). In the 1920s and under the League of Nations, the Western European states accepted the unanimity rule. Some

East European states "adhered to the view that every state had the sovereign right to make reservations unilaterally and at will, and to become party to treaties subject to such reservation even if they were objected to by other contracting nations." Id. at 289-90.

During this period, the United States developed a system for reservations through the Pan-American Union. See id.

> The basis for the Pan-American system was that as between parties ratifying without reservations, the treaty was in force in the terms in which it was originally drafted; and where reservations were accepted, the treaty was in force between the reserving party and accepting states as modified by the reservation. The reservation was not in force between the reserving party and parties that had already ratified but did not accept the reservation. Pan-American practice differed from League of Nations practice in that the objection of one state did not preclude the reserving state from becoming a party to the treaty, provided that at least one other state had accepted the reservation.

Id.

At the time, the United States recognized both practices for making reservations. The United States was a founding member of the Pan-American Union and a party to certain treaties ratified under its auspices. At the same time, the United States was a party to multiple pre-World War I European conventions. See id.; see also Malkin, Reservations to Multilateral Conventions, 7 Brit. Y.B. Int'l L. 141 (1926).

The United Nations Secretariat followed the League of Nations' practice until 1951, when the International Court of Justice rendered its Genocide Convention opinion. Clark at 291. In that opinion, the International Court of Justice ruled that the traditional laws of contracts requiring acceptance to a reservation from all parties to the agreement could not easily be applied to multinational treaties. The court held that, absent a provision to the contrary, reservations to multinational treaties are permitted, provided the reservations are not inconsistent with the object

and purpose of the treaty. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 International Court of Justice ("I.C.J.") 15 (May 28).

> The Court concluded that no absolute answer could be given to the question whether a reserving state could still be regarded as a party if its reservation was objected to by some of the other parties; the answer depended on the circumstances of each case.
>
> The Court said that if [a party state] finds the reservation to be incompatible with the object and purpose of the treaty, the objecting state may consider that the reserving state is not a party. Each state party is entitled individually to appraise the validity of a reservation, and since no state can be bound by a reservation to which it has not consented, each objecting state will consider (within the limits of the criterion of the object and purpose of the treat) either that a reserving state is a party to the treaty or that it is not. The decision will only affect the relationship between the objecting and reserving states . . .
>
> * * *
>
> The General Assembly [, in 1952,] adopted a resolution requesting that the Secretary-General conform with the Court's opinion with respect to the multilateral conventions for which he was a depository to all state concern, "leaving it to each state to draw legal consequences from such communications."
>
> In its practice regarding conventions adopted after 1952, the UN Secretariat adopted this flexible system. In 1959 reservations to multilateral conventions were again considered by the General Assembly. It not only reaffirmed the directive to the Secretary-General in its 1952 resolution, but also extended it to cover all conventions concluded under the auspices of the United Nations prior to 1952 that did not contain contrary provisions.

Clark at 294-96 (footnotes omitted).

When the Vienna Convention was negotiated, 110 delegations were present; not one favored the old rule of unanimity to govern the admission of reservations. Instead, the delegations decided to follow the flexible system advanced by the International Court of Justice in the Genocide Convention case. Report of the International Law Commission on the Work of its Eighteenth

Session, 21 UN GAOR Supp. (No. 9) at 10, UN Doc. A/6309/Rev. 1 (1966), reprinted in 2 Y.B. Int'l L. Comm'n 169, 177, UN Doc. A/CN.4/SER.A/1966/Add.1., cited in Clark at 289.

Articles 19 through 23 of the Vienna Convention on the Law of Treaties codify the flexible system. Although the United States is not a party to the Vienna Convention, Restatement § 313 adopts articles 19-21 of the Vienna Convention, and summarizes the results of this flexible system:

> It tends to fragment those multilateral agreements into a number of smaller multilateral or bilateral agreements. The original arrangements continues among those states that adhere without reservation. The original arrangement pertains also between a reserving state and a state that rejects the reservation if the reserving state decides to accept the agreement without reservation vis-a-vis the objecting state. A different arrangement prevails between a reserving state and a state that accepts a particular reservation.

Restatement § 313 cmt b.

Furthermore, "[w]hen a State objecting to a reservation has not opposed entry into force of the treaty between itself and the reserving state, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation." Vienna Convention on the Law of Treaties, concluded May 23, 1969, 1155 U.N.T.S. 331, 337 (entered into force Jan. 27, 1980). This was the state of international law when the United States ratified the ICCPR.

In 1994, however, another view was espoused that "treaty bodies" are competent to address the legality of reservations during their consideration of the states parties' periodic reports. See William A. Schabas, Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child, 3 Wm. & Mary J. Women & L. 79, 92 (1997), (citing General Comment No. 24, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., at ¶ 17, U.N. Doc. CCPR/C/2 I/Rev. 1/Add.6 (1994)). When the United States submitted its first report of compliance to the Human Rights Committee, the Committee concluded that the

reservations dealing with the death penalty were invalid because they were incompatible to the object and purpose of the ICCPR. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53d Sess., 1413th mtg. ¶ 14, at 4, U.N. Doc. CCPR/C/79/add.50 (1995). Under the Human Rights Committee's view, if a treaty body determines that a reservation is inconsistent with the object and purpose of the agreement, it must determine whether the reservation is severable. See Loizidou v. Turkey, 310 Eur. Ct. H.R. (Ser. A) ¶¶ 89-97 (1995).

> The Committee has determined that the U.S. reservations to articles 6, paragraph 5 and 7 of the Covenant are contrary to the object and purpose of the treaty and consequently invalid. If the reservations are illegal, the question becomes whether the United States remains bound by the Covenant, including articles 6 and 7. Examining the matter narrowly, it would appear that the United States has never consented to be bound by article 6 and 7 of the Covenant as far as the death penalty is concerned. Accession to an international treaty is a form of international contract and a state cannot be bound to obligations against its will. However, if the matter is examined from another angle, it is also clear that the United States intends to be generally bound by the Covenant. The issue is one of severability or separability, that is, whether the reservations to articles 6, paragraph 5 and 7 can be dissociated from the accession to the Covenant. If the answer is no, then the United States is not a party to the Covenant. If the answer is yes then the United States is bound by the Covenant, including articles 6 and 7.

William A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?, 21 Brook. J. Int'l L. 277, 317 (1995) (footnote omitted).

The Human Rights Committee has adopted the view that "the normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party." General Comment No. 24. U.N. GAOR, Hum. Rts. Comm., 53d Sess., ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994). The Human Rights Committee concluded that reservations that are

inconsistent with the object and purpose of the agreement "will generally be severable, in the sense that the Covenant will be operative for the reserving party-without the benefit of reservation." Id.

The United States has strenuously objected to the Human Rights Committee's opinion:

> The United States has stated, "Since this conclusion is so completely at odds with established legal practice and principles and even the express and clear terms of adherence by many States, it would be welcome if some help clarification could be made." Observations by the United States of America on General Comment No. 24 (52), 16 Hum. Rts. L.J. 422, 423 (1995) (observations transmitted by letter dated March 28, 1995). See also, U.N. Doc. A/C.6/50/SR.13, at 52 (1995) (stating the comments of Legal Advisor, Conrad Harper, to the sixth Committee). The United States also stated that it reservations are "integral parts of its consent to be bound by the Covenant and are not severable." Observations by the United States, at 423. It has further indicated that "if it were to be determined that any one or more of them were ineffective, the ratification as a whole could thereby be nullified." Id. The United States argues that "the general view of the academic literature" is that reservations are an essential part of a State's consent and "cannot simply be erased." Id., at 424. It stated that a State that expressly withholds its consent from a provision "cannot be presumed, on the basis of some legal fiction, to be bound by it."

Schabas, 3 Wm. & Mary J. Women & L., at 109-10.

France and Great Britain also oppose the Human Rights Committee's position. See Report of the Human Rights Committee (Observations of States Parties under article 40), U.N. GAOR, 51st Sess., Annex VI, U.N. Doc. A/51/40 (1996) (stating the observations of France under article 40, ¶ 5 of the ICCPR); see also Report of Human Rights Committee (Submission of Reports and Additional Information by States Parties Under Article 40 of the ICCPR During the Period of Review), U.N. GAOR, 50th Sess., Annex. III, U.N. Doc. A/50/40 (1995) (stating the observations of the United Kingdom of Great Britain and Northern Ireland under Article 40, ¶ 5 of the ICCPR). The United States does not adhere to the Human Rights Committee's view. Rather, it adheres to the flexible view set forth in the Vienna Convention and the Restatement.

The ICCPR contains no provision concerning possible reservations to the ICCPR. Conversely, the ICCPR does not provide that only certain reservations can be made. Not one of the party states has specifically stated that it considers the U.S. reservations as an obstacle to entry into force of the ICCPR. Accordingly, the reservation to article 6 does not render it incompatible with the object and purpose of the ICCPR.

The United States' reservation to Article 6 does not violate the Vienna Convention or Restatement § 313. Thus, the United States' reservation to Article 6 is not invalid, and U.S. treaty obligations do not preclude South Carolina from imposing the death penalty for Hughes's crime.

b.) Neither Customary International Law Nor Jus Cogens Prohibits South Carolina From Executing Herman Hughes for Crimes Committed While He Was Under the Age of Eighteen.

The United States Supreme Court has sanctioned the death penalty for persons over sixteen years of age. In that decision, the Court looked to national practice, not international practice. Stanford v. Kentucky, 492 U.S. 367 (1989). Additionally, Section 16-3-20 of the South Carolina Code sanctions capital punishment for persons sixteen or older. Therefore, it is unnecessary to resort to international law to determine the legality of the application of the death penalty in South Carolina to a sixteen-year-old.

1.) Any prohibition on the execution of a sixteen-year-old is not customary international law and, even if it were, such law does not bind South Carolina.

Hughes argues that customary international law is part of the law of the United States and that both federal and state courts must apply it. He quotes The Paquete Habana, 175 U.S. 677 (1900) for the proposition that "'international law is part of our law, and must be ascertained and

administrated by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.'" Id. at 700.

Conveniently, however, Hughes quotes the case out of context. The entire passage reads:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.

Id. (emphasis added).

Thus, the courts look to customary international law only when "no treaty and no controlling executive or legislative act or judicial decision" exists. Id.; accord Gisbert v. Attorney General, 988 F.2d 1437, 1447, n. 21 (5th Cir. 1993) ("Public international law controls, however, only 'where there is no treaty and no controlling executive or legislative act or judicial decision" (quoting The Paquete Habana)); Bradvica v. Immigration and Naturalization Service, 128 F.3d 1009, 1014, n. 5 (7th Cir. 1997) ("Moreover, customary international law is not applicable in domestic courts where there is a controlling legislative act . . . ").[24] The Senate's ratification of the ICCPR, with the reservation to Article 6, constitutes a "controlling decision" that precludes the application of customary international law in this case.

[24]The qualification to The Paquete Habana is not dicta. See Gisbert, 988 F.2d at 1447, n. 21.

VOLUME FOUR OF FIVE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-167667

SUPPLEMENTAL APPENDIX

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Alternatively, assuming arguendo that Hughes's sentence violates customary international law,[25] the alleged violation does not warrant relief. The courts "are bound by a properly enacted statute, provided it be constitutional, even if that statute violates international law." Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991); accord United States v. Aguilar, 883 F.2d 662, 679 (9th Cir. 1989) ("In enacting statutes, Congress is not bound by international law; if it chooses to do so, it may legislate contrary to the limits posed by international law"); see also Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988) ("no enactment of Congress can be challenged on the ground that it violates customary international law").

Both state statutory and federal constitutional law authorize the death penalty for sixteen-year-old offenders. Accordingly, this Court's inquiry is at an end. Even if Hughes properly preserved his allegation of a violation of customary international law, it provides no basis for vacating his death sentence.

Furthermore, not every nation is bound by customary international law. Under the majority view, acts of nations become customary international law when the international community as a whole accepts the norm, although not every state must agree. The Restatement provides that "[a] rule of international law is one that has been accepted as such by the international community of states." Restatement § 102(1). Opinio juris requires that the states feel that they are legally required or obligated to observe the principle. See id.

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[25]Hughes has not shown even that customary international law prohibits the execution of sixteen-year-olds. Regardless of international practice, over 100 states' laws authorize the death penalty for offenders under the age of eighteen. See infra subsection 2.

Because some customary international law is deemed binding on all states, a corollary doctrine developed to respect the sovereignty of the non-consenting states and to determine whether they were obligated to follow the norm. If a state persistently objects to an emerging norm, it is not bound by that norm once it gains the status of customary international law. The rationale behind this doctrine is that "customary international law, like international law defined by treaties and other international agreements, rests on the consent of states." Siderman de Blake v. Argentina, 965 F.2d 699, 715 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993). Therefore "[a] state that persistently objects to a norm of customary international law that other states accept is not bound by that norm. . . ." Id. (citing Restatement § 102 cmt d.).

Assuming arguendo that customary international law proscribes the execution of sixteen- and seventeen- year-old offenders, the United States is not bound because it has persistently objected to that alleged norm. The respondents do not argue that there is not a global trend to abolish the death penalty. See generally Kristi Tumminello Prinzo, The United States - "Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend Is Toward Its Abolition, XXIV Brook. J. Int'l L. 855 (1999). Rather, because the United States has persistently objected to both the abolitionist movement and to the prohibition against executing sixteen- and seventeen- year-old offenders, it is not bound by any such customary international law.

"The United States has legally permitted juvenile offenders to receive a sentence of death throughout most of its history. . . ." See Lynn Loschin, The Persistent Objector and Customary International Law: A Proposed Analytical Framework, 2 U.C. Davis J. Int'l L. & Pol'y 147, 157 (1996). "From 1900 to 1930 seventy-seven persons under age eighteen were executed for crimes committed under the age of eighteen." Cele Hancock, The Incompatibility of the Juvenile Death

Penalty and the United Nation's Convention on the Rights of the Child: Domestic and International Concerns, 12 Ariz. J. Int'l & Comp. L. 699, 725 (1995). By 1995, that number had grown to 192 offenders executed for crimes committed while they were under eighteen years of age. See id.

The United States has consistently conditioned its accession to human rights treaties on its exception to the death penalty; its reservations to the ICCPR did not represent a change in that practice. In 1969, at the final drafting conference of the American Convention on Human Rights, the United States urged the deletion of the prohibitions against executions for offenders under the age of eighteen. The United States has not ratified that treaty because the drafting conference would not remove those provisions. United States: Report of the Delegation to the Inter-American Specialized Conference on Human Rights (Apr. 22, 1970), reprinted in 9 I.L.M. 710 (1970). Similarly, the United States has not ratified the Convention on the Rights of the Child, which not only proscribes the death penalty for persons under eighteen years of age, but also life imprisonment without parole. Convention on Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. a/44/736 (1989, reprinted in 28 I.L.M. 1448 (1989).

The only treaty containing a prohibition against the execution of persons under eighteen to which the United States has not objected is the Fourth Geneva Convention. "'In any case, the death penalty may not be pronounced against a protected person, [one held by a party to the conflict or an occupying force of which he/she is not a national] who was under eighteen years of age at the time of the offense.'" Ved P. Nanda, The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International ICCPR on Civil and Political Rights, 42 DePaul L. Rev. 1311, 1330 (1993) (quoting Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 286).

Thus, the United States has only agreed not to execute the juveniles of another country and only during war. This narrow exception does not vitiate the United States' status as a persistent objector.

Therefore, assuming arguendo if this Court determines both that customary international law prohibits the execution of persons under eighteen and that customary international law is applicable, South Carolina is not precluded from imposing the death penalty because the United States has persistently objected to the proscription against the execution of persons under eighteen. Furthermore, the United States Supreme Court reviewed this issue in Stanford v. Kentucky and "discerned neither a historical nor modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, this Court finds and concludes that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment." Stanford v. Kentucky, 492 U.S. at 380. Therefore, this Court must deny relief.

2.) Any Prohibition Against the Execution of Sixteen- and Seventeen-year-old Offenders Has Not Attained Jus Cogens Status.

Hughes argues that the alleged customary international legal prohibition against the execution of sixteen- and seventeen-year-olds has attained the status of jus cogens and therefore binds South Carolina. This argument is also meritless.

"The term 'jus cogens' means 'compelling law' and, as such, a jus cogens norm holds the highest hierarchical position among all other norms and principles. As a consequence of that standing, jus cogens norms are deemed to be 'peremptory' and nonderogable." M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 Law & Contemp. Probs. 63, 67 (1996). Considerable disagreement, however, exists concerning the meaning of a

"peremptory norm." For a norm to be jus cogens, the international community must accept not only the norm but also its peremptory character. See Restatement. § 331 cmt e ("A domestic court should on its own authority refuse to give effect to an agreement on the ground that it violates a peremptory norm"). For that reason, the United States "insisted that claims of jus cogens be subject to adjudication by the International Court of Justice or to arbitration . . . ." Id., n. 4.

According to the Restatement, not all human rights are jus cogens, but any violation of Restatement §§ 702 (2)(a-f) is a violation of jus cogens.[26] Hughes implies that the nonderogation provision of Article 4, paragraph 2 of the ICCPR, which precludes derogation of Article 6 in time of emergency, renders the proscription against executing sixteen- and seventeen-year-old offenders jus cogens. This assertion fails: "Nonderogability on emergency and jus cogens are different principles, responding to different concerns, and they are not necessarily congruent." Restatement § 702 n. 11. Accordingly, the nonderogation provision is not "compelling law" rising to the level of jus cogens.

Additionally, the prohibition against capital punishment for sixteen-year-old offenders is not as widely accepted as Hughes would have the Court believe. Kha Q. Nguyen, In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States, 28 Geo. Wash. J. Int'l L. & Econ. 401, 424 (1996) (hereinafter "Nguyen"). In 1989, the United States was among one hundred nations that authorized capital punishment for minors. See id. Furthermore, although Amnesty International would like to consider the United States one distinct state as

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[26]The Restatement declares that the prohibition against (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment (e) prolonged arbitrary detention, and (f) systematic racial discrimination are peremptory norms.

opposed to fifty individual states, an argument could be made under Stanford that each state is a separate entity in determining whether a peremptory norm is generally accepted. 492 U.S. at 371-72. If that is done, the following information is added to the equation:

> Currently, fourteen states and the District of Columbia forbid the imposition of the death penalty. Of the states that have a death penalty, some specify no minimum age, some allow the death penalty for juveniles under eighteen, and some expressly set their minimum age at eighteen. Seventeen states have legislation authorizing capital punishment without specifying any minimum age for the imposition of the death penalty. Of these seventeen states, eight states, as of 1991, still had not established a minimum age for capital punishment. Nine states do not mandate a minimum age in their death penalty statutes, but have set that age by reference to their statutory provisions governing the age at which juveniles may be transferred to criminal court for trial as an adult. Furthermore, eight states have explicitly authorized the capital punishment of juveniles in their death penalty statutes by setting a minimum age below eighteen. Finally, eleven states have established the age of eighteen years as the minimum age for the imposition of the death sentence.
>
> Collectively, seventeen states permit the execution of minors either by the express terms of their death penalty statutes or by indirect reference to their juvenile transfer legislation. While twenty-five states and the District of Columbia prohibit the execution of minors, an additional eight states have not directly addressed the issue of a minimum age for capital punishment.

Nguyen at 405 (footnotes omitted.)

Stanford v. Kentucky supports this view. In that case, Justice Scalia stated that the Court would consider the American conceptions of decency when ruling on the death penalty. 492 U.S. at 369, n.1.

Moreover, when the United States Supreme Court decided Stanford, the Inter-American Commission on Human Rights had already given its annual report finding, in their opinion, that the United States violated jus cogens by permitting the execution of children. Pinkerton and Roach v. United States, Resolution No. 3/87, Case 9647, Inter-Am. Cm. H.R., Annual Report of the Inter-American Commission on Human Rights 1986-1987 at 147, OES/Ser.L/V/II/71, doc. 9, rev. 1

(1987). The Supreme Court did not even mention this determination in its decision. In Pinkerton, "the Commission found that in the member states of the OAS a universal norm of jus cogens is recognized which prohibits the state execution of children. The norm, it stated, is accepted by all the states of the inter-American system, including the United States." Cerna, Universality of Human Rights: The Case of the Death Penalty, 3 ILSA J. Int'l. & Comp. L. 465, 473 (1997). The Commission rested its decision upon what it deemed the United States' recognition of this alleged norm in its response to the petition of Pinkerton and Roach. See id. In that response, the United States said, "All states, moreover, have juvenile justice systems; none permits its juvenile court to impose the death penalty." Id. (emphasis added). The Commission found that United States recognized the norm of not executing children, but that there was no consensus as to what constituted majority. See id. at ¶ 57. Thus,, even if this Court finds that jus cogens prohibits the execution of children, Hughes's death sentence does not violate this peremptory norm because he was certified as an adult before trial.

The United States Supreme Court had the opportunity to find that the execution of sixteen- and seventeen-year-old offenders was proscribed by jus cogens, but elected to rest its decision in Stanford on domestic law. Even so, there is no clear consensus on whether international law finds the execution of sixteen- and seventeen-year-old offenders violates jus cogens. This Court must deny relief. Counsel was not ineffective under Strickland v Washington, supra., in failing to raise this claim.

C. Summary of Findings and Conclusion on Ground 9(g), (h).

This Court concludes that Applicant's constitutional rights have not been violated. Applicant has failed to satisfy the *Strickland* standard of review for challenging a death sentence. Applicant

has failed to show that trial counsel's performance during the sentencing phase was deficient. Even if trial counsel could be found ineffective(deficient), the Applicant has failed to show that absent any error on the part of trial counsel, the balance of aggravating and mitigating circumstances would not warrant the death penalty. PCR relief can only be granted where "the conviction of the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state." S.C. Code Ann. § 17-27-20 (1985). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Any issues that could have been raised at trial or on appeal cannot be asserted in a post-conviction relief action. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973), Drayton v. Evatt, Id. This Court makes the following findings and conclusions of law:

1. Applicant waived his allegation for relief under international law based on his failure to raise this issue on direct appeal.

2. Counsel was not ineffective for failing to argue that international treaties because this Court agrees that reasonably competent counsel would not have asserted the international law issue based on the following:

    a. Applicant presents a novel argument that his death sentence violates the Supremacy Clause of the U.S. Const. Based on the International Covenant on Civil and Political Rights' (ICCPR) prohibition of the death penalty on persons under the age of eighteen, however, this Court wishes to join the unanimous judicial authority rejecting it.

    b. Applicant lacks standing to sue under the ICCPR.

    c. Under S.C. Code § 16-3-20(A), the ICCPR does not invalidate the sentencing of sixteen year old persons who committed murder to the death penalty.

3. Applicant has failed to show that counsel's failure to argue the international law issue undermined confidence in the outcome or prejudiced Applicant in any way.

Issue Concerning Ineffective Appellate Counsel and Proportionality Argument Ground 9(I) Applicant's Memorandum, pp 98-101

9(I) *Applicant was denied the effective assistance of appellate counsel violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

10(I) *Appellate counsel failed to raise on appeal any proportionality argument concerning the propriety of a death sentence for a sixteen year old defendant with mental retardation or borderline. Appellate counsel's failure was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).*

In Ground 9(I), he contends that appellate counsel Savitz erred in making a specific argument to the South Carolina Supreme Court in the appeal that the death sentence on Hughes was not proportionate because he was a sixteen (16) year-old offender with borderline intelligence. He asserts that under § 16-3-25(B), the Court did not properly complete its duty and appellate counsel should have specifically argued and briefed this issue. This Court must find that he failed in his burden of proof.

During the state PCR hearing, appellate counsel Joseph Savitz testified that he did not normally raise "proportionality" arguments in the capital appeals to the South Carolina Supreme Court and did not do so in this case. PCR Tr. p. 282. He stated that the Supreme Court does its own review, but he did not know if the Court would have done a better job if he had specifically raised

it. PCR Tr. pp. 282-83. Savitz acknowledged that in a number of his appeals capital defendants had committed more aggravated crimes. PCR Tr. p. 285. Savitz acknowledged that his brief included facts that he was transferred from Family Court, had been determined to have a borderline intelligence, presented the fact that defense counsel reminded the jury that Pearce was an aggressor and the crime would not have happened without him; the mitigating factors of his age, below eighteen, and had mental retardation. PCR Tr. pp. 293-94. He admitted that this information was in the initial portion of his brief. PCR Tr. pp. 294-95. Counsel Savitz stated that in the 161 opinions of the South Carolina Supreme Court, proportionality was rarely briefed or argued. PCR Tr. p. 295.

In the opinion of the South Carolina Supreme Court, it concluded as follows in determining proportionality:

> Finally, we find the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991), cert. denied, 502 U.S. 1038, 112 S. Ct. 888, 116 L. Ed. 2d 791 (1992) (murder and armed robbery of school principal in Anderson); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), cert. denied, 502 U.S. 1103, 112 S. Ct. 1193, 117 L. Ed. 2d 434 (1992) (robbery and murder of Domino's Pizza employee); State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S. Ct. 229, 112 L. Ed. 2d 183 (1990) (robbery and murder of woman outside a mall in Charleston).

Hughes, 493 S.E.2d 825.

Hughes maintains that the Supreme Court failed to do an appropriate proportionality review under § 16-3-25(C), speculating that it failed to consider the characteristics of the defendant.

This Court concludes that he has failed in his burden of showing ineffective assistance by his appellate counsel. Although counsel Savitz did not specifically argue proportionality, the Supreme Court complied with its statutory duty in resolving that the sentence was proportionate. Counsel reviewed to the age, mentality, and role of the Applicant in its brief before the Supreme Court. His speculation that their tasks were not completed flies in the face of the compelling conclusion made in the opinion. He has failed to show either deficient performance or prejudice under Strickland, supra.

In summary, this Court must deny relief on this claim. Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show a reasonable probability that but for the errors on the part of appellate counsel, the jury would have found reasonable doubt as to the guilt of Applicant.

The Applicant claims that:

1. Appellate counsel Joseph Savitz failed to argue that Applicant's death sentence was disproportionate because he was sixteen (16) years old.

2. Appellate court did not fully comply with S.C. Code § 16-3-25(B).

This Court makes the following factual finds:

1. Appellate counsel provided an explanation as to why he did not raise this argument. He stated that he does not normally make proportionality arguments in capital cases because the Supreme Court does its own review.

2. Supreme Court found that the death sentence was proportionate to that in similar cases and is neither excessive nor disproportionate to the crime.

3. Although appellate counsel did not argue disproportionality, the Supreme Court complied with its statutory duty in resolving that the sentence was proportionate.

4. Applicant has failed to show a reasonable probability that but for appellate counsel's failure to address this issue on appeal that the result of the proceedings would have been different.

This Court must deny relief.

Issue Concerning IAC and the Mitigating Instruction Charge - Issue 9(j) - Abandoned at Hearing and Not Briefed by Applicant.

9(j) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law in that counsel failed to object to the trial court's sentencing phase charge which effectively prohibited the jury from properly considering mitigating circumstances.

10(j) During the sentencing phase charge, the trial court instructed the jury that mitigating circumstances could be considered only if "the Defendant has proven [the existence of statutory mitigating circumstances] by any evidence." ROA at 1698. The court then instructed that statutory mitigating circumstances are only those which reduce the "degree of moral culpability for the commission of the act of murder." ROA at 1698. Moreover, the trial court diminished the important role of non-statutory mitigating circumstances by charging the jury that "a non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the Defendant claims served the same purpose; that is, to reduce the degree of his punishment for the offense." R. at 1700 (emphasis added). In addition, the trial court's written instructions refer only to statutory mitigating circumstances. These instructions effectively prevented the consideration of applicant's

mitigating evidence in violation of the Eighth and Fourteenth Amendments. See Skipper v. South Carolina, 476 U.S. 1 (1986), State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 484 U.S. 1020 (1988).

In this allegation, Hughes claimed that he received ineffective assistance of counsel because counsel failed to object to the mitigating circumstance instruction. This issue was abandoned at the hearing and not briefed. This Court finds and concludes that it must be dismissed with prejudice for lack of prosecution under the Rules of Civil Procedure.

Issues Concerning Federal And State Constitution Death Penalty on a 16 year old and Ineffective assistance - Grounds 9(k) and 9(l) - Applicant's Brief, pp. 101-112.

9(k) Applicant was denied the effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by appellate counsel's failure to appeal the trial court's ruling that the South Carolina Constitution permits the imposition of the death penalty upon a defendant who was a juvenile at the time of the alleged crime.

10(k) Trial counsel moved to bar the State from seeking the death penalty against Applicant, arguing that imposition of the death penalty for a crime committed while the defendant was a juvenile violates both the United States Constitution and the South Carolina Constitution. After hearing oral argument, the trial court concluded that "the appropriate case law, including that of South Carolina, does not suggest that one...who was sixteen at the time of the alleged commission of the crime cannot suffer supreme penalty if a jury of 12 find it is warranted." (Emphasis added). Appellate counsel failed to appeal the trial court's finding on the state constitutional issue, despite the lack of any controlling South Carolina Supreme Court decision concerning the issue. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(l) Alternatively, in the event the court finds that the issue concerning the South Carolina Constitution in Ground 9(k) was not preserved for appeal, Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and relevant South Carolina law by trial counsel's failure to obtain a ruling regarding whether the imposition of the death penalty upon a person who was a juvenile at the time of the crime violates the South Carolina Constitution.

In 9(k) and 9(l), Hughes contends that appellate counsel was ineffective in failing to assert under the federal and state Constitutions that the death sentence for a sixteen year-old offender was improper. The record reveals that trial counsel Newsom made a Motion to Bar Imposition of the

Death Sentence under both the South Carolina and federal Constitution. After hearing argument, the trial judge denied the motion, concluding: "the appropriate case law, including that of South Carolina, does not suggest that one . . . who was sixteen at the time of the alleged offense cannot suffer the supreme penalty. . . ." R. pp. 1886-88. Appellate counsel Savitz reviewed the motion hearing, R. pp. 1881-88, but counsel did not specifically state why he abandoned this issue in the appeal. PCR Tr. pp. 291-301.

This Court finds that the Applicant has failed to show Sixth Amendment prejudice by failing to argue either the federal or state constitutional issues. In State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997), the South Carolina Supreme Court expressly concluded that the Eighth Amendment to the United States Constitution was not violated by the application of the death penalty to a sixteen year-old murder defendant

This Court finds that the Applicant has failed to prove either deficient performance or resulting prejudice by appellate counsel Savitz under Strickland because -- for the reasons set forth herein -- he cannot show a reasonable probability that the result of the proceeding (appeal) would have been different.[27]

Applicant claims that Article I, Section 15, of the South Carolina Constitution, which bars cruel and unusual punishment, prohibits execution of individuals age seventeen and under at the time of the offense. In support of his claim, he offers the purported rejection by society of the death penalty for juveniles as allegedly reflected in state and federal legislation, court decisions, internal

[27] This Court further would also finds that counsel was not deficient in failing to raise these claims. Rather, it is unnecessary for the Court to address the first prong under Strickland because there is absolutely no conceivable way Applicant was prejudiced by counsel's performance.

law, popular opinion, and positions assumed by religious organizations. Applicant also asks this Court to consider as evidence of the constitutional violation the lack of deterrence or retribution resulting from the death sentence for a young offender. This Court finds, however, that Applicant's argument is not persuasive, having been rejected in Conyers.

> The Eighth Amendment of the United States Constitution provides:
>
> Excessive bails shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted.
>
> Similarly, Article I, Section 15, of the South Carolina Constitution, provides in pertinent part,
>
> Excessive bail shall not be required; nor shall fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted . . .

The analysis utilized by the United States Supreme Court for determining Eighth Amendment error is applied to review claims made pursuant to Article I, Section 15, of the South Carolina Constitution. State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992).

In Stanford v. Kentucky, 492 U.S. 361 (1989), the United States Supreme Court held that the application of the death penalty to an individual who commits a murder at sixteen or seventeen years of age does not constitute cruel and unusual punishment pursuant to the Eighth Amendment of the United States Constitution. The Court determined that the punishment was not shown to violate evolving standards of decency. The information Applicant offers to show that application to him of capital punishment violates evolving standards of decency -- generalized state and federal legislation, judicial decisions, international law, popular opinion, positions of religious organizations and lack of deterrent or retributive effect -- was rejected in Stanford as indicia of evolving standards of decency to establish a violation of the prohibition against cruel and unusual punishment. Accord

Graham v. Collins, 950 F.2d 1009, 1030 (5th Cir. 1992); Prejean v. Smith, 889 F.2d 1391, 1402 (5th Cir. 1989).

The recent increase in violent juvenile crime and the reaction to it is contrary to the lenient attitude Applicant claims is reflected in legislation, public opinion, and jury decisions. The issue Applicant raises has been decided adversely to him by the United States Supreme Court. Stanford v. Kentucky, supra. See also Roach v. Martin, 757 F.2d 1463 (4th Cir. 1985).

In her concurring opinion in Thompson v. Oklahoma, supra, Justice O'Connor agreed with the majority that the death sentence of a fifteen year old defendant should be reversed but reached that conclusion on narrower grounds than the majority. O'Connor considered the fact that the Oklahoma death penalty statute did not establish a minimum age for imposition of the death penalty; that juvenile waiver provisions would allow a fifteen year old juvenile offender to be treated as an adult offender; and that the Oklahoma legislature may not have realized that application of the waiver provision would allow juvenile offenders to be sentenced to death. She also considered that there was significant national consensus forbidding the execution of offenders below the age of sixteen. Thompson, 487 U.S. at 848-849, 108 S.Ct. at 2706 (O'Connor, J., concurring in judgment).

Justice O'Connor determined that in the discrete circumstances presented by the Oklahoma statute, the defendant could not be executed under a statute which did not specify a minimum age at which the death penalty would apply. Because the defendant was waived from juvenile court to stand trial as an adult, because there was no explicit indication from the Oklahoma legislature that it was aware of and intended that the death penalty apply to fifteen year old offenders, and because there was established a national consensus against application of the death penalty to fifteen year old offenders, O'Connor determined that the sentence should be set aside. O'Connor made clear,

however, that establishing a statutory minimum age would not be necessary if it was clear that national consensus did not forbid capital punishment for crimes committed at the defendant's age. Id. at 849-859, 108 S.Ct. at 2706-2711. This is essentially Applicant's claim.

However, this Court finds that Applicant ignores that the United States Supreme Court subsequently held that there was no national consensus forbidding imposition of death for sixteen and seventeen year old capital murderers in Stanford v. Kentucky, supra. The facts involved in this case are also distinguishable from those considered by Justice O'Connor in Thompson, and are consistent with her concurring opinion in Stanford, 492 U.S. at 380-383, 2981-2982 (O'Connor, J., concurring in part and concurring in judgment). In the concurring opinion in Stanford, Justice O'Connor opined that there would be no requirement that a state legislature specify that the death penalty would be applicable to sixteen and seventeen year old offenders. Id.

This Court finds that the record in this case reflects that Applicant was sixteen years old at the time of the offense. As discussed, the United States Supreme Court in Stanford found no national consensus forbidding the application of the death penalty to offenders sixteen years of age and older. In three cases, Conyers, Ted Powers [State v Powers , 331 S.C. 37, 501 S.E.2d 116 (1998)] and Hughes, the South Carolina Supreme Court has conducted a proportionality review under state law and found that the sentences were proportionate where the offender was a sixteen year old at the time of the offense. There is no reasonable probability the South Carolina Supreme Court would have vacated the sentences if the issue would have been presented as a matter of federal law, Conyers, or under the South Carolina Constitution, Conyers, Wilson. His allegation must be dismissed for failing to prove Sixth Amendment prejudice as to appellate counsel.

A. Summary of Findings and Conclusion For Denying Grounds 9(k), (l).

This Court must deny relief. Applicant's constitutional rights have not been violated. Applicant has failed to satisfy the *Strickland* standard of review for challenging a death sentence. Applicant has failed to shows that trial counsel's performance during the sentencing phase was deficient. Even if trial counsel could be found ineffective(deficient), the Applicant has failed to show that absent any error on the part of trial counsel or appellate counsel, the balance of aggravating and mitigating circumstances would not have warranted the death penalty.

The South Carolina Supreme Court expressly concluded that the imposition of the death penalty on a sixteen year old murder-defendant is not a violation of the Eighth Amendment to the U.S. Constitution. State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997). Eighth Amendment to the U.S. Constitution provides: "Excessive bails shall not be required nor excessive fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted." Death sentence imposed on a person who commits murder and who is age sixteen years old does not constitute cruel and unusual punishment pursuant to the Eighth amendment to the U.S. Constitution. Stanford v. Kentucky, 492 U.S. 361 (1989). There is no national consensus forbidding imposition of the death penalty for sixteen year old defendants who commit capital murders. Stanford v. Kentucky, 492 U.S. 361 (1989).

This Court specifically finds:

1. Trial counsel made a Motion to Bar Imposition of the Death Penalty under the state and federal constitutions.

2. Applicant has failed to show a reasonable probability that but for appellate counsel's failure to address this issue on appeal that the result of the proceedings would have been different.

3. The South Carolina Supreme Court has conducted proportionality reviews for two other cases involving sixteen year old defendants.

4. Applicant has failed to show a reasonable probability that but for appellate counsel's failure to address this issue on appeal that the result of the proceedings would have been different.

The allegation is denied.

Issues Related To The Failure To Appoint 2 Lawyers - Grounds 9(m) and 9(n) - Applicant's Brief, pp. 112-118

9(m) Applicant was denied his statutory right to the appointment of two attorneys to represent him at his capital trial.

10(m) Despite Applicant's indigence, the trial court failed to appoint a second lawyer to assist in his representation, as required by S.C. Code Ann. § 16-3-26 and Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

9(n) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and South Carolina law by trial counsel's failure to move for the appointment of a second attorney and by the court's failure to appoint a second attorney.

10(n) Because of his indigence, Applicant was entitled under S.C. Code Ann. § 16-3-26 to the appointment of a second attorney. Nevertheless, upon information and belief, Applicant's trial counsel failed to move for the appointment of a second attorney, and the court did not appoint a second attorney. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984), see also Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

Applicant contends in this argument that he was denied his statutory right to two lawyers because retained trial counsel failed to secure the assistance of two (2) attorneys pursuant to S.C. Code Ann. § 16-3-26. Next, he contends that retained counsel was ineffective for failing to preserve appellate review of this issue. This Court finds that Applicant was not entitled to additional

appointed counsel and that Applicant failed to demonstrate that obtaining an additional attorney would have changed the outcome of his trial.

Counsel Newsom testified that he was retained by the Applicant, through his grandmother, to represent Hughes. At the time of his retention, there was a discussion with the solicitor that this case might be a capital case. PCR Tr. pp. 306-307. Newsom testified that he approached Judge Cottingham, who determined that the appointed counsel on the case would be relieved by Newsom since he had been retained. PCR Tr. p. 311. Subsequently, Newsom stated that he sought to have an additional lawyer appointed to assist but the judge refused his request. PCR Tr. p. 311. Judge Cottingham did allow, however, for indigent funds to be used for investigators and expert witnesses. PCR Tr. p. 311. Newsom said that he was aware of the statute that provided for appointment of two counsel in a capital case. Additionally, he said that he discussed with Judge Cottingham the fact that another judge in the Susan Smith case had appointed a lawyer when David Bruck had been retained. He stated that the judge still denied his request. PCR Tr. pp. 312-313. Counsel Newsom stated that some of his discussion occurred with the trial court in chambers. PCR Tr. p. 312.

The records of hearing do not reveal that this request was done in open court. However, on July 27, 1995, a motion hearing was held where Newsom was substituted as counsel for appointed counsel Hutto and Dean. Judge Cottingham, at the hearing, released the appointed lawyers. Judge Cottingham expressly stated that "with the full understanding that this court, pursuant to their understanding and agreement, will not appoint any counsel for him, but I will make available some investigative funds." State Exhibit One , July 27, 1995, Transcript, pp. 10-11.

To prevail on an ineffective assistance of counsel claim, Applicant bears the burden of demonstrating that his attorney's "representation fell below an objective standard of reasonableness"

and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In assessing counsel's performance, the Court must bear in mind that its review is "highly deferential." Id. at 689. Indeed, the Court must afford a strong presumption that counsel's performance was within the extremely wide range of professionally competent assistance. See id. And, to eliminate the deceptive effects of hindsight on its consideration, the Court must look to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. See id. at 691-92. Therefore, deficiencies in Applicant's attorney's conduct would warrant the grant of collateral relief only if Applicant convinces the court that in the absence of unprofessional errors by his attorney there is a reasonable probability -- i.e., one adequate to undermine confidence in the result -- that "the result of the proceeding would have been different." See id. at 694.

Initially, it is clear that there is no constitutional right to have two attorneys appointed, even in a capital case. See Comm. v. Griffin, 511 Pa. 553, 570-71, 515 A.2d 864, 873-74 (1986) (trial counsel not ineffective for failing to obtain another attorney to handle the penalty phase). Therefore, Applicant was not entitled to a second attorney based on any constitutional claim.

Contrary to the representations of the Applicant, with regard to whether Applicant was entitled to additional counsel under state law, it is clear that S.C. Code Ann. § 16-3-26 does not require that two attorneys be appointed to a capital case when an attorney or attorneys have been

privately retained. Section 16-3-26(b), in pertinent part, provides: "Whenever any person is charged with murder and the death penalty is sought, the court, *upon determining that such person is financially unable to retain adequate legal counsel*, shall appoint two attorneys to defend such person in the trial of the action." (emphasis added). A plain reading of the statute requires the appointment of two attorneys only when a defendant is "financially unable to retain adequate legal counsel." In Applicant's case, he was able, through his grandmother, to retain the services of Mr. Newsom. Because he was able to retain Mr. Newsom, the statute providing for appointment of two attorneys when a defendant is unable to retain counsel does not apply to this case.[28] At no time did the trial court ever find that Hughes in retaining Newsom was unable financially to retain adequate legal counsel. As the record of the July 27, 1995, hearing reveals, Judge Cottingham found that Hughes was able to retain such counsel!

The Supreme Court of South Carolina, under in favorem vitae review, has affirmed numerous capital cases in which a retained attorney or attorneys did not request and were not provided with additional appointed attorneys. These cases support the conclusion that Applicant was not entitled to two additional attorneys as a matter of state law. See e.g., State v. Gilbert and Gleaton, 273 S.C.

[28] In pertinent part , the statute states: "(B)(1) Whenever any person is charged with murder and the death penalty is sought, the court, *upon determining that such person is unable financially to retain adequate legal counsel*, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense."

690, 258 S.E.2d 890 (1979) (co-defendants represented by same attorney in joint trial); State v. Gilbert and Gleaton, 277 S.C. 53, 283 S.E.2d 179 (1981);[29] State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1982); State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985); State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986); State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990); State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992).[30] See also State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32, cert. denied, 508 U.S. 978, 113 S.Ct. 2978, 125 L.Ed.2d 675 (1993); Rocheville v Moore, 175 F.3d 1015, 1999 Westlaw 140668 (4th Cir. 1999) (unpublished).[31] Because of the state law determination by the

[29] In Gilbert, one retained attorney represented two defendants. The Fourth Circuit recently found that counsel's representation of both the defendants was not unconstitutional or ineffective. See Gilbert v. Moore, Gleaton v Moore, 134 F.3d 642, 647 (4th Cir.), cert. denied, 525 U.S. 840, 119 S.Ct. 103, 142 L.Ed.2d 82 (1998). Hughes current counsel raised this same ground on behalf of petitioner Gleaton on the eve of execution that was denied in collateral proceedings.

[30] This Court acknowledges Respondents concession that this same issue was not presented in the appeals of those cases. However, it represents supportive actions by state trial judges consistent with the state PCR court's decision.

[31] In Rocheville, he raised this same claim in a state PCR proceeding that was denied , on certiorari and in the federal habeas actions. In an unpublished decision, the Fourth Circuit addressed the issue in the following manner:

> Rocheville explains that the state trial court found him to be indigent but never appointed counsel for him or made him aware that he was entitled to have attorneys appointed. *Rather, Rocheville was represented by one retained attorney whom his parents hired for him.* Thus, Rocheville asserts, he was denied due process in violation of the Fourteenth Amendment because the state court failed to obtain his waiver of the statutory right to appointed counsel. Furthermore, Rocheville claims his trial counsel was ineffective for failing to secure appointed counsel.
>
> Rocheville raised these claims in his state PCR proceeding, and that court ruled that the claims lacked merit. It interpreted the statute as not requiring the appointment of counsel when a defendant already has had retained counsel. This ruling is one of state law with which we have no authority to disagree. See Estelle, 502 U.S. at 67-68. *Because under state law Rocheville was not entitled to appointed counsel, the state trial court did not err in failing to obtain a waiver from Rocheville, and his retained attorney was not ineffective for failing to secure appointed counsel.* Thus, Rocheville's claims that the trial court erred in failing to obtain a waiver of his right

trial court that Applicant was not entitled to additional appointed counsel under state law, retained trial counsel could not be deficient for failing to the matter set forth more fully on the record. At the July 27, 1995, hearing, Applicant waived the right to two appointed counsel and the court stated after retention that it was not going to appoint counsel.

This Court rejects current counsel's assertion that as a matter of public policy, the statute should be read to allow the appointment when counsel is retained by a third party. However, the statutes speaks for itself : an indigent is allowed to have two counsel appointed if he is financially unable to retain adequate legal counsel. Since *adequate* legal counsel was retained the statute was complied with. The mere fact the a judge in another case determined that the defendant did not retain adequate legal counsel under the discrete circumstances in that case did not bind any and all judges to provide two appointed counsel whenever counsel is also retained by an indigent.

Since he was not entitled to the second counsel, there could be no prejudice shown by the failure to place his specific request "on the record."

Similarly, this Court finds there was no requirement to have a waiver hearing by Hughes as suggested in footnote 42 of the Applicant's memorandum, as a matter of state procedure, because Hughes was <u>not</u> entitled to the alleged right he now asserts because he had retained counsel of choice. Further, a reading of the July 1995 motion hearing reveals a waiver of the right to the two appointed counsel in lieu of his retained counsel. Since § 16-3-26 was not applicable to his situation, retained counsel cannot be deemed ineffective in failing to advise his client of a state law right that Hughes did not have and the trial court, similarly did not err in failing to hold an on-the-record

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to appointed counsel and that his attorney was ineffective in failing to secure additional appointed counsel lack merit. Id.

waiver hearing. As the Court in Strickland, supra, a reviewing court must presume that a trial judge acts within the correct interpretation of state law, not that the Applicant has the luck of a lawless decision maker. His assertions must be rejected.

A. Summary of Findings and Conclusions in Denying Ground 9(m), (n).

This Court denies relief. Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show prejudice.

There is no constitutional right to have two attorneys appointed, even in a capital case. Comm. v. Griffin, 511 Pa. 553 (1986)(trial counsel not found ineffective for failing to obtain another attorney in capital case). S.C. Code § 16-3-26 does not require 2 attorneys be appointed to a capital case when an attorney or attorneys have been privately retained; plain reading of statute requires appointment of two attorneys ONLY when defendant is "financially unable to retain adequate legal counsel." State v. Gilbert and Gleaton, 273 S.C. 690 (1979), State v. Butler, 277 S.C. 452 (1982), State v. Kornahrens, 290 S.C. 281 (1986), State v. Bell, 302 S.C. 18 (1990), State v. Davis, 309 S.C. 326 (1992), State v. Rocheville, 310 S.C. 20 (1993), Rocheville v. Moore, 175 F.3d 1015 (1999).

The Court specifically finds:

1. Judge refused Newsome's request for second appointed lawyer, but this request was made in chambers and not in open court.

2. Judge did make available indigent funds to be used for investigators and expert witnesses.

3. Based on Applicant's ability to retain counsel Newsome, the Court finds that Applicant was financially able to retain adequate legal counsel.

4. Therefore Applicant was not entitled to two (2) attorneys under S.C. Code § 16-3-26.

This ground is denied.

Issue Involving Accomplice Liability Instruction and IAC - Grounds 9(o), 9(p) - Abandoned at Hearing and Not Briefed.

9(o) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to object to the trial court's instruction on accomplice liability.

9(p) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to request a specific jury instruction regarding accomplice credibility.

The Applicant abandoned grounds 9(o) and 9(p) at the hearing and did not brief the issues. This Court finds that each ground must be dismissed with prejudice for lack of prosecution.

Issue Relating to the Failure to Object to The Introduction of School Disciplinary Records - Ground 9(q) - Incorporated in Ground 9(f) Applicant's Brief, pp. 69-74

9(q) In violation of the Sixth and Fourteenth Amendments to the United States Constitution, Applicant was denied effective assistance of counsel at his sentencing trial by counsel's failure to object to the State's introduction of Applicant's school disciplinary reports as evidence in aggravation of punishment.

This Court has addressed the issue above section 9(f). This Court incorporates its order above in denying relief on that matter. This Court further finds that the school disciplinary evidence was admissible pursuant to the notice of evidence in aggravation. R. 1904. The evidence was used and presented by the Applicant's social worker who declared that she reviewed school records from St. Matthews and John Ford Middle School. R. p. 1535. She specifically referred to his education

plan in elementary school through the significant number of infractions that he had in the Middle School. R. pp. 1542-1545. Since the records were generally included in the notice of evidence of aggravation as violation of "rules" and "disregard for peace and good order" as a juvenile, counsel was not deficient in failing to object. State v Riddle, 291 S.C. 232, 237, 353 S.E.2d 138, 141 (1987). Section 16-3-20 (B). ("In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible.") Further, even if counsel was deficient, prejudice has not been proven where the same evidence is presented by his own social work expert to support her opinions about his "rapidly deteriorating" situation. Under Jones v State, supra, Sixth Amendment prejudice has not been shown. This Court denied relief for the reasons set forth above and as stated in its order set forth in ground 9(f) above.

Issue Relating to Concession of Guilt and IAC - Ground 9(r) - Applicant's Brief, pp. 118-121

9(r) Applicant did not knowingly or intelligently waive his right to present a case in defense of his innocence and was thereby denied due process of law as guaranteed by Article 1, § 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

In this allegation , Hughes asserts the counsel's concession of guilt at the outset of the case violated his rights under the state and federal constitution. Prior to opening statements, defense counsel announced to the court that, as a matter of strategy, the defense would admit to Applicant's involvement in the charges and that the reason he was doing so was to allow the jury to make the decision in the penalty phase rather than the judge. He stated that if the law was different that they would have pled guilty a long time ago. Contrary to the assertion of the Applicant, counsel stated that they would assert that the defendant was guilty, but not state it specifically to assure that it was

not a guilty plea. R. pp. 762-63. Counsel then declared that he had discussed this strategy with the Applicant and his family and he declared that he had and that he believed that they concurred in the strategy. R. pp. 763-64. The trial judge then inquired of Hughes concerning his understanding of the burden of proof and asked Applicant whether he had been informed of and agreed with defense counsel's strategy to admit his "involvement in the affair"--"that [he] was in, around, upon and a part of it" - and Applicant answered affirmatively. ROA p. 765.

Consistent with the expressed strategy, during the opening statement, defense counsel announced to the jury that Applicant was not only involved in, but also guilty of the crimes charged:

> This young man, you will find the evidence, is involved. His guilt under the law - you'll hear about the felony murder rule. His guilt is clear. It does not matter who had the gun. It does not matter who pulled the trigger. If you combine to commit a crime and people's lives are taken, you're guilty. ROA p. 809.

The Applicant makes the bare conclusion that these comments and strategy revealed that the waiver was secured upon an erroneous premise. This Court must reject that characterization. This is not supported by the evidence. Newsom testified that his actions were consistent with the agreed strategy. PCR Tr. pp. 370-371, 443-444. Newsom was convinced that his client was informed of the position and that he also informed his grandmother. PCR Tr. pp. 443-44. Hughes responded affirmatively to the trial judge's question as to whether Applicant agreed to admit his involvement. Particularly, he was advised that his counsel was going to admit his involvement in the grand larceny of a vehicle, armed robbery, assault and battery and murder and that he was "in, around, upon and a part of it." R. p. 765. Contrary to the assertions of current counsel, this Court must find as a fact that there is no evidence that he did not understand the court's questions.

In Young v Catoe, 205 F.3d 750, 761 (4th Cir 2000), the Court recently rejected a challenge to a concession of guilt strategy in a South Carolina case. In its pertinent part, the Court addressed the issue as follows:

> Our precedents plainly illustrate that counsel's concession of a client's guilt does not automatically constitute deficient performance. Rather, we must heed Strickland 's admonition to consider the totality of the circumstances confronting the lawyer in order to accurately evaluate the reasonableness of the conduct at issue. In Clozza v. Murray, 913 F.2d 1092 (4th Cir.1990), a capital habeas proceeding, we addressed the petitioner's claim that defense counsel had rendered ineffective assistance at trial by making a number of remarks intended to put distance between counsel and the petitioner, with the result that the jury may have perceived counsel to have effectively conceded the petitioner's guilt. We acknowledged that, under Strickland, a trial strategy designed to maintain counsel's credibility with the jury could be reasonable, notwithstanding the possibility of short-term harm to the defendant. The lawyer in Clozza, faced with "overpowering" proof against his client, id. at 1101, was left with the sole hope of convincing the jury to accept his characterization of the evidence and ignore those portions of the defendant's trial testimony inconsistent with an intoxication defense. We observed that the remarks at issue indicated to the jury that defense counsel understood the gravity of the crimes as well as their horrible nature. Had counsel attempted to pass the crimes off as anything other than the atrocities that they were, his credibility with the jury would most certainly become suspect. Thus, we conclude that counsel's remarks were consistent with his trial strategy.
> Id. at 1099.
> Our subsequent decision in Bell v. Evatt, 72 F.3d 421 (4th Cir.1995), makes the point more precisely. In that case, the petitioner's lawyer, attempting to secure a guilty-but-mentally-ill verdict for his client on charges of murder and kidnaping, explicitly told the jury during his closing argument*760 that his client was guilty of the latter. We rejected the petitioner's claim that counsel had represented him ineffectively, noting that the evidence supporting the kidnaping charge was "overwhelming," id. at 429, and that it was important for the defense to retain some credibility so that the jury would be sympathetic to the defense witnesses testifying that Bell deserved mercy....The decision to pursue a GBMI verdict was a strategic one that Bell and his trial counsel agreed to.... All indications lead us to conclude that the decision to concede his guilt was a rational one.... Id. at 428 (internal quotation marks omitted). [FN6]
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> FN6. See also United States v. Leifried, 732 F.2d 388, 390 (4th Cir.1984) (counsel not ineffective for admitting defendant's guilt of individual drug offenses where

evidence was overwhelming and concession's purpose was to persuade the jury that defendant was innocent of operating a continuing criminal enterprise).

Clozza and Bell stand for the proposition that, on occasion, it is best to risk losing the battle in the hope of winning the war. "There is a distinction which can and must be drawn between a statement or remark which amounts to a tactical retreat and one which has been called a complete surrender." Clozza, 913 F.2d at 1099. As we there-after recognized, "some remarks of complete concession may constitute ineffective assistance of counsel, but tactical retreats may be reasonable and necessary within the context of the entire trial, particularly when there is overwhelming evidence of the defendant's guilt." Bell, 72 F.3d at 429.

In Clozza, it was necessary for counsel to retreat from being identified too closely with the cause of his client, if the latter were to stand any chance of benefiting from the former's credibility. In Bell, it was necessary for counsel to retreat from pursuing acquittal on the charge of kidnaping, in order to increase the likelihood that the jury would return a verdict of something less than unequivocal guilt of murder. And, in the case now before us, it was necessary for counsel to retreat from an unlikely acquittal of a patently guilty client, so that he might attain the more realistic goal of saving the client's life.

That was, at least, the reasoning of the PCR Court, which found that, in the face of "an overwhelmingly strong case" against Young, [FN7]

FN7. In addition to Young's confession, detailed supra at 756, witnesses placed Young in the vicinity of the school near the time of the shooting, the murder weapon had been hidden just outside the front door of Young's residence, and Young had told his mother that investigators were accusing him of a "shooting at the school," when the officers had not yet revealed the purpose of their visit to the family's home.

counsel felt that the best way to save [Young's] life was if he gave the jury the appearance that he was willing for the truth to come out concerning the murder and was remorseful for his role in it.... Obviously, counsel's concession is consistent with the overall strategy of conceding that [Young] was technically guilty of murder but did not deserve the death penalty.

J.A. 1738-39. The court concluded that "counsel's strategic decision--made only after investigation and with [Young's] express approval [FN8]--was reasonable." J.A. 1726.

FN8. At the PCR hearing, Young denied having discussed with Mann any trial strategy. As we observed supra in note 3, however, we are bound to accept the PCR Court's contrary finding. Nonetheless, Young points out that Mann's own testimony acknowledged that they discussed the decision to "concede guilt" only to the extent that Mann promised Young that his arguments to the jury would be crafted to

> Young's anticipated testimony. Young's testimony, of course, established that he was guilty of murder. See supra at 758. Hence, the PCR Court's finding of consent has not been rebutted by clear and convincing evidence, and is not unreasonable.
>
> With regard to the Sixth Amendment's requirement that trial counsel render competent ~~*761~~ assistance, the PCR Court's interpretation of the applicable Supreme Court precedents is largely in accord with our own, as evidenced by the similarities in circumstances, analysis, and result between this case on one hand, and Clozza and Bell on the other. Insofar as one could argue, however, that the PCR Court's decision is an extension of Strickland and its progeny beyond the limits of what we have previously sanctioned, it nevertheless does not represent an unreasonable application of clearly established federal law. Consequently, paying strict heed to the standard of review set forth in § 2254(d)(1), we must uphold the PCR Court's conclusion that Mann's concession of Young's guilt did not constitute deficient performance. [FN9]
>
> FN9. It is of little moment that Mann also conceded the presence of malice. As we noted supra at 757, malice is an essential element of the crime of murder in South Carolina. By conceding Young's guilt of murder, Mann necessarily conceded that Young acted with malice aforethought. In the event that the jury might have ascribed unintended meaning to counsel's concession, i.e., viewed Young as a malicious person within the lay definition of the term, Mann effectively negated that possibility by portraying his client in a positive light during the balance of his opening. Further, to the extent that the prosecution's burden of proof was in danger of being ameliorated as the result of Mann's misstatements concerning implied malice, that danger was avoided as the result of the trial judge giving a proper malice instruction prior to the jury commencing its deliberations. Id.

The Court finds the "waiver" to reveal his consent to the concession of guilt strategy was sufficient. There was no showing that counsel actions were either deficient or prejudicial under Strickland. Hughes statements in open court carry a presumption of verity.[32] The record reveals that Hughes was informed of the strategy. Hughes has failed to show that he did not understand or agree with the strategy. Further there is no evidence that Hughes disagreed with this strategy.

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[32] State v Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988) is distinguishable. Although Newsom stated that he could not be sure that he understood these discussions, there is no evidence that Hughes disagreed with the approach.

A. Summary of Conclusion and Findings

Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post-conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show prejudice.

Counsel's concession of guilt does not automatically constitute deficient performance, but must heed Strickland's admonition to consider the totality of the circumstances. Young v. Catoe, 205 F.3d 750 (4th Cir. 2000); Clozza v. Murray, 913 F.2d 1092 (4th Cir. 1990). Court finds:

1. Counsel announced prior to opening that as a matter of strategy, he would admit to Applicant's involvement to allow the jury to make the decision in the penalty phase rather than the judge.

2. Counsel stated that they would assert Hughes was guilty, but not state it specifically to avoid guilty plea.

3. Applicant answered affirmatively to court's specific questions regarding his understanding of the burden of proof and whether or not he had been informed of and agreed with counsel's strategy to admit involvement.

4. Newsome was convinced that client and his grandmother were informed of the position.

5. Newsome's trial strategy, which was designed to maintain counsel's credibility with the jury, is reasonable.

6. Applicant has failed to show that Newsome's actions were deficient or prejudicial under *Strickland*; his speculation that Hughes did not concur in the strategy is defeated by his statements in open court which carry a presumption of verity.

7. State v. Arthur is distinguishable. Although Newsome stated he could not be sure that he understood these discussions, there is o evidence that Hughes disagreed with the approach.

This Court must deny the allegation.

Issues Related to Owens' Misstatement about Penalty for Misprision of Felony and Prosecutorial Misconduct and IAC - Grounds 9(s), 9(t) - Applicant's Brief, pp. 122- 125

9(s) Applicant was denied due process of law in violation of the Sixth, Eighth, and Fourteenth Amendments in that the state elicited testimony during direct examination of a witness that the solicitor either knew or should have known to be false.

9(t) Applicant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution by counsel's failure to object to the solicitor's elicitation of false testimony during the direct examination of a witness.

As stated in the argument set forth herein in ground 9(d), during direct examination of State's witness Henry Daniel Owens, Jr. -- who was facing charges of misprision of a felony, accessory before the fact of murder, and accessory before the fact of armed robbery relating to the same incident for which Applicant was charged – the solicitor elicited testimony from the witness with respect to his plea agreement. The witness divulged that he pled guilty to misprision and had agreed to testify in exchange for the State's dismissal of the other charges against him. ROA p. 823. The witness further stated that for the misprision charge he was facing "up to fifteen" years in prison. ROA p. 823. Specifically, the following colloquy occurred:

Q. Would you tell the jury what that plea agreement is?

A. I plead guilty to misprision [sic], and they won't charge me with the accessory charges.

Q. All right. And do you know how much time you're facing on the misprision charge?

A. Up to 15.

Q. Okay....

ROA p. 823.

Misprision of a felony is a common law offense, adopted in South Carolina pursuant to S.C. Code § 14-1-50. See State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980). As set forth before in argument 9(d),under state law, the offense may give rise to a prison term of up to ten years, see State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)(noting that defendant's sentence, originally eighteen months imprisonment, was adjusted to a ten year term). The witness's mistaken statement or belief at the time of his testimony that he was facing "up to fifteen" as a result of the guilty plea is clearly inaccurate, see Transcript of Record (Guilty Plea), State v. Henry Daniel Owens, Jr., (court asking Owens, "do you understand that for misprision of a felony I could put you in jail for ten years"; Owens responding, "yes, sir").

The Applicant contends that by not only eliciting but affirming (by silence) the witness's misstatement, the solicitor improperly and intentionally created a false and misleading impression and, thereby, denied Applicant due process of law. See Miller v. Pate, 386 U.S. 1, 6-7 (1968), Napue v. Illinois, 360 U.S. 264 (1959), Mooney v. Holohan, 294 U.S. 103 (1935), see also Johnson v. Mississippi, 486 U.S. 578 (1988). This Court finds that this comment does not mandate a new trial under any theory of prosecutorial misconduct.

In his testimony before the PCR court, Solicitor Bailey addressed his reasons for not correcting the statement of Owens at the time of the questioning.[33] He stated that he asked Owens about the plea bargain to preempt Newsom from asking the questions and did not make it want to appear that he was hiding anything. PCR Tr. p. 621. He stated that he wanted to elicit what Owens

[33] Solicitor Bailey in his guilt phase closing statement correctly stated that misprision of a felony carries a penalty of ten years. Particularly, he stated: " Daniel Owens has a plea negotiation with the state which limits his potential prison time, as he stated, to **ten** years because of his involvement in this thing." ROA 1259, 14-18.

understanding in his mind was of the plea agreement and what motivated him to give the testimony. He stated that he did not think it was significant what the crime actually carried. PCR Tr. p. 621. "I thought the significant issue was what he thought it carried because that would have been the only thing that could have motivated him." ROA p. 621. Solicitor Bailey conceded that he was aware that misprision carried a ten year sentence, but stated that his purpose was not to get into a debate with Owens about what the actual time was. He said that he was not privy to what Mr. Culclasure, who represented Owens, had told him the time was. Solicitor Bailey stated he did not think that it was appropriate to go and try to correct anything that his lawyer had told him. The solicitor stated that the issue was not what the time was but what Owens understanding was and that he had answered that question. ROA p. 632.

Counsel Newsom stated that he did not recall Owens testimony at trial about the penalty for misprision. PCR Tr. pp. 358-59. Newsom stated that he was aware that the penalty for misprision was ten years. PCR Tr. p. 359. Newsom stated that he did not recall why he did not object or request clarification. PCR Tr. p. 359.

1.) Law and Analysis.

This Court agrees with Respondents contention that this Court should begin the analysis by identifying the essential components of a Brady violation. In Brady the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S., at 87, 83 S.Ct. 1194. The duty to disclose such evidence is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses

impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., at 682, 105 S.Ct. 3375; see also Kyles v. Whitley, 514 U.S. 419, 433-434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." Id., at 438, 115 S.Ct. 1555. In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles, 514 U.S., at 437, 115 S.Ct. 1555.

These cases, together with earlier cases condemning the knowing use of perjured testimony, (See, e.g., Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (per curiam); Pyle v. Kansas, 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942); Napue v. Illinois, 360 U.S. 264, 269- 270, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).) illustrate the special role played by the American prosecutor in the search for truth in criminal trials.

In Napue, the principal state witness at the defendant's murder trial testified falsely that he had received no promises in exchange for his testimony. In fact, the prosecutor had promised the witness a recommendation for a reduced sentence. The prosecutor failed to correct the witness' perjured testimony, although he clearly knew it to be false. The Supreme Court held that the false testimony used by the State in securing the conviction may have had an effect on the outcome of the trial, and accordingly, reversed the defendant's conviction. Id. at 272, 79 S.Ct. 1173. Likewise, in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the government's only witness linking the defendant with the crime falsely testified on cross-examination that he had

received no promise of immunity from prosecution. The prosecutor failed to correct his perjury and repeated the witness' falsehood in his summation. The Supreme Court reversed the defendant's conviction because there was reasonable likelihood that the prosecutor's knowing use of perjury on an issue so relevant to the witness' credibility affected the judgment of the jury. Giglio, 405 U.S. at 154-55, 92 S.Ct. 763.

The United States Supreme Court in Giglios stated that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice; the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Accord, Washington v. State, 324 S.C.232, 487 S.E.2d 883(1996). (State's failure to correct false information about its relationship with one of its witnesses warranted post conviction relief of new trial; evidence indicated that state made incorrect statement in opening argument that no plea agreement existed with witness, and presented testimony at trial that no deal existed when if fact a deal existed).

A defendant who alleges a Brady violation about a prosecutor's use of perjured testimony, must clear a lower hurdle in proving materiality. In such situations, "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the outcome of the jury." United States v. Bagley, 473 U.S. at 678, 105 S.Ct. at 3381-82, 87 L.Ed.2d at 492.

Within the federal system, for example, the Supreme Court has said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose

interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

This special status explains both the basis for the prosecution's broad duty of disclosure and the conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence--that is, to any suppression of so-called "Brady material"--although, strictly speaking, there is never a real "Brady violation" unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

The Supreme Court held that due process is violated when the state knowingly offers false testimony to obtain a conviction and permits that testimony go uncorrected. Napue, 360 U.S. at 269, 79 S.Ct. at 1177. In applying this doctrine, the Fifth Circuit has held that: false testimony for these purposes includes testimony that affects only the credibility of a witness. Napue, 360 U.S. at 269-70, 79 S.Ct. at 1177. Thus, the grant of a new trial based upon a Napue violation is proper only if (1) the statements in question are shown to be actually false; (2) the prosecution knew that they were false; and (3) the statements were material. United States v. Blackburn, 9 F.3d 353, 357 (5th Cir.1993). United States v. O'Keefe, 128 F.3d 885, 893 (5th Cir. 1997).

Here, no evidence was produced that establishes Owens was aware at the time of his testimony that he was facing ten years rather than fifteen. Solicitor Bailey conceded that he knew

the response was legally inaccurate since misprision carried 10 years but did not know how Owens had been advised. When the Solicitor was given his opportunity to state the potential punishment in his argument to the jury, he clarified that it was a ten year potential.

The question as to whether there was prejudice, however, is not difficult to answer. The test for prejudice for "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any reasonable likelihood that the false testimony could have affected the outcome of the jury.*" United States v. Bagley, supra. Here, the difference in potential punishment was a slight difference of five years contrasted to the potential life sentence he had been facing for accessory before the fact to murder. It is difficult to see how this difference would have uniquely undermined the credibility of the witness. Also, the jury was told the accurate potential sentence when the prosecution made its closing argument. Finally, this difference created no "reasonable likelihood" that the outcome of the jury could have been affected. The Applicant had conceded guilt and an unchallenged admission that he shot the victim was entered into evidence. Hughes was identified as the only perpetrator by the surviving witness. His print was found on the cash drawer. There was no showing that this erroneous statement, *later corrected by the prosecution*, to a reasonable likelihood affected either guilt or sentencing verdicts. [See also, Order at 9(d).]

As this issue relates to ineffective assistance of counsel because counsel Newsom failed to correct the punishment for misprision, Respondents submit that "prejudice" under Strickland has not been proven for the same reasons that Brady "prejudice" was not shown. There is no "reasonable probability" that but for counsel's failure to point out the five year difference in penalty that the result of the guilt or penalty phase would be different.

A. Summary of Conclusions and Findings of Fact

This Court must deny relief. Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show prejudice.

Applicant claims that the solicitor's office had knowledge of witness Owens providing false testimony as to the penalty he faced for misprision of a felony. This Court specifically finds:

1. Guilty plea transcript of Owens reveals the court asking "do you understand that for misprision of a felony, I could put you in jail for ten years." Owens responded, "yes."

2. Owens testimony in response to the questions by Solicitor Bailey about his plea agreement, although legally inaccurate, was Owens belief of the amount of time he faced and was not an attempt to deceive or mislead the jury.

3. Solicitor's affirming witnesses misstatement (through silence) does not mandate a new trial under any theory of prosecutorial misconduct.

4. Solicitor Bailey testified at PCR hearing that did not correct misstatements because he did not want it to appear that he was hiding anything and that he wanted to elicit what Owens' understanding *in his mind* of the plea agreement and what motivated him to testify.

5. Solicitor Bailey did correctly state in closing statement that misprision of felony carried 10 years. Stated, "Daniel Owens has a plea negotiation with the state which limits his potential prison time, as he stated, to ten years because of his involvement in this thing."

6. The difference in punishment was a slight difference (5years) and pointing out that difference would not have uniquely undermined the credibility of the witness.

7. The 5 year difference created no "reasonable likelihood"that the outcome of the jury could have been affected.

7. Applicant failed to show that he was prejudiced by Owens' testimony, particularly given the following:

a. Applicant conceded guilt.
b. Applicant's unchallenged admission that he shot Kelly Hoffman was entered into evidence.
c. Applicant was identified as the perpetrator by the surviving witness.
d. Applicant's prints were found on cash drawer at the scene.
e. The prosecutor corrected Owens' misstatement in summation.

The allegation for relief must be denied.

CONCLUSION

For all the foregoing reasons, the entire Application for Post-Conviction Relief must be denied and dismissed. This Court finds that the Applicant has failed in his burden of proof in this proceeding. Therefore, the applicant's request for post-conviction relief is denied.

AND IT IS SO ORDERED.

PAULA H. THOMAS
Presiding Judge

Date: December 8, 2000
Conway, South Carolina

STATE OF SOUTH CAROLINA

IN THE CALHOUN COUNTY COURT OF COMMON PLEAS

HERMAN LEE HUGHES, JR., Applicant 5. **MICHAEL MOORE,** Commissioner, S.C. Department of Corrections, and **CHARLES M. CONDON,** Attorney General, State of South Carolina, Respondents.	CA#: 98-CP-09-101

APPLICANT'S MOTION TO ALTER OR AMEND THE JUDGMENT

Applicant, through his undersigned counsel, hereby moves to alter or amend the judgment pursuant to rule 59(e) of the South Carolina Rules of Civil Procedure.[1] In this motion, applicant will focus on several significant errors in the court's order. In doing so, however, applicant does not abandon or waive any previous argument or issue raised in prior pleadings or prior hearings in support of the application for post-conviction relief, or any objection previously raised to the draft

[1]Counsel for Mr. Hughes, John H. Blume, was in California participating in a federal evidentiary hearing in *Sims v. Calderon* when the order was received. Thus counsel is not sure whether the order came on Tuesday, December 12 or Wednesday December 13, 2000. Counsel believes that the order arrived in his office on Wednesday December 13 (making this motion due on Wednesday December 27, 2000), but counsel for respondent, Donald J. Zelenka received the order on Tuesday December 12, 2000. After conferring with Mr. Zelenka, counsel have agreed that this motion would be timely (whether by correct computation of time or by extension of time) if filed on Wednesday December 27, 2000.

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order submitted by the Attorney General, and adopted, with minor modifications, by this court as the final order.

I.

A.

An individual seeking post-conviction relief does not have to conclusively establish that the outcome of either the guilt-or-innocence or the sentencing phases of the trial would have been different to satisfy the prejudice prong of *Strickland v. Washington,* 466 U.S. 668 (1984), and its progeny. However, the court's order denying post-conviction relief at various points treats the *Strickland* prejudice inquiry as an outcome determinative test. Such a stringent standard was specifically rejected by the *Strickland* Court, 466 U.S. at 693-94, in favor of the "reasonable probability" test: a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 695. Furthermore, last term, in *Williams v. Taylor*, 120 S.Ct. 1495 (2000), the Supreme Court clearly established that the "reasonable probability" standard, is less onerous than the preponderance of the evidence test, i.e., a person seeking post-conviction relief does not even have to show by a preponderance of the evidence – by 51/49 % – that the outcome of either phase of the trial would have been different but for counsel's acts or omissions. 120 S.Ct. at 1519. For purposes of the Sixth Amendment, confidence in the outcome is undermined – and a new trial required – by a lesser showing.

B.

Furthermore, in assessing prejudice, a reviewing court must look at the totality of the information which the did not consider. *Williams v. Taylor*, 120 S.Ct. at 1515 (the court must consider "the totality of the mitigation evidence – both that adduced at trial, and the evidence

adduced in the habeas proceedings. . . ." The court's order denying post-conviction relief never does that. For example, the order chops the mitigation up into discreet isolated areas, and, concludes, as to each specific category of mitigation (e.g., applicant's youth, mental retardation, brain damage) that it would not have changed the outcome of the trial.

C.

Additionally, the overall gist of the Court's order is that applicant can not demonstrate prejudice under *Strickland* because, no matter what evidence trial counsel presented, the jury would still have sentenced applicant to death. Not only would this be a legally inappropriate standard, but it is simply not true. In the overall scheme of things, this was not a highly aggravated offense. One person was killed and another was seriously injured in the botched armed robbery of a video poker lounge. Herman Hughes was only 16 years old at the time of the offense. He was both brain damaged and mentally retarded. He had no prior record of any significance, and he was by far the youngest and most impaired of the three individuals involved in this offense (against whom the State did not even seek the death penaty). This is not the kind of case that routinely results in a death verdict, even taking into account the fact that Herman is black and victim was white and the racial discrimination in the application of the death penalty which has been demonstrated empirically to be true time and again in black defendant/white victim cases. *See* Blume, Eisenberg & Johnson, *Post-McClesky Racial Discrimination Claims in Capital Cases*, 83 Cornell Law Rev. 1771 (1998). In fact, this was a case which would only have ended up with the defendant on death row in the hands of an inexperienced attorney trying his first capital case. Similarly, this was a case in which the slightest change in the consideration of aggravation and mitigation could easily have led at least one juror to decide that the death penalty was not the appropriate punishment.

D.

Finally, it is not enough to satisfy *Strickland* 's first prong – the performance prong – that counsel is able to articulate some reason for his decisions at trial. Even a strategic decision must be reasonable under all the circumstances. The court's order at various points rejects petitioner's various allegations of ineffective assistance of counsel on the basis that trial counsel was able to articulate some reason for his conduct. *See, e.g.,* Order at 159. If that is the standard, the Sixth Amendment right to counsel has been reduced to a mere formality. It will be the rare case in which counsel has absolutely no articulable reason for why he did – or did not do – something at trial or on appeal.

II.

At p. 54, and again in footnote 10 on p. 60, the Court dismisses the testimony of Dr. Jonathan Venn because he is opposed to the imposition of the death penalty for juveniles. First, at the recent hearing in Georgetown, counsel for the applicant understood the Court to rule that it was not adopting this part of the Attorney General's proposed order and that all such references would be deleted. And this would be correct for good reason. Less than half of the people in the United States, according to recent polling data, support the death penalty for minors. Even more people oppose the death penalty for persons with mental retardation. There is even less support for the death penalty for juveniles among mental health professionals (and the bench and bar for that matter). The number of states that permit the death penalty for children dwindles every year. The unspoken assumption behind this part of the court's order is that only the staunchest supporters of the death penalty – those who favor the death penalty for 16 year old with no reservations whatsoever -- are qualified to give expert testimony in capital cases where the defendant is a juvenile. That simply can not be correct,

especially in the absence of one iota of evidence that Dr. Venn's views – shared by most Americans – somehow effected his evaluation in this case.

III.

P. 96 of the Court's order contains the statement that "impeachment tactics have been held to be matters of trial strategy." This assertion is made in connection with applicant's claim that trial counsel was ineffective for failing to impeach Henry Daniel Owens, Jr. with evidence regarding the full extent of his deal with the prosecution. However, trial counsel offered no strategic reason for failing to impeach Owens. The failure to properly impeach Owens was simply an omission on his part, arising as did so many others, from his lack of experience in serious criminal cases and his unfamiliarity with the law. Even more fundamentally, what would be a legitimate strategic reason for failing to inform the jury that an important state's witness -- the oldest and most educated of the three persons involved in the offense -- was initially charged with a crime that carried a life sentence, but was permitted by the prosecution to plead guilty to a charge that carried a maximum sentence of ten years in exchange for his testimony against the defendant?

IV.

A.

The court rejects applicant's contention that trial counsel was deficient for failing to impeach the state's chief witness, Kelly Hoffman, by adopting Mr. Newsom's statement that he did not "abandon impeaching Hoffman, he only chose not to be aggressive in his style." Order at 99. Applicant has never suggested that counsel ineffective for failing to scream at Kelly Hoffman, "get in her face," make her cry or attempt to intimidate her. Rather, applicant's contention is that there was a host of inconsistencies in her statements which could – and should – have been used to

undermine the accuracy of her account of the offense. This could have easily been accomplished in a "non-aggressive" style without "going after her."

B.

The court's order suffers from the same deficiencies when discussing the other evidence trial counsel did not present which both undermined the accuracy of certain details in Kelly Hoffman's account of the offense and supported the defense that Herman Hughes was not the most culpable of the three individuals involved in the offense. For example, on p. 100, the court adopts as legitimate Mr. Newsom's assertion that he did not call Amy Presley (the victim's sister who possessed information of Pearce's advanced planning of the robbery) as a witness because he "hoped to inquire of Pearce about it if he testified." But this is nonsense. No criminal defense lawyer exercising reasonable trial strategy would bank on getting an important piece of information out of an uncooperative co-indictee who intended to invoke the Fifth Amendment. There was no downside to calling Ms. Presley, as was demonstrated at the post-conviction relief hearing. She had important information about the case which was consistent with counsel's efforts to mitigate Herman's role in the offense.

C.

The court's treatment of counsel's failure to call Duane Gilmore (p. 101) suffers from similar analytical and factual weaknesses. The court adopts Newsom's assertion that Gilmore's testimony about "Pearce bragging about the shooting" was "inconsistent with their theory." *Id.* But that is not true. Any fair review of the trial record reveals that counsel's strategy – poorly executed as it was – focused on developing evidence that Pearce was inside the video poker lounge and fired at least some of the shots. Thus, it was both unreasonable and prejudicial not to put forward the strongest

case possible on the participation of others in the planning and commission of this offense. Counsel failed to call Amy Presley, failed to call Duane Gilmore, failed to call Officer Danny Kirkland, failed to impeach Henry Daniel Owens, Jr. effectively and failed to impeach Kelly Hoffman. This unpresented information must be viewed *in toto*, not in isolation.

V.

A.

The court's order contains a number of legally and factually inaccurate assertions regarding trial counsel's failure to secure experts with experience in child development, mental retardation and brain damage. For example, on p. 111, the order states that counsel did not retain an expert in mental retardation because it was his understanding that Herman would not qualify "because his IQ was not at 70." First, this statement is inconsistent with the testimony of his own experts at trial, who despite their lack of familiarity with the definition of mental retardation, attempted to opine that Herman is retarded. Second, it is not correct. The DSM-IV – which was in effect at the time of trial – clearly states that a person can be determined to have mental retardation with an IQ as high as 75. Third, the court's order ignores the fact that Mr. Newsom was given the names and phone numbers of experts in mental retardation and specifically advised to retain one of them to assist in the development and presentation of the mental retardation evidence. Counsel's failure to secure appropriate experts allowed the State to undermine the case in mitigation with misleading and inaccurate information because his own defense experts were unfamiliar with a) the definition of mental retardation; b) the tests used to determine mental retardation; and, c) the severity of mental retardation as a mental impairment.

B.

Similarly, on p. 116, the court's order determines that trial counsel was not unreasonable in failing to develop evidence of applicant's brain damage because neither of his experts advised counsel of the need for further neurological testing. However, the experts both submitted affidavits -- admitted without objection at the post-conviction relief hearing -- affirmatively stating that they were not aware that applicant had been exposed to syphilis, and further stating that if they had known of his exposure they would have recommended neuropsychological testing. Furthermore, Mr. Newsom was specifically advised to secure the services of a neuropsychologist and was given the names and phone numbers of several experts in the Columbia area. He simply failed to do so.

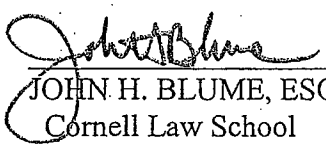
VI.

Finally, applicant wishes to clarify that his state constitutional challenges to the death sentence imposed in this case, as well as his international law challenges, are not exclusively limited to the fact that he was only sixteen years old at the time of the offense. These challenges are also based on his mental retardation.

CONCLUSION

For all these reasons, as well as for all the reasons stated in applicant's prior pleadings, applicant respectfully submits that he is entitled to post-conviction relief. Thus the court's order signed December 8, 2000 should be altered or amended not only in the particular respects referenced in this motion, but also as to the ultimate outcome in this capital post-conviction case.

Respectfully submitted,



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ATTORNEY FOR APPLICANT

December 27, 2000.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CALHOUN)	
HERMAN LEE HUGHES, JR.,)	
)	
Applicant)	
)	**CERTIFICATE OF SERVICE**
)	
v.)	
)	
MICHAEL MOORE,)	
Commissioner, S.C.)	
Department of Corrections, and)	
CHARLES M. CONDON,)	
Attorney General, State of)	
South Carolina,)	
Respondents.)	
)	

I do hereby certify that I have served upon the attorney for the respondent the Applicant's Rule 59(e) Motion in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Donald J. Zelenka, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

This the 27th day of December, 2000, in Columbia, South Carolina.

John H. Blume

STATE OF SOUTH CAROLINA

IN THE CALHOUN COUNTY COURT OF COMMON PLEAS

HERMAN LEE HUGHES, JR., Prison Number 5018, Applicant, v. **MICHAEL MOORE,** Commissioner, S.C. Department of Corrections, and **CHARLES M. CONDON,** Attorney General, State of South Carolina, Respondents.	CA#: 98-CP-09-101

MEMORANDUM AND APPENDICES IN SUPPORT OF APPLICANT'S MOTION TO ALTER OR AMEND THE JUDGMENT

VOLUME I

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IN THE CALHOUN COUNTY COURT OF COMMON PLEAS

HERMAN LEE HUGHES, JR., Prison Number 5018, Applicant, v. **MICHAEL MOORE,** Commissioner, S.C. Department of Corrections, and **CHARLES M. CONDON,** Attorney General, State of South Carolina, Respondents.	CA#: 98-CP-09-101

MEMORANDUM IN SUPPORT OF APPLICANT'S MOTION TO ALTER OR AMEND THE JUDGMENT

Applicant, through his undersigned counsel, files this memorandum in support of the motion to alter or amend the judgment. In this memorandum, applicant will focus on several significant errors in the court's order. In doing so, however, applicant does not abandon or waive any previous argument or issue raised in prior pleadings or prior hearings in support of the application for post-conviction relief, or any objection previously raised to the draft order submitted by the Attorney General, and adopted, with minor modifications, by this court as the final order.

I.

A.

The Supreme Court has definitively held that an individual seeking post-conviction relief does not have to establish conclusively — or even as more likely than not — that the outcome of either the guilt-or-innocence phase or the sentencing phase of the trial would have been different in order to satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984) (attached hereto as appendix A), and its progeny.[1] Nevertheless, this court's order denying post-conviction relief at various points treats the *Strickland* prejudice inquiry as an outcome-determinative test. Such a stringent standard was specifically rejected by the *Strickland* Court, 466 U.S. at 693-94, in favor of the "reasonable probability" test: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.[2]

---

[1]*Strickland* sets forth a two-part test for establishing that counsel's defective assistance requires reversal of a conviction or sentence:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

[2]The Court elaborated on the limits of an applicant's burden:

> [A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. . . .
>
> . . . . An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower [than the "newly discovered evidence" standard]. The result of a proceeding can be rendered

The *Strickland* Court explicitly stated that this standard does not require that an applicant show that it is more likely than not that the outcome would have been different. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." 466 U.S. at 694. Last term, in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000) (attached hereto as appendix B), the Supreme Court clearly affirmed that the "reasonable probability" standard specified in *Strickland* is less onerous than the preponderance of the evidence test; i.e., a person seeking post-conviction relief does not have to show even by a preponderance of the evidence — by 51 % to 49 % — that the outcome of either phase of the trial would have been different but for counsel's acts or omissions.

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that [state court] decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different."

> unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

466 U.S. at 693-94. The Court further stated that courts must not allow the strong presumption of the reliability of judicial proceedings in general to obscure their duty to assess in each case "the fundamental fairness of the proceeding" — specifically, whether "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* at 696.

120 S. Ct. at 1519. For purposes of the Sixth Amendment, confidence in the outcome is undermined — and a new trial required — by a lesser showing than a preponderance of the evidence.

Moreover, controlling precedent does not allow the court to infer that the "reasonable probability" standard requires an applicant to "almost" meet the preponderance standard; the burden on an applicant is far more modest. The Supreme Court has held that "[t]here is little, if any, difference" between a "reasonable possibility" burden of proof imposed on one party and the imposition on the adverse party of a "beyond a reasonable doubt" burden of proof. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (Black, J.) (attached hereto as appendix C). *See also Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (defining the "harmless beyond a reasonable doubt" standard as the absence of a " 'reasonable possibility' that trial error contributed to the verdict") (attached hereto as appendix D). There is some ambiguity in the details of how the Court has distinguished between the "reasonable possibility" and "reasonable probability" standards, but the broad principles are clear.

> First, while "reasonable possibility" or "reasonable likelihood," . . . and "reasonable probability" express distinct levels of confidence concerning the hypothetical effects of errors on decisionmakers' reasoning, the differences among the standards are slight. Second, the gap between all three of those formulations and "more likely than not" is greater than any differences among them.

Strickler v. Greene, 527 U.S. 263, 300 (1999) (Souter, J., concurring in part and dissenting in part) (specifically cautioning about the risk that courts may mistakenly treat the term "probability" "as akin to the more demanding standard, 'more likely than not' "; Justice Souter suggests that the phrase "significant possibility" might be less likely to mislead courts

as to the proper standard of the prejudice enquiry than does the phrase "reasonable probability", *see* 527 U.S. at 298) (attached hereto as appendix E).

An example of this court's erroneous application of the materiality standard for ascertaining prejudice is evident on pp. 186 and 187 of the order. There the court twice states that establishing prejudice, on the basis of counsel's failure to object to the prosecution's eliciting of false testimony from a witness, requires a showing that objection to and correction of the testimony would have "uniquely undermined" the credibility of the witness. Under Strickland, prejudice is demonstrated in a proceeding if an applicant shows that there is a "reasonable probability" that, but for counsel's ineffective assistance, a different result would have ensued. "A reasonable probability is a probability *sufficient to undermine confidence* in the outcome." 466 U.S. at 694 (emphasis added), *quoted in Jones v. State*, 332 S.C. 329, 504 S.E.2d 822, 823 (1998) (attached hereto as appendix F). This court's use of "uniquely undermine" is wholly without foundation in state or federal law. The phrase appears in no published decision or order of the South Carolina state courts, the United States Supreme Court, the federal appellate courts authoritative in the Fourth Circuit, the United States district or bankruptcy courts for South Carolina, or the Judicial Panel on Multidistrict Litigation. Search of WestLaw, SC-CS-ALL database (Jan. 9, 2001) (terms and connectors query for phrase "UNIQUELY UNDERMINE!") (search result printout attached hereto in appendix G). Indeed, a search of the *entire* WestLaw case law database failed to uncover a *single* use of the phrase. Search of WestLaw, ALLCASES, ALLCASES-OLD databases (Jan. 9, 2001) (search result printouts attached hereto in appendix G).

Having used a phrase wholly lacking any discernable foundation in the precedents of our jurisprudence, the court offers no discussion or clarification of its meaning. In this circumstance, applicant can see no basis for a novel requirement for demonstrating prejudice, that counsel's errors must *uniquely* undermine confidence in the outcome of the proceeding, and submits that the court's invocation of such a standard is a clear error of law, imposing an improper burden of proof on the applicant.

Indeed, not only did this court commit a clear error of law in demanding of applicant a level of proof that is contrary to Supreme Court precedent, it applied the "reasonable probability" standard to the wrong party in this proceeding. This court found that even if a request for DJJ evaluation had been granted, "prejudice under *Strickland* has not been shown. Assuming a presentation similar to the testimony of Dr. Venn would have occurred it is *reasonably likely*[3] that transfer [from family court] would have occurred under the *Strickland* test." (Order at 58 (emphasis added).) If this court determines that applicant has failed to meet his burden of proof in establishing prejudice because it is merely "reasonably likely" that the adverse outcome would have resulted anyway, that means that the court is requiring

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[3] A "reasonable likelihood" standard is the same as the "reasonable *possibility*" one, which, as shown *supra*, p. 4, is even less demanding than the "reasonable *probability*" standard. The Supreme Court has clearly defined "reasonable likelihood", too, as less demanding than "preponderance of the evidence".

> [T]he proper inquiry . . . is whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. [A] defendant *need not establish* that the jury was *more likely than not* to have been impermissibly inhibited by the instruction . . . .

Boyde v. California, 494 U.S. 370, 380 (1990) (emphasis added) (attached hereto as appendix H). *See also Strickler v. Greene*, 527 U.S. 263, 299 (1999) (Souter, J., concurring in part and dissenting in part) ("We have treated 'reasonable likelihood' as synonymous with 'reasonable possibility' ") (attached hereto as appendix E). The South Carolina Supreme Court has recognized *Boyde* as the controlling authority on this standard. *See State v. Bell*, 305 S.C. 11, 21, 406 S.E.2d 165, 171 (1991) (attached hereto as appendix I).

applicant to prove beyond a reasonable doubt that trial counsel's error resulted in prejudice. Proof beyond a reasonable doubt is the only way applicant could show that it was not "reasonably likely" that the omitted testimony would have failed to alter the outcome. *See Strickler*, 527 U.S. at 299 (Souter, J., concurring in part and dissenting in part) ("reasonable likelihood" is synonymous with "reasonable possibility"); *Brecht*, 507 U.S. at 637 (defining the "harmless beyond a reasonable doubt" standard as the absence of a " 'reasonable possibility' that trial error contributed to the verdict"); *Chapman*, 386 U.S. at 24 (same). It is axiomatic that if the court fails to apply the required standard to the right party, it cannot begin to apply the standard properly. These are two clear errors of law, and require alteration of the judgment.

B.

Furthermore, in assessing prejudice in the ineffective assistance of counsel context, a reviewing court must look at the totality of the information that the jury did not consider. *Williams*, 120 S. Ct. at 1515 (the court must consider "the totality of the mitigation evidence — both that adduced at trial, and the evidence adduced in the habeas proceedings"). The court's order denying post-conviction relief never does that. For example, the order chops the mitigation up into discrete isolated areas, and, flouting *Strickland*'s instruction to "consider the totality of the evidence," 466 U.S. at 695, concludes as to each specific category of mitigation (e.g., applicant's youth, mental retardation, brain damage) that it would not have changed the outcome of the trial. This is manifestly contrary to Supreme

Court precedent on materiality.[4] Under *United States v. Bagley*, 473 U.S. 667 (1985) (attached hereto as appendix M), the Court held that the materiality standard with respect to suppressed evidence was the same as the *Strickland* materiality standard. *See* 473 U.S. at 682. As explicated in *Bagley*, materiality, and thus prejudicial effect, must be assessed on the basis of the evidence "considered collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (attached hereto as appendix N). While a court of course must evaluate item by item "the tendency and force" of each element applicant submits for its consideration, it fails to fulfill its duty if it does not then "evaluate [the elements'] *cumulative* effect for purposes of materiality *separately*." *Id.* at 436 n.10 (emphasis added).

C.

Additionally, the overall gist of the Court's order is that applicant cannot demonstrate prejudice under *Strickland* because, no matter what evidence trial counsel presented, the jury would still have sentenced applicant to death. Not only is this a legally inappropriate standard, but it is simply not true. In the overall scheme of things, this was not a highly aggravated offense. One person was killed and another was seriously injured in the botched armed robbery of a video poker lounge. Herman Hughes was only 16 years old at the time of the offense — he is the youngest person sentenced to death in this state in the modern era of capital punishment. He was both brain damaged and mentally retarded. He had no prior record of any significance, and he was by far the youngest and most impaired of the three

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[4]The Court treats a prejudice enquiry under *Strickland* as synonymous with the materiality determination under *Brady v. Maryland*, 373 U.S. 83 (1963) (attached hereto as appendix J). *See Strickler*, 527 U.S. at 281-82, 290-91, 296; *see also Schlup v. Delo*, 513 U.S. 298, 327 n.45 (1995) (attached hereto as appendix K); *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (attached hereto as appendix L).

individuals involved in this offense (but he was, nonetheless, the only one of those three against whom the State even sought the death penalty). This is not the kind of case that routinely results in a death verdict, even taking into account that Herman is black and the victim was white, and that racial discrimination in the application of the death penalty has been verified empirically time and again in black defendant/white victim cases. *See* John H. Blume et al., *Post-McClesky Racial Discrimination Claims in Capital Cases*, 83 Cornell L. Rev. 1771, 1772, 1773 n.4, 1774-75 & n.8, 1776-77 & n.22, 1781-83, 1784-85 & n.80, 1789-90 & nn.98-99, 1791-92, 1794 n.116, 1795 & n.122, 1797-98, 1802 & n.161, 1809-10 & n.181 (1998) (attached hereto as appendix O).

In fact, this case could have ended up with the defendant on death row only in the hands of an inexperienced attorney trying his first capital case. There is ample case law testifying to the risk of ineffective assistance when trial counsel is inexperienced, a risk that is especially high in cases involving capital and other serious crimes. *See Helton v. Secretary for the Dep't of Corrections*, 233 F.3d 1322, 1327 (11th Cir. 2000) (reversing conviction for second-degree murder of 22-month old child, and life sentence) (attached hereto as appendix P); *Jackson v. Calderon*, 211 F.3d 1148, 1161-64 (9th Cir. 2000) (reversing death sentence) (attached hereto as appendix Q); *Tyler v. Kemp*, 755 F.2d 741, 743-44 (11th Cir.) (1985) (per curiam) (reversing death sentence) (attached hereto as appendix R); *United States v. Murphy*, 50 M.J. 4, 8-10 & n.1, 12, 15-16 (C.A.A.F.1998) (applying *Strickland*'s two-pronged test) (setting aside premeditated-murder verdict and death sentence; observing "that a capital case — or at least this capital case — is not 'ordinary,' and counsels' inexperience in this sort of

litigation is a factor that contributes to our ultimate lack of confidence in the reliability of the result: a judgment of death," 50 M.J. at 13) (attached hereto as appendix S); *Rose v. State*, 675 So.2d 567, 572-74 (Fla. 1996) (vacating death sentence and remanding) (attached hereto as appendix T). Therefore, in this case, when the slightest change in the consideration of aggravation and mitigation could easily have led at least one juror to decide that the death penalty was not the appropriate punishment, counsel's inexperience is of enormous significance.

D.

Finally, it does not suffice to satisfy *Strickland*'s first prong — the performance prong — that counsel is able to articulate *some* reason for his decisions at trial. Counsel must be able to articulate a *valid* reason for employing a strategy. *See Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (attached hereto as appendix U), *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (attached hereto as appendix V). Even a strategic decision must be reasonable under the totality of the circumstances. The South Carolina Supreme Court has held that counsel is ineffective even though he coherently articulates a strategy, involving a tactical decision to focus on one aspect of the case rather than another, when that strategy is "invalid under an objective standard of reasonableness," *see Roseboro v. State*, 317 S.C. 292, 293-94, 454 S.E.2d 312, 313 (1995) (attached hereto as appendix W) — which is the language *Strickland* uses to define ineffective assistance of counsel. 466 U.S. at 688 (applicant "must show that counsel's representation fell below an objective standard of reasonableness"). Furthermore, the United States Supreme Court has

— invoking that language from *Strickland* — emphasized that "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 1037 (2000) (attached hereto as appendix X). In South Carolina, representation has been held to fall below an objective standard of reasonableness notwithstanding trial counsel's articulated strategic decision not to challenge an element of the State's case, when that element embodied a blatant violation of applicant's constitutional rights. *See Sikes v. State*, 323 S.C. 28, 30, 32, 448 S.E.2d 560, 562-63 (1994) (attached hereto as appendix Y). Representation was held was held to fall below an objective standard of reasonableness notwithstanding trial counsel's articulated strategic decision not to make an objection, when an error of law was involved in that decision. *See Gallman v. State*, 307 S.C. 273, 276-77, 414 S.E.2d 780, 782 (1992) (attached hereto as appendix Z). The South Carolina Supreme Court has also held that counsel may be ineffective for failing to reëvaluate trial strategy in the light of developments during the trial. *See Foye v. State*, 335 S.C. 586, 592, 518 S.E.2d 265, 268 (1999) (attached hereto as appendix AA).

This court's order fails to rise to its analytical obligations. At several points it rejects petitioner's various allegations of ineffective assistance of counsel on the basis that trial counsel was able to articulate some reason for his conduct. (*See, e.g.*, Order at 159.) If that were the standard, the Sixth Amendment right to counsel would be reduced to a mere formality. It is the rare case in which counsel has absolutely no articulable reason for why he did — or did not do — something at trial or on appeal. By accepting trial counsel's stated

reasons at face value, this court has failed to scrutinize his actions under the appropriate legal standard.

II.

At p. 54, and again in footnote 10 on p. 60, the Court dismisses the testimony of Dr. Jonathan Venn because he is opposed to imposing the death penalty upon juveniles. At the hearing conducted in Georgetown prior to signing the order, counsel for the applicant understood the Court to rule that it was not adopting this part of the Attorney General's proposed order and that all such references would be deleted. That would be the correct action — and for good reason. The United States is one of the few countries in the world that permits the legalized murder of children. Even in the United States, many people who support the death penalty — a steadily dwindling majority — are opposed to the execution of sixteen-year olds. The death penalty for juveniles finds even less support among mental health professionals (and among the bench and at the bar, for that matter) than it does among the general public. The number of states that permit the death penalty for juveniles shrinks every year; legislation outlawing the execution of juveniles has been pending in South Carolina[5], and is pending in several other states.[6] The unspoken assumption behind this part

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[5]*See* H. 113-4094 (S.C. 1999, introduced) (Rep. Joseph H. Neal, principal sponsor) (attached hereto as appendix BB). This bill was still in committee when the 113th Session of the General Assembly ended; presumably, Representative Neal will reintroduce the legislation in the newly-begun session.

[6]For example, Arkansas (S. 83-78 (Ark. 2001, pending) (reported from Senate Judiciary Committee with recommendation to pass, Jan. 10, 2001) (summary and tracking information attached hereto in appendix CC)), Kentucky (H. 2001-109 (Ky. 2001, pending) (summary and tracking information attached hereto in appendix CC)), and Mississippi (H. 2001-172 (Miss. 2001, pending) (summary and tracking information attached hereto in appendix CC)). Because the new legislative sessions across the nation are only a few days old, similar bills may be introduced in other states.

of the court's order, dismissing Dr. Venn's evaluation, is that only the most avid enthusiasts of the death penalty — those who favor the death penalty for sixteen-year olds with no reservations whatsoever — are qualified to give expert testimony in capital cases where the defendant is a juvenile. That simply cannot be correct, especially in the absence of one iota of evidence that Dr. Venn's views — shared by most of his professional colleagues, and a growing number of all Americans — somehow skewed his evaluation in this case.

III.

Page 96 of the Court's order contains the statement that "impeachment tactics have been held to be matters of trial strategy." This assertion is made in connection with applicant's claim that trial counsel was ineffective for failing to impeach Henry Daniel Owens, Jr. with evidence regarding the full extent of his deal with the prosecution. Trial counsel, however, offered no strategic reason for failing to impeach Owens. The failure to impeach Owens properly was simply an omission on counsel's part, arising, as did so many others, from his lack of experience in serious criminal cases and his unfamiliarity with the law. Even more fundamentally, the precedents of our state courts and the Supreme Court, *see supra*, pp. 10-11 § I.D., require that this court address a crucial question: what would be a *legitimate* strategic reason for failing to inform the jury that an important State's witness — the oldest and most educated of the three persons involved in the offense — was initially charged with a crime that carried a life sentence, but was permitted by the prosecution to plead guilty to a charge that carried a maximum sentence of ten years in exchange for his testimony against the defendant?

When counsel's failure to impeach a witness means that the defense has failed to engage the crucial issue of a witness's credibility, weak assertions that the failure was a matter of trial strategy do not sustain the presumption that counsel has rendered effective assistance. *See Steinkuehler v. Meschner*, 176 F.3d 441, 444-45 (8th Cir. 1999) (attached hereto as appendix DD). Trial counsel's failure to impeach a witness's testimony in a death penalty case must receive especially close scrutiny. That decision bears consequences not only for the guilt-or-innocence phase of the trial, but also for the penalty phase, in which any evidence or argument that tends to undermine a juror's sense of absolute certainty can be crucial in persuading one or more jurors not to impose a death sentence. *See Smith v. Wainwright*, 741 F.2d 1248, 1255 (11th Cir. 1984) (attached hereto as appendix EE); *see also Way v. Florida*, 760 So.2d 903, 923-24 & n.20 (Fla. 2000) (Pariente, J., concurring) (attached hereto as appendix FF).

IV.

A.

The court rejects applicant's contention that trial counsel was deficient for failing to impeach the State's chief witness, Kelly Hoffman; it instead credits Mr. Newsom's statement that he did not "abandon impeaching Hoffman, he only chose not to be aggressive in his style." (Order at 99.) Applicant has never suggested that counsel was ineffective because he failed to scream at Kelly Hoffman, "get in her face," make her cry or attempt to intimidate her. Applicant's post-hearing memorandum is utterly devoid of any suggestion that trial counsel should have adopted such absurd tactics. (*See* Applicant's Post-Hr'g Mem. Law

Supp. 3d Am. Application for Post Conviction Relief at 50-51 (May 17, 2000) (hereinafter "Applicant's Post-Hr'g Mem.").) The court's failure to engage applicant's arguments concerning effective tactics that trial counsel failed to pursue, and its choice instead to fixate on respondents' outlandish and unfounded notion — that the only alternative to counsel's supine failure to submit crucial inquiries to Hoffman was to roar into a disastrously belligerent confrontation with her — means that the court's rejection of applicant's argument is not supported by probative evidence, and is subject to reversal. *See Horton v. State*, 306 S.C. 252, 255, 411 S.E.2d 223, 225 (1991) (attached hereto as appendix GG).

In contrast to the court's unfounded characterizations, applicant's contention is that there was a host of inconsistencies in Hoffman's statements that could — and should — have been used to undermine the credibility of her account of the offense. Hoffman has admitted to her inconsistent statements regarding the number of shots that were fired, the order of the shots, whether one or two persons were inside the Blue Diamond (and the height of the persons involved), whether she saw everything that transpired during the robbery (that is, whether she was looking up the whole time, or whether she slumped over), and the amount of time that elapsed between applicant's initial and subsequent entry into the Blue Diamond. (*See* PCR Tr. at 654-58.) Applicant presented this argument to the court in detail, but the court's order is devoid of any response to the issues applicant raised, whereby he demonstrated how impeachment could have easily been accomplished in a "non-aggressive" style, without "going after" Hoffman. Indeed, the court offers no support for its contention

that effective impeachment of the witness would have required a bellicose approach, and its assertion of that position must be deemed facially incredible.

B.

The court's order suffers from the same deficiencies in its discussion of the other evidence trial counsel did not present — evidence that both undermined the accuracy of certain details in Kelly Hoffman's account of the offense and supported the defense that Herman Hughes was not the most culpable of the three individuals involved in the offense. For example, on p. 100, the court credits as a legitimate strategic rationale Mr. Newsom's assertion that he did not call Amy Presley (the victim's sister, who possessed information of Pearce's advanced planning of the robbery) as a witness because he "hoped to inquire of Pearce about it if he testified." This is simply nonsense. No criminal defense lawyer exercising reasonable trial strategy would bank on getting an important piece of information out of an uncooperative co-indictee who intended to invoke the Fifth Amendment privilege against self-incrimination; a potential witness who intends to exercise his right not to testify against himself is effectively unavailable. *See Douglas v. Alabama*, 380 U.S. 415, 419 (1965) (attached hereto as appendix HH).

A markedly similar failure by counsel may be found in *State v. Fisher*, 730 P.2d 825 (Ariz. 1986) (in banc) (attached hereto as appendix II). The defendant's principal defense in his murder trial was that his wife was the guilty party and that he had confessed to protect her. His wife

> entered into a plea agreement covering her potential liability for this homicide/robbery. . . . One condition provided that "if she is called as a

> witness in the trial of James Fisher and required to testify, her testimony will not vary substantially in relevant areas to statements previously given * * *." Efforts at defendant's trial to obtain the testimony of [his wife] were unsuccessful as she followed her counsel's advice to claim her fifth amendment privilege and refused to testify about the murder.

Id. at 826 (internal quotation marks and citation omitted). The defendant was found guilty of first-degree murder. His wife then (prior to sentencing) confessed to his attorney that she, not the defendant, had killed the victim. The attorney moved for a new trial on the ground that the "transcript of [the wife]'s confession and her sworn affidavit were newly discovered evidence." *Id.* At the motion hearing, counsel did not have the wife testify, and introduced only her unsworn confession. Nor did he call the defendant's former wife, "although her testimony would have indicated that [the defendant's present wife]'s confession was consistent with prior statements." *Id.* at 826, 828. The trial court denied the motion for new trial, holding that the evidence was not newly discovered and was not credible. *Id.* at 826. The defendant was subsequently sentenced to death. The Arizona Supreme Court held that counsel had rendered ineffective assistance at the motion for a new trial, and that his "[f]ailure to interview and call the essential witnesses needed to bolster defendant's case prejudiced his case." *Id.* at 829.

In *Fisher*, either the wife was still reluctant to testify at the hearing and was in a position to continue invoking her Fifth Amendment privilege, or counsel did not intend to call her. The effect was the same — and is the same as the effect, in this case, of Pearce's intention to invoke his Fifth Amendment privilege: a crucial witness will not be testifying before the court, leaving one witness who can provide testimony on a vital point. The *Fisher*

court recognized, consistent with *Strickland*, that counsel was ineffective and prejudiced his client by failing to call that essential witness, in the absence of an alternative source of the testimony.

Just so, in this case Hughes's counsel was ineffective in not calling Ms. Presley, the only available source of crucial testimony, and prejudiced his client by failing to do so. There was certainly no detriment in calling Ms. Presley, as was demonstrated at the post-conviction relief hearing. She had important information about the case that was consistent with counsel's efforts to mitigate Herman's role in the offense, and there is no reason to believe that she would have testified at trial other than exactly as she did at the post-conviction relief hearing.

C.

The court's treatment of counsel's failure to call Duane Gilmore (p. 101) suffers from similar analytical and factual weaknesses. The court credits Newsom's assertion that Gilmore's testimony about "Pearce bragging about the shooting" was "inconsistent with their theory." *Id.* But that is not true. Any fair review of the trial record reveals that counsel's strategy — poorly executed as it was — focused on developing evidence that Pearce was inside the video poker lounge and fired at least some of the shots. Thus, it was both unreasonable and prejudicial not to put forward the strongest case possible on the participation of others in the planning and commission of this offense. Counsel failed to call Amy Presley, failed to call Duane Gilmore, failed to call Officer Danny Kirkland, failed to

impeach Henry Daniel Owens, Jr. effectively and failed to impeach Kelly Hoffman. This information that counsel failed to present must be viewed *in toto*, not in isolation.[7]

V.

A.

The court's order contains a number of legally and factually inaccurate assertions regarding trial counsel's failure to secure experts with experience in child development, mental retardation and brain damage. For example, on p. 111, the order states that counsel did not retain an expert in mental retardation because it was his understanding that Herman would not qualify "because his IQ was not at 70." First, this statement is inconsistent with the testimony of his own experts at trial, who, despite their lack of familiarity with the definition of mental retardation, attempted to opine that Herman is retarded. (*See* Harold Morgan, Affidavit at 1 ¶ 3, 2 ¶ 5 (Oct. 6, 1999) (attached hereto as appendix JJ); John H. Dewitt, Affidavit at 1-2 ¶ 3, 3 ¶ 6 (Dec. 21, 1999) (attached hereto as appendix KK); *see also* Applicant's Post-Hr'g Mem. at 61-65.) Second, it is not correct. The DSM-IV — which was in effect at the time of trial — clearly states that a person can be determined to have mental retardation with an IQ as high as 75. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 39-46 (4th ed. 1994) (attached hereto as appendix LL). Third, the court's order ignores the fact that Mr. Newsom was given the names and phone numbers of experts in mental retardation and specifically advised to retain one of them

[7]Nevertheless, each individual failure to call or impeach a witness was, as shown above, a substantial error by counsel, and must be viewed as crucially important in the outcome of a case so closely in the balance as this one (*see supra*, pp. 8-10 § I.C.).

to assist in the development and presentation of the mental retardation evidence. (*See* Applicant's Objections to Respondents' Proposed Order at 2-3 (October 4, 2000).) Counsel's failure to secure appropriate experts allowed the State to undermine the case in mitigation with misleading and inaccurate information because his own defense experts were unfamiliar with (a) the definition of mental retardation; (b) the tests used to determine mental retardation; and, (c) the severity of mental retardation as a mental impairment. (*See* Morgan Affidavit at 2 ¶¶ 4-5; Dewitt Affidavit at 2 ¶ 4.)

B.

Similarly, on p. 116, the court's order determines that trial counsel was not unreasonable in failing to develop evidence of applicant's brain damage because neither of his experts advised counsel of the need for further neurological testing. The experts, however, both submitted affidavits — admitted without objection at the post-conviction relief hearing — affirmatively stating that they were not aware that applicant had been exposed to syphilis, and further stating that if they had known of his exposure they would have recommended neuropsychological testing. (*See* Morgan Affidavit at 2 ¶ 4; Dewitt Affidavit at 2 ¶ 5.) Furthermore, Mr. Newsom was specifically advised to secure the services of a neuropsychologist and was given the names and phone numbers of several experts in the Columbia area. (*See* Applicant's Objections to Respondents' Proposed Order at 2-3 (October 4, 2000).) He simply failed to do so.

VI.

Applicant wishes to clarify that his state constitutional challenges to the death sentence imposed in this case, as well as his international law challenges, are not exclusively limited to the fact that he was only sixteen years old at the time of the offense. These challenges are also based on his mental retardation. The execution of mentally retarded persons is emphatically proscribed under international law.

> Imposition of the death penalty on mentally retarded or insane persons is . . . prohibited. Paragraph 6 of the Declaration of [*sic*] the Rights of Mentally Retarded Persons,[8] provides that, if prosecuted for any offence, a mentally retarded person shall have the right to due process of law with full recognition of his degree of mental responsibility. . . . In addition, in paragraph 1 (d) of resolution 1989/64 on implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty,[9] the Economic and Social Council recommended that States strengthen further the protection of the rights of those facing the death penalty by eliminating the death penalty for persons suffering from mental retardation *or extremely limited mental competence*, whether at the stage of sentence or execution.

Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Mission to the United States of America, United Nations Commission on Human Rights, 54th Sess., Provisional Agenda Item 10, ¶36, U.N. Doc. E/CN.4/1998/68/Add.3 (1998) (emphasis added) (attached hereto as appendix OO).[10] The U.N. Special Rapporteur amplified concerns about the vulnerability of the mentally retarded in capital case proceedings:

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[8] *Declaration on the Rights of Mentally Retarded Persons*, G.A. Res. 2856 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, at 93, U.N. Doc. A/8429 (1971) (attached hereto as appendix MM).

[9] *Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, United Nations Economic and Social Council (ECOSOC) resolution 1989/64 (1989) (attached hereto as appendix NN).

[10] The Commission on Human Rights (CHR) reports to ECOSOC, and was established by ECOSOC resolution 5 (I) of 16 February 1946. CHR working documents are issued under the series symbol E/CN.4/-.

> Because of the nature of mental retardation, mentally retarded persons are much more vulnerable to manipulation during arrest, interrogation and confession. Moreover, mental retardation appears not to be compatible with the principle of full criminal responsibility. The Special Rapporteur believes that mental retardation should at least be considered as a mitigating circumstance.

Id. ¶ 58. This report also noted that such concerns have been echoed in the American Bar Association's resolution, adopted February 7, 1989 (text attached hereto as appendix PP), that no person with mental retardation should be subject to sentence of death or execution. *Id.* ¶ 59.

This represents a consensus in international law that has become increasingly clear in recent decades. Even though the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*opened for signature* Dec. 16, 1966) (*entered into force* Mar. 23, 1976)[11] (hereinafter ICCPR) (attached hereto as appendix QQ), did not expressly prohibit the imposition of the death penalty on the mentally retarded, the prohibition of the practice in most states of the world, *see* John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 Harv. Hum. Rts. J. 59, 75 (1993) (attached hereto as appendix RR), signaled that the prohibition against executing the mentally retarded was at least a general principle of international law even before it emerged as an express norm. Notably, the ICCPR did expressly prohibit the *arbitrary* taking of life, *see* ICCPR, art. 6(1), 999 U.N.T.S. at 174;

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[11]The United States ratified the ICCPR on September 8, 1992. U.S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1999*, at 389 (1999).

thus, even under that agreement, "where the condemned person is seriously lacking in understanding, the taking of life might be considered arbitrary," and thus the execution of the mentally retarded be considered contrary to international law. Quigley, *supra*, at 75.

VII.

Finally, applicant emphasizes again his objection to the manner in which this court produced the order. As foretold in applicant's Objections to Respondents' Proposed Order (October 4, 2000), the order is, in most respects, a verbatim regurgitation of respondents' post-hearing brief, with the Court's own numbered findings added to each section as an afterthought. The order is a stark testament to the absence of the independent judicial decisionmaking that would have been necessary had this court written its own order that reflected the court's independent findings and conclusions.

The court's wholesale reproduction in its order of the Attorney General's post-hearing brief is obvious to any reader who has the two documents side by side. Certain details are, however, especially telling; the examples that follow are by no means even close to exhaustive.

On p. 87 of the court's order, a Supreme Court decision is cited as follows: "In Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 [302 S.C. 24] L.Ed.2d 589 (1975) . . . ." The interjection of a bracketed citation to South Carolina Reports exactly reproduces the interjection in the corresponding *Murphy* citation found on p. 83 of respondents' post-hearing brief. This anomaly puzzled applicant's counsel when he saw it in the brief (although he recognized that the bracketed material cited to a page in *State v. Bell*, 302 S.C. 18, 393

S.E.2d 364 (1990) (attached hereto as appendix SS)), until he realized that the anomaly was an S.C. Reports page marker that exactly matched the text of *Bell* as found on the South Carolina CD-ROM of West's Premise Research Software. Indeed, that entire paragraph at pp. 83-84 of respondents' brief (which characterizes the Supreme Court's decision in *Murphy*), was lifted verbatim — and uncited — from *Bell*. *See* 302 S.C. at 23-24, 393 S.E.2d at 367. Counsel for respondents clearly "blocked" the *Bell* paragraph's text in Premise on his computer screen, executed the "copy" command, and pasted it into the word processing file of his brief. His unattributed replication of this text would probably have gone unnoticed, except that he failed to review his document closely enough to spot and excise the page-marker citation that pointed to the source of that paragraph.

In the paragraph that begins, "As stated in the argument . . . ," on p. 180 of the court's order, there are successive em-dashes in the first sentence. The first is rendered as a double hyphen: "--". The second is an unbroken dash: "–". This exactly replicates the typography in respondents' brief at p. 162.

Likewise, at p. 181, line 3, of the court's order, a typographical error omits a space after a comma, rendering the text as follows: "argument 9(d),under state law". This exactly replicates the error found at p. 162 of respondents' brief.

On p. 183 of the court's order, the paragraph at the center of the page consists of a single sentence broken in its middle by a parenthetical string citation. In the first case cited, the underlining of the case name begins in the space before the first letter, thus:

See, e.g., Mooney v. Holohan, ...

The closing parenthesis after the final citation should be followed by a comma, and then the concluding text of the sentence. Instead, there is a period inside the parenthesis (as if the parentheses contained a complete sentence, rather than a series of phrases internal to the sentence containing the parentheses), and no comma after the closing parenthesis — although a comma is mistakenly placed *before* the opening parenthesis. The relevant portions of the text are thus:

> [T]he knowing use of perjured testimony, (See, e.g., Mooney v. Holohan, . . . (1959).) illustrate the special role . . . .

These errors or anomalies in the court's order exactly replicate the text found in respondents' brief at p. 165.

Applicant's point is not that the text of the order or the brief contains these errors or anomalies; he acknowledges that they can be dismissed as trivial, albeit undesirable. Instead, their triviality is their most revealing aspect: they could not have arisen out of independent accidents. Applicant grants that a court may properly adopt portions of a party's brief as apt expressions of its conclusions in a case. Applicant submits that in this instance, however, it is impossible to conclude that the court was exercising the editorial oversight even of an amanuensis. Had the court copied large portions of respondent's text by typing it into the court's own computer file, the errors and anomalies noted *supra* — along with innumerable others in the order — would not have been slavishly replicated from respondents' brief. A copyist will at least notice and correct such mechanical errors.

The persistence of these minor errors in the text of the order, and the order's more profound substantive flaws, spring from the same source: the Attorney General supplied the

court with the computer file of his brief, and the court generated its order by making minor modifications to that file as were needed to conform to legal requirements (such as the addition of numbered findings of law), but clearly did not devote to the text scrutiny that was sufficient to catch even its most obvious errors and infelicities — let alone its manifold analytical shortcomings and misapplications of law.

The order's surfeit of flaws great and small vividly illustrates the pitfalls that this court invited when it "uncritically accepted findings prepared without judicial guidance by the prevailing party"; only the most oblivious observer could fail "to doubt that the findings . . . represent the judge's own considered conclusions." *Anderson v. Bessemer City*, 470 U.S. 564, 572-73 (1985) (attached hereto as appendix TT).

Appellate courts have expressed clear disapproval of lower courts' wholesale adoptions of one party's findings of fact and conclusions of law, concluding that such findings are "not the original product of a disinterested mind." *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977) (attached hereto as appendix UU); *see also, e.g.*, *Shaw v. Martin*, 733 F.2d 304, 309 n.7 (4th Cir. 1984) ("The adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions") (attached hereto as appendix VV). This disapproval stems from the clear implication of such a practice: wholesale adoption of such findings and conclusions indicates the lower court's abdication of its proper function as adjudicator. *See, e.g.*, *Philbrook v. Ansonia Bd. of Educ.*, 925 F.2d 47, 53 (2d Cir. 1991) (viewing with disfavor court's verbatim adoption of party's proposed order) (attached hereto as appendix WW);

Kelson v. United States, 503 F.2d 1291, 1294-95 (10th Cir. 1974) (stating, with reference to Fed. R. Civ. P. 52 (to which S.C. R. Civ. P. 52(a)-(b) corresponds), that mechanical adoption of one party's proposed findings constitutes an abdication of the trial judge's duty, because findings "made" in that manner "fail to 'reveal the discerning line for decision []' " (quoting *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964) (attached hereto as appendix YY), and citing in particular n.4 (a court's signing of findings of fact and conclusions of law prepared by the prevailing party "is an abandonment of the duty and the trust that has been placed in the judge" (quoting Judge J. Skelly Wright)))) (attached hereto as appendix XX). In light of these strong expressions of disapproval for the uncritical adoption of one party's proposed findings and order, the findings in the court's December 8, 2000 order should be entitled to little deference by any subsequent reviewing court, and are proper subjects for alteration or amendment pursuant to this Rule 59(e) motion.

CONCLUSION

For all these reasons, as well as for all the reasons stated in applicant's prior pleadings, applicant respectfully submits that he is entitled to post-conviction relief. Thus the court's order signed December 8, 2000 should be altered or amended not only in the particular respects referenced in this motion, but also as to the ultimate outcome in this capital post-conviction case.

Respectfully submitted,

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ATTORNEYS FOR APPLICANT

January 16, 2001

APPENDIX A

466 U.S. 668, 80 L.Ed.2d 674

[668] Charles E. STRICKLAND, Superintendent, Florida State Prison, et al., Petitioners

v.

David Leroy WASHINGTON.

No. 82-1554.

Argued Jan. 10, 1984.

Decided May 14, 1984.

Rehearing Denied June 25, 1984.

See 467 U.S. 1267, 104 S.Ct. 3562.

Defendant, who received death penalty for murder conviction, filed petition for writ of habeas corpus. The United States District Court for the Southern District of Florida, C. Clyde Atkins, Chief Judge, denied relief, and the Court of Appeals, 673 F.2d 879, affirmed in part and vacated in part. On rehearing en banc, 693 F.2d 1243, the Court of Appeals, Vance, Circuit Judge, reversed and remanded. On certiorari, the Supreme Court, Justice O'Connor, held that: (1) proper standard for attorney performance is that of reasonably effective assistance; (2) defense counsel's strategy at sentencing hearing was reasonable and, thus, defendant was not denied effective assistance of counsel; and (3) even assuming challenged conduct of counsel was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence.

Reversed.

Justice Brennan concurred in part and dissented in part and filed opinion.

Justice Marshall dissented and filed opinion.

1. Habeas Corpus ⇐45.3(1)

Rule requiring dismissal of mixed habeas corpus petitions containing exhausted and unexhausted claims, though to be strictly enforced, is not jurisdictional.

2. Criminal Law ⇐641.12(1)

Government violates right to effective assistance of counsel when it interferes in certain ways with ability of counsel to make independent decisions about how to conduct defense. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐641.13(1)

Benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced a just result. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.13(7)

A capital sentencing proceeding is sufficiently like a trial in its adversarial format and in existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial, which is to ensure that adversarial testing process works to produce a just result under standards governing decision. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐1166.11

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components: first, defendant must show that counsel's performance was deficient, requiring showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment and, second, defendant must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.13(1)

Proper standard for attorney performance is that of reasonably effective assistance. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.5

Counsel's function in representing a criminal defendant is to assist defendant, and hence counsel owes client duty of loyalty, a duty to avoid conflicts of interest. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐641.13(1)

From counsel's function as assistant to defendant derive the overarching duty to advocate defendant's cause and more particular duties to consult with defendant on important decisions and to keep defendant informed of important developments in course of the prosecution. U.S.C.A. Const. Amend. 6.

9. Criminal Law ⇐641.13(1)

Defense counsel has duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(1)

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or of the range of legitimate decisions regarding how best to represent a criminal defendant; any set of rules would interfere with constitutionally protected independence of counsel and restrict wide latitude counsel must have in making tactical decisions, and could distract counsel from the overriding mission of vigorous advocacy of defendant's cause. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐1144.10

Court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance; that is, defendant must overcome presumption that, under those circumstances, challenged action might be considered sound trial strategy. U.S.C.A. Const. Amend. 6.

12. Criminal Law ⇐641.13(1)

A convicted defendant making a claim of ineffective assistance must identify acts or omissions of counsel that are alleged not to have been result of reasonable professional judgment and, then, court must determine whether, in light of all circumstances, identified acts or omissions were outside wide range of professional competent assistance; in making that determination, court should keep in mind that counsel's function is to make adversarial testing process work in the particular case. U.S. C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(6)

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.13(1, 6)

Inquiry into counsel's conversations with defendant may be critical to proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⇐1166.11

An error by counsel, even if professionally unreasonable, does not warrant setting aside judgment in a criminal proceeding if the error had no effect on the judgment. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐1163(2)

Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. U.S.C.A. Const.Amend. 6.

17. Criminal Law ⇐1163(2)

As relating to Sixth Amendment claims of ineffective assistance of counsel, prejudice is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. U.S.C.A. Const. Amend. 6.

18. Criminal Law ⇐1163(2)

Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to general requirement that defendant affirmatively prove prejudice. U.S. C.A. Const.Amend. 6.

19. Criminal Law ⇐641.13(1)

To succeed on a Sixth Amendment claim of ineffective assistance of counsel, defendant must show that there is a "reasonable probability," which is a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofes-

sional errors, result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

20. Criminal Law ⇐1163(2)

In making determination whether specified errors of counsel resulted in required prejudice for a defendant to succeed on a Sixth Amendment claim, a court should presume, absent challenge to judgment on grounds of evidentiary insufficiency, that judge or jury acted according to law. U.S.C.A. Const.Amend. 6.

21. Criminal Law ⇐641.13(7)

When a defendant challenges a death sentence on ground of ineffective assistance of counsel, question is whether there is a reasonable probability that, absent the errors, sentencer, including appellate court, to extent it independently reweighs the evidence, would have concluded that balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const. Amend. 6.

22. Criminal Law ⇐641.13(1)

In determining whether defendant was denied effective assistance of counsel in death sentence case, court must consider totality of the evidence before judge or jury. U.S.C.A. Const.Amend. 6.

23. Criminal Law ⇐641.13(1)

A court need not determine whether counsel's performance was deficient before examining prejudice suffered by defendant as result of alleged deficiencies. U.S.C.A. Const.Amend. 6.

24. Habeas Corpus ⇐25.1(6)

Since fundamental fairness is central concern of writ of habeas corpus, no special standards ought to apply to claims of ineffective assistance of counsel made in habeas proceedings. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

25. Criminal Law ⇐641.13(1)

Ineffectiveness of counsel is not a question of basic, primary, or historic fact but, rather, is a mixed question of law and fact. U.S.C.A. Const.Amend. 6.

26. Criminal Law ⇐641.13(7)

In capital murder case, defense counsel's strategy at sentencing hearing of not seeking out character witnesses or requesting a psychiatric examination or presentence report was reasonable and, thus, defendant was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6.

27. Criminal Law ⇐1166.11

Even assuming challenged conduct of defense counsel at sentencing hearing was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence because, given overwhelming aggravating factors, there was no reasonable probability that omitted evidence would have changed conclusion that aggravating circumstances outweighed mitigating circumstances and, hence, sentence imposed. U.S.C.A. Const.Amend. 6.

Syllabus *

Respondent pleaded guilty in a Florida trial court to an indictment that included three capital murder charges. In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility." In preparing for the sentencing hearing, defense counsel spoke with respondent about his background, but did not seek out character witnesses or request a psychiatric examination. Counsel's decision not to present evidence concerning respondent's character and emotional state reflected his judgment that it

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

was advisable to rely on the plea colloquy for evidence as to such matters, thus preventing the State from cross-examining respondent and from presenting psychiatric evidence of its own. Counsel did not request a presentence report because it would have included respondent's criminal history and thereby would have undermined the claim of no significant prior criminal record. Finding numerous aggravating circumstances and no mitigating circumstance, the trial judge sentenced respondent to death on each of the murder counts. The Florida Supreme Court affirmed, and respondent then sought collateral relief in state court on the ground, *inter alia*, that counsel had rendered ineffective assistance at the sentencing proceeding in several respects, including his failure to request a psychiatric report, to investigate and present character witnesses, and to seek a presentence report. The trial court denied relief, and the Florida Supreme Court affirmed. Respondent then filed a habeas corpus petition in Federal District Court advancing numerous grounds for relief, including the claim of ineffective assistance of counsel. After an evidentiary hearing, the District Court denied relief, concluding that although counsel made errors in judgment in failing to investigate mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. The Court of Appeals ultimately reversed, stating that the Sixth Amendment accorded criminal defendants a right
669 to counsel rendering "reasonably effective assistance given the totality of the circumstances." After outlining standards for judging whether a defense counsel fulfilled the duty to investigate nonstatutory mitigating circumstances and whether counsel's errors were sufficiently prejudicial to justify reversal, the Court of Appeals remanded the case for application of the standards.

Held:

1. The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding—such as the one provided by Florida law—that is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial. Pp. 2063–2064.

2. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Pp. 2064–2069.

(a) The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. Pp. 2064–2067.

(b) With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Pp. 2067–2069.

1670 3. A number of practical considerations are important for the application of the standards set forth above. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. The principles governing ineffectiveness claims apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. And in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d), but is a mixed question of law and fact. Pp. 2069–2070.

4. The facts of this case make it clear that counsel's conduct at and before respondent's sentencing proceeding cannot be found unreasonable under the above standards. They also make it clear that, even assuming counsel's conduct was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence. Pp. 2070–2071.

693 F.2d 1243 (5th Cir.1982), reversed.

Carolyn M. Snurkowski and Calvin L. Fox, Tallahassee, Fla., for petitioners.

Richard E. Shapiro, Trenton, N.J., for respondent.

1671 Justice O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a 10-day period in September 1976, respondent planned and committed three groups of crimes, which included 672 three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. App. 50–53. He also stated, however, that he accepted responsibility for the crimes. *E.g., id.*, at 54, 57. The trial judge

told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision. *Id.*, at 62.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on 673 the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. *Id.*, at A266.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. See *id.*, at A282. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own. *Id.*, at A223–A225.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." *Id.*, at A227; App. 311. Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared. App. to Pet. for Cert. A227–A228, A265–A266.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. *Id.*, at A265–A266. Counsel also argued that respondent had no history of criminal activity and that respondent committed 674 the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and

shooting the murder victim's sisters-in-law, who sustained severe—in one case, ultimately fatal—injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions, respondent had stated that he had engaged in a course of stealing. In any case, even if respondent had no significant history of criminal activity, the aggravating circumstances "would still clearly far outweigh" that mitigating factor. Second, the judge found that, during all three crimes, respondent was not suffering from extreme mental or emotional disturbance and could appreciate the criminality of his acts. Third, none of the victims was a participant in, or consented to, respondent's conduct. Fourth, respondent's [675] participation in the crimes was neither minor nor the result of duress or domination by an accomplice. Finally, respondent's age (26) could not be considered a factor in mitigation, especially when viewed in light of respondent's planning of the crimes and disposition of the proceeds of the various accompanying thefts.

In short, the trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances." See *Washington v. State*, 362 So.2d 658, 663–664 (Fla.1978), (quoting trial court findings), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979). He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts. In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He also submitted one psychiatric report and one psychological report stating that respondent, though not under the influence [676] of extreme mental or emotional disturbance, was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes. App. 7; see also *id.*, at 14.

The trial court denied relief without an evidentiary hearing, finding that the record evidence conclusively showed that the ineffectiveness claim was meritless. App. to Pet. for Cert. A206–A243. Four of the assertedly prejudicial errors required little discussion. First, there were no grounds to request a continuance, so there was no error in not requesting one when respondent pleaded guilty. *Id.*, at A218–A220. Second, failure to request a presentence investigation was not a serious error because the trial judge had discretion not to grant such a request and because any presentence investigation would have resulted in admission of respondent's "rap sheet" and thus would have undermined his assertion of no significant history of criminal activity. *Id.*, at A226–A228. Third, the argument and memorandum given to the sentencing judge were "admirable" in light of the overwhelming aggravating circumstances and absence of mitigating circumstances. *Id.*, at A228. Fourth, there was no error in failure to examine the medical

examiner's reports or to cross-examine the medical witnesses testifying on the manner of death of respondent's victims, since respondent admitted that the victims died in the ways shown by the unchallenged medical evidence. *Id.*, at A229.

The trial court dealt at greater length with the two other bases for the ineffectiveness claim. The court pointed out that a psychiatric examination of respondent was conducted by state order soon after respondent's initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was "chronically frustrated and depressed because of his economic dilemma," he was not under the influence of extreme mental or emotional disturbance. All three [677] reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree. Accordingly, counsel could reasonably decide not to seek psychiatric reports; indeed, by relying solely on the plea colloquy to support the emotional disturbance contention, counsel denied the State an opportunity to rebut his claim with psychiatric testimony. In any event, the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack.

The court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems. Respondent himself had already testified along those lines at the plea colloquy. Moreover, respondent's admission of a course of stealing rebutted many of the factual allegations in the affidavits. For those reasons, and because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior criminal history, no substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral attack.

Applying the standard for ineffectiveness claims articulated by the Florida Supreme Court in *Knight v. State*, 394 So.2d 997 (1981), the trial court concluded that respondent had not shown that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding. The court specifically found: "[A]s a matter of law, the record affirmatively demonstrates beyond any doubt that even if [counsel] had done each of the ... things [that respondent alleged counsel had failed to do] [678] at the time of sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely *overwhelming* ...." App. to Pet. for Cert. A230.

The Florida Supreme Court affirmed the denial of relief. *Washington v. State*, 397 So.2d 285 (1981). For essentially the reasons given by the trial court, the State Supreme Court concluded that respondent had failed to make out a prima facie case of either "substantial deficiency or possible prejudice" and, indeed, had "failed to such a degree that we believe, to the point of a moral certainty, that he is entitled to no relief ...." *Id.*, at 287. Respondent's claims were "shown conclusively to be without merit so as to obviate the need for an evidentiary hearing." *Id.*, at 286.

C

Respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. He advanced numerous grounds for relief, among them ineffective assistance of counsel based on the same errors, except for the failure to move for a contin-

uance, as those he had identified in state court. The District Court held an evidentiary hearing to inquire into trial counsel's efforts to investigate and to present mitigating circumstances. Respondent offered the affidavits and reports he had submitted in the state collateral proceedings; he also called his trial counsel to testify. The State of Florida, over respondent's objection, called the trial judge to testify.

The District Court disputed none of the state court factual findings concerning trial counsel's assistance and made findings of its own that are consistent with the state court findings. The account of trial counsel's actions and decisions given above reflects the combined findings. On the legal issue of ineffectiveness, the District Court concluded that, although trial counsel made errors in judgment in failing to [679] investigate nonstatutory mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. Relying in part on the trial judge's testimony but also on the same factors that led the state courts to find no prejudice, the District Court concluded that "there does not appear to be a likelihood, or even a significant possibility," that any errors of trial counsel had affected the outcome of the sentencing proceeding. App. to Pet. for Cert. A285–A286. The District Court went on to reject all of respondent's other grounds for relief, including one not exhausted in state court, which the District Court considered because, among other reasons, the State urged its consideration. *Id.*, at A286–A292. The court accordingly denied the petition for a writ of habeas corpus.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims that it developed in its opinion. 673 F.2d 879 (5th Cir.1982). The panel decision was itself vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc. 679 F.2d 23 (1982). The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards. 693 F.2d 1243 (1982).

The court noted at the outset that, because respondent had raised an unexhausted claim at his evidentiary hearing in the District Court, the habeas petition might be characterized as a mixed petition subject to the rule of *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), requiring dismissal of the entire petition. The court held, however, that the exhaustion requirement is "a matter of comity rather than a matter of jurisdiction" and hence admitted of exceptions. The court agreed with the District Court that this case came within an exception to the mixed petition rule. 693 F.2d, at 1248, n. 7.

[680] Turning to the merits, the Court of Appeals stated that the Sixth Amendment right to assistance of counsel accorded criminal defendants a right to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." *Id.*, at 1250. The court remarked in passing that no special standard applies in capital cases such as the one before it: the punishment that a defendant faces is merely one of the circumstances to be considered in determining whether counsel was reasonably effective. *Id.*, at 1250, n. 12. The court then addressed respondent's contention that his trial counsel's assistance was not reasonably effective because counsel breached his duty to investigate nonstatutory mitigating circumstances.

The court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight, and that "[t]he

amount of pretrial investigation that is reasonable defies precise measurement." *Id.*, at 1251. Nevertheless, putting guilty-plea cases to one side, the court attempted to classify cases presenting issues concerning the scope of the duty to investigate before proceeding to trial.

If there is only one plausible line of defense, the court concluded, counsel must conduct a "reasonably substantial investigation" into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. *Id.*, at 1252. The same duty exists if counsel relies at trial on only one line of defense, although others are available. In either case, the investigation need not be exhaustive. It must include " 'an independent examination of the facts, circumstances, pleadings and laws involved.' " *Id.*, at 1253 (quoting *Rummel v. Estelle*, 590 F.2d 103, 104 (CA5 1979)). The scope of the duty, however, depends [1681] on such facts as the strength of the government's case and the likelihood that pursuing certain leads may prove more harmful than helpful. 693 F.2d, at 1253, n. 16.

If there is more than one plausible line of defense, the court held, counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial. If counsel conducts such substantial investigations, the strategic choices made as a result "will seldom if ever" be found wanting. Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment. *Id.*, at 1254.

If counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective. Counsel may not exclude certain lines of defense for other than strategic reasons. *Id.*, at 1257–1258. Limitations of time and money, however, may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence. Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based. Thus, "when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.*, at 1255 (footnote omitted). Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. *Id.*, at 1256–1257, n. 23.

Having outlined the standards for judging whether defense counsel fulfilled the duty to investigate, the Court of Appeals turned its attention to the question of the prejudice to the [1682] defense that must be shown before counsel's errors justify reversal of the judgment. The court observed that only in cases of outright denial of counsel, of affirmative government interference in the representation process, or of inherently prejudicial conflicts of interest had this Court said that no special showing of prejudice need be made. *Id.*, at 1258–1259. For cases of deficient performance by counsel, where the government is not directly responsible for the deficiencies and where evidence of deficiency may be more accessible to the defendant than to the prosecution, the defendant must show that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense." *Id.*, at 1262. This standard, the Court of Appeals reasoned, is compatible with the "cause and prejudice" standard for overcoming procedural defaults in federal collateral proceedings and discourages insubstantial claims by requiring more than a showing, which could virtually always be made, of some conceivable adverse effect on the defense from counsel's errors. The specified showing of prejudice

would result in reversal of the judgment, the court concluded, unless the prosecution showed that the constitutionally deficient performance was, in light of all the evidence, harmless beyond a reasonable doubt. *Id.*, at 1260–1262.

The Court of Appeals thus laid down the tests to be applied in the Eleventh Circuit in challenges to convictions on the ground of ineffectiveness of counsel. Although some of the judges of the court proposed different approaches to judging ineffectiveness claims either generally or when raised in federal habeas petitions from state prisoners, *id.*, at 1264–1280 (opinion of Tjoflat, J.); *id.*, at 1280 (opinion of Clark, J.); *id.*, at 1285–1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); *id.*, at 1288–1291 (opinion of Hill, J.), and although some believed that no remand was necessary in this case, *id.*, at 1281–1285 (opinion of Johnson, J., joined by Anderson, J.); *id.*, at 1285–1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); *id.*, at 1288–1291 (opinion of Hill, J.), a majority [688] of the judges of the en banc court agreed that the case should be remanded for application of the newly announced standards. Summarily rejecting respondent's claims other than ineffectiveness of counsel, the court accordingly reversed the judgment of the District Court and remanded the case. On remand, the court finally ruled, the state trial judge's testimony, though admissible "to the extent that it contains personal knowledge of historical facts or expert opinion," was not to be considered admitted into evidence to explain the judge's mental processes in reaching his sentencing decision. *Id.*, at 1262–1263; see *Fayerweather v. Ritch*, 195 U.S. 276, 306–307, 25 S.Ct. 58, 67–68, 49 L.Ed. 193 (1904).

D

Petitioners, who are officials of the State of Florida, filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals. The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. *E.g., United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657. With the exception of *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), however, which involved a claim that counsel's assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of "actual ineffectiveness" of counsel's assistance in a case going to trial. Cf. *United States v. Agurs*, 427 U.S. 97, 102, n. 5, 96 S.Ct. 2392, 2397, n. 5, 49 L.Ed.2d 342 (1976).

In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See *Trapnell v. United States*, 725 F.2d 149, 151–152 (CA2 1983); App. B to Brief for United States in *United States v. Cronic, supra*, at pp. 3a–6a; Sarno, [684] Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A.L.R. 4th 99–157, §§ 7–10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in *United States v. Cronic, supra*, 7a–10a; Sarno, *supra*, at 83–99, § 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in *United States v. Decoster*, 199 U.S.App. D.C. 359, 371, 374–375, 624 F.2d 196, 208, 211–212 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979), and adopted by the State of Florida in *Knight v. State*, 394 So.2d, at 1001, a standard that requires a showing that specified

deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261–1262.

[1] For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See *Rose v. Lundy*, 455 U.S., at 515–520, 102 S.Ct., at 1201–04. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through |685 the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942); see *Powell v. Alabama*, *supra*, 287 U.S. at 68–69, 53 S.Ct. 63–64.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Gideon v. Wainwright*, *supra*; *Johnson v. Zerbst*, *supra*. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

[2] |686 For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, *e.g.*, *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 612–613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358

(1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 593–596, 81 S.Ct. 756, 768–770, 5 L.Ed.2d 783 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," *Cuyler v. Sullivan*, 446 U.S., at 344, 100 S.Ct., at 1716. *Id.*, at 345–350, 100 S.Ct., at 1716–1719 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

[3] The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

[4] The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see *Barclay*[687] *v. Florida*, 463 U.S. 939, 952–954, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134 (1983); *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

[5] A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

[6] As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See *Trapnell v. United States*, 725 F.2d, at 151–152. The Court indirectly recognized as much when it stated in *McMann v. Richardson*, *supra*, 397 U.S., at 770, 771, 90 S.Ct., at 1448, 1449, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also *Cuyler v. Sullivan*, *supra*, 446 U.S., at 344, 100 S.Ct., at 1716. When a convicted defendant[688] complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It re-

lies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See *Michel v. Louisiana*, 350 U.S. 91, 100–101, 76 S.Ct. 158, 163–164, 100 L.Ed. 83 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

[7–9] Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan*, *supra*, 446 U.S., at 346, 90 S.Ct., at 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 287 U.S., at 68–69, 53 S.Ct., at 63–64.

[10] These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take [1689] account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See *United States v. Decoster*, 199 U.S.App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

[11] Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133–134, 102 S.Ct. 1558, 1574–1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel v. Louisiana*, *supra*, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, [1690] The Trial for Life: Effective Assistance of Counsel

in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

[12] Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

[13] These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

[14] The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See *United States v. Decoster, supra*, at 372–373, 624 F.2d, at 209–210.

B

[15] An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364–365, 101 S.Ct. 665, 667–

668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure[692] that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

[16] In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronic*, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046–2047, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S., at 659, 104 S.Ct., at 2047. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

[17] One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345–350, 100 S.Ct., at 1716–1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, *e.g.*, Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan, supra*, 446 U.S., at 350, 348, 100 S.Ct., at 1719, 1718 (footnote omitted).

[18] [693]Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866–867, 102 S.Ct. 3440, 3446–3447, 73 L.Ed.2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are

sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings.694 Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as *Amicus Curiae* 19–20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. *United States v. Johnson*, 327 U.S. 106, 112, 66 S.Ct. 464, 466, 90 L.Ed. 562 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

[19] Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States v. Agurs*, 427 U.S., at 104, 112–113, 96 S.Ct., at 2397, 2401–2402, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *United States v. Valenzuela-Bernal*, *supra*, 458 U.S., at 872–874, 102 S.Ct., at 3449–3450. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

[20] In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.695 An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

[21] The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a

reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

[22, 23] In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to 1696 be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. *Trapnell v. United States*, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different 1697 formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

[24] The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the "cause and prejudice" test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. See *United States v. Frady*, 456 U.S. 152, 162–169, 102 S.Ct. 1584, 1591–1595, 71 L.Ed.2d 816 (1982); *Engle v. Isaac*, 456 U.S. 107, 126–129, 102 S.Ct. 1558, 1570–1572, 71 L.Ed.2d 783 (1982). An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, see *id.*, 1698 at 126, 102 S.Ct., at 1570, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

[25] Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," *Townsend v. Sain*, 372 U.S. 293, 309, n. 6, 83 S.Ct. 745, 755, n. 6, 9 L.Ed.2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See *Cuyler v. Sullivan*, 446 U.S., at 342, 100 S.Ct., at 1714. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles. See *Pullman-Standard v. Swint*, 456 U.S. 273, 291–292, 102 S.Ct. 1781, 1791–1792, 72 L.Ed.2d 66 (1982).

Application of the governing principles is not difficult in this case. The facts as described above, see *supra*, at 2056–2060, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the 1699 challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

[26] With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, see App. 383–384, 400–401, nothing in the record indicates, as one possible reading of the District Court's opinion suggests, see App. to Pet. for Cert. A282, that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well

known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

[27] With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the 1700 sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Our conclusions on both the prejudice and performance components of the ineffectiveness inquiry do not depend on the trial judge's testimony at the District Court hearing. We therefore need not consider the general admissibility of that testimony, although, as noted *supra*, at 2069, that testimony is irrelevant to the prejudice inquiry. Moreover, the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without regard to the evidence presented at the District Court hearing. The state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

1701 We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly

Reversed.

Justice BRENNAN, concurring in part and dissenting in part.

I join the Court's opinion but dissent from its judgment. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg v. Georgia*, 428 U.S. 153, 227, 96 S.Ct. 2909, 2971, 49 L.Ed.2d 859 (1976) (BRENNAN, J., dissenting), I would vacate respondent's death sentence and remand the case for further proceedings.[1]

1. The Court's judgment leaves standing another purportedly imposed in compliance with the procedural standards developed in cases begin- in an increasing number of capital sentences

[702]I

This case and *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657, present our first occasions to elaborate the appropriate standards for judging claims of ineffective assistance of counsel. In *Cronic*, the Court considers such claims in the context of cases "in which the surrounding circumstances [make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial," at 661, 104 S.Ct., at 2048. This case, in contrast, concerns claims of ineffective assistance based on allegations of specific errors by counsel—claims which, by their very nature, require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding. Accordingly, a defendant making a claim of this kind must show not only that his lawyer's performance was inadequate but also that he was prejudiced thereby. See also *Cronic*, at 659, n. 26, 104 S.Ct., at 2047, n. 26.

I join the Court's opinion because I believe that the standards it sets out today will both provide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law. Like all federal courts and most state courts that have previously addressed the matter, see *ante*, at 2062, the Court concludes that "the proper standard for attorney performance is that of reasonably effective assistance." *Ante*, at 2064. And, [703]rejecting the strict "outcome-determinative" test employed by some courts, the Court adopts as the appropriate standard for prejudice a requirement that the defendant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," defining a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ante*, at 2068. I believe these standards are sufficiently precise to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not; at the same time, the standards are sufficiently flexible to accommodate the wide variety of situations giving rise to claims of this kind.

ning with *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Earlier this Term, I reiterated my view that these procedural requirements have proven unequal to the task of eliminating the irrationality that necessarily attends decisions by juries, trial judges, and appellate courts whether to take or spare human life. *Pulley v. Harris*, 465 U.S. 37, 59, 104 S.Ct. 871, 886, 79 L.Ed.2d 29 (1984) (BRENNAN, J., dissenting). The inherent difficulty in imposing the ultimate sanction consistent with the rule of law, see *Furman v. Georgia*, 408 U.S. 238, 274–277, 92 S.Ct. 2726, 2744–2746, 33 L.Ed.2d 346 (1972) (BRENNAN, J., concurring); *McGautha v. California*, 402 U.S. 183, 248–312, 91 S.Ct. 1454, 1487–1520, 28 L.Ed.2d 711 (1971) (BRENNAN, J., dissenting), is confirmed by the extraordinary pressure put on our own deliberations in recent months by the growing number of applications to stay executions. See *Wainwright v. Adams*, 466 U.S. 964, 965, 104 S.Ct. 2183, 2184, 80 L.Ed.2d 809 (1984) (MARSHALL, J., dissenting) (stating that "haste and confusion surrounding ... decision [to vacate stay] is itself degrading to our role as judges"); *Autry v. McKaskle*, 465 U.S. 1085, 104 S.Ct. 1458, 79 L.Ed.2d 906 (1984) (MARSHALL, J., dissenting) (criticizing Court for "dramatically expediting its normal deliberative processes to clear the way for an impending execution"); *Stephens v. Kemp*, 464 U.S. 1027, 1032, 104 S.Ct. 562, 565, 78 L.Ed.2d 370 (1983) (POWELL, J., dissenting) (contending that procedures by which stay applications are considered "undermines public confidence in the courts and in the laws we are required to follow"); *Sullivan v. Wainwright*, 464 U.S. 109, 112, 104 S.Ct. 450, 465, 78 L.Ed.2d 210 (1983) (BURGER, C.J., concurring) (accusing lawyers seeking review of their client's death sentences of turning "the administration of justice into [a] sporting contest"); *Autry v. Estelle*, 464 U.S. 1, 6, 104 S.Ct. 20, 23, 78 L.Ed.2d 1 (1983) (STEVENS, J., dissenting) (suggesting that Court's practice in reviewing applications in death cases "injects uncertainty and disparity into the review procedure, adds to the burdens of counsel, distorts the deliberative process within this Court, and increases the risk of error"). It is difficult to believe that the decision whether to put an individual to death generates any less emotional pressure among juries, trial judges, and appellate courts than it does among Members of this Court.

With respect to the performance standard, I agree with the Court's conclusion that a "particular set of detailed rules for counsel's conduct" would be inappropriate. *Ante*, at 2065. Precisely because the standard of "reasonably effective assistance" adopted today requires that counsel's performance be measured in light of the particular circumstances of the case, I do not believe our decision "will stunt the development of constitutional doctrine in this area," *post*, at 2076 (MARSHALL, J., dissenting). Indeed, the Court's suggestion that today's decision is largely consistent with the approach taken by the lower courts, *ante*, at 2069, simply indicates that those courts may continue to develop governing principles on a case-by-case basis in the common-law tradition, as they have in the past. Similarly, the prejudice standard announced today does not erect an insurmountable obstacle to meritorious claims, but rather simply requires courts carefully to examine trial records in light of both the nature and seriousness of counsel's errors and their effect in the particular circumstances of the case. *Ante*, at 2069.[2]

[704]II

Because of their flexibility and the requirement that they be considered in light of the particular circumstances of the case, the standards announced today can and should be applied with concern for the special considerations that must attend review of counsel's performance in a capital sentencing proceeding. In contrast to a case in which a finding of ineffective assistance requires a new trial, a conclusion that counsel was ineffective with respect to only the penalty phase of a capital trial imposes on the State the far lesser burden of reconsideration of the sentence alone. On the other hand, the consequences to the defendant of incompetent assistance at a capital sentencing could not, of course, be greater. Recognizing the unique seriousness of such a proceeding, we have repeatedly emphasized that " 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' " *Zant v. Stephens*, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983) (quoting *Gregg v. Georgia*, 428 U.S., at 188–189, 96 S.Ct., at 2932–2933 (opinion of Stewart, POWELL, and STEVENS, JJ.)).

For that reason, we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding. As Justice MARSHALL emphasized last Term:

> "This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), it recognized that right in capital cases, *Powell v. Alabama*, 287 U.S. 45, 71–72, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932). Time [705]and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. See, *e.g.*, *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (*per curiam*); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) ....

2. Indeed, counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice. See *Cronic*, 466 U.S., at 659–660, 104 S.Ct., at 2047; *Javor v. United States*, 724 F.2d 831, 834 (CA9 1984) ("Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all").

> "Because of th[e] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' *Ibid.*" *Barefoot v. Estelle*, 463 U.S. 880, 913–914, 103 S.Ct. 3383, 3405, 77 L.Ed.2d 1090 (1983) (dissenting opinion).

See also *id.*, at 924, 103 S.Ct., at 3405 (BLACKMUN, J., dissenting). In short, this Court has taken special care to minimize the possibility that death sentences are "imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982) (O'CONNOR, J., concurring).

In the sentencing phase of a capital case, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). For that reason, we have repeatedly insisted that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings v. Oklahoma*, 455 U.S., at 112, 102 S.Ct., at 875. In fact, as Justice O'CONNOR has noted, a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the "interests of justice" may impose on reviewing courts "a duty to remand [the] case for resentencing." *Id.*, at 117, n., and 119, 102 S.Ct., at 877, n., and 878 (O'CONNOR, J., concurring).

[706] Of course, "[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." Comment, 83 Colum.L.Rev. 1544, 1549 (1983). See, *e.g.*, *Burger v. Zant*, 718 F.2d 979 (CA11 1983) (defendant, 17 years old at time of crime, sentenced to death after counsel failed to present any evidence in mitigation), stay granted, 466 U.S. 902, 104 S.Ct. 1676, 80 L.Ed.2d 151 (1984). Accordingly, counsel's general duty to investigate, *ante*, at 2066, takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

That the Court rejects the ineffective-assistance claim in this case should not, of course, be understood to reflect any diminution in commitment to the principle that " 'the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " *Eddings v. Oklahoma*, *supra*, 455 U.S., at 112, 102 S.Ct., at 875 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)). I am satisfied that the standards announced today will go far towards assisting lower federal courts and state courts in discharging their constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment.

Justice MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is the right to the effective assistance[707] of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, n. 14, 25 L.Ed.2d 763 (1970). The state and lower federal courts have developed standards for distinguishing effective from inade-

quate assistance.[1] Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

I

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." *Ante*, at 2065. Second, the majority holds that only an error of counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds for overturning a conviction. *Ante*, at 2068. I disagree with both of these rulings.

A

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave [1708] "reasonably" and must act like "a reasonably competent attorney," *ante*, at 2065, is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

The debilitating ambiguity of an "objective standard of reasonableness" in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?[2] The majority offers no clues as to the proper responses to these questions.

The majority defends its refusal to adopt more specific standards primarily on the ground that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account [709] of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defend-

1. See Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After *United States v. Decoster*, 93 Harv.L.Rev. 752, 756–758 (1980); Note, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U.Chi.L. Rev. 1380, 1386–1387, 1399–1401, 1408–1410 (1983).

2. Cf., *e.g.*, *Moore v. United States*, 432 F.2d 730, 736 (CA3 1970) (defining the constitutionally required level of performance as "the exercise of the customary skill and knowledge which normally prevails at the time and place").

ant." *Ante*, at 2065. I agree that counsel must be afforded "wide latitude" when making "tactical decisions" regarding trial strategy, see *ante*, at 689; cf. *infra*, at 2077–2078, but many aspects of the job of a criminal defense attorney are more amenable to judicial oversight. For example, much of the work involved in preparing for a trial, applying for bail, conferring with one's client, making timely objections to significant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefor could profitably be made the subject of uniform standards.

The opinion of the Court of Appeals in this case represents one sound attempt to develop particularized standards designed to ensure that all defendants receive effective legal assistance. See 693 F.2d 1243, 1251–1258 (CA5 1982) (en banc). For other, generally consistent efforts, see *United States v. Decoster*, 159 U.S.App.D.C. 326, 333–334, 487 F.2d 1197, 1203–1204 (1973), disapproved on rehearing, 199 U.S.App. D.C. 359, 624 F.2d 196 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); *Coles v. Peyton*, 389 F.2d 224, 226 (CA4), cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968); *People v. Pope*, 23 Cal.3d 412, 424–425, 590 P.2d 859, 866, 152 Cal.Rptr. 732, 739 (1979); *State v. Harper*, 57 Wis.2d 543, 550–557, 205 N.W.2d 1, 6–9 (1973).[3] By refusing to address the merits of these proposals, and indeed suggesting that no such effort is worthwhile, the opinion of the Court, I fear, will stunt the development of constitutional doctrine in this area.

[710]B

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.[4] In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

3. For a review of other decisions attempting to develop guidelines for assessment of ineffective-assistance-of-counsel claims, see Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am.Crim.L.Rev. 233, 242–248 (1979). Many of these decisions rely heavily on the standards developed by the American Bar Association. See ABA Standards for Criminal Justice 4–1.1—4–8.6 (2d ed. 1981).

4. Cf. *United States v. Ellison*, 557 F.2d 128, 131 (CA7 1977). In discussing the related problem of measuring injury caused by joint representation of conflicting interests, we observed:
"[T]he evil ... is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490–491, 98 S.Ct. 1173, 1181–1182, 55 L.Ed.2d 426 (1978) (emphasis in original).
When defense counsel fails to take certain actions, not because he is "compelled" to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.

[711]Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.[5] The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

In *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), we acknowledged that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." Among these rights is the right to the assistance of counsel at trial. *Id.*, at 23, n. 8, 87 S.Ct., at 827, n. 8; see *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).[6] In my view, the right [712]to *effective* assistance of counsel is entailed by the right to counsel, and abridgment of the former is equivalent to abridgment of the latter.[7] I would thus hold that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby.

II

Even if I were inclined to join the majority's two central holdings, I could not abide the manner in which the majority elaborates upon its rulings. Particularly regrettable are the majority's discussion of the "presumption" of reasonableness to be accorded lawyers' decisions and its attempt to prejudge the merits of claims previously rejected by lower courts using different legal standards.

A

In defining the standard of attorney performance required by the Constitution, the majority appropriately notes that many problems confronting criminal defense attorneys admit of "a range of legitimate" responses. *Ante*, at 2065. And the majority properly cautions courts, when reviewing a lawyer's selection amongst a set of options, to avoid the hubris of hindsight. *Ibid.* The majority goes on, however, to suggest that reviewing courts should "indulge a strong presumption that counsel's conduct" was constitutionally acceptable, *ibid.*; see *ante*, at 2066, 2069, and should "appl[y] a heavy measure of deference to counsel's judgments," *ante*, at 2066.

5. See *United States v. Decoster*, 199 U.S.App.D.C. 359, 454–457, 624 F.2d 196, 291–294 (en banc) (Bazelon, J., dissenting), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); Note, 93 Harv.L.Rev., at 767–770.

6. In cases in which the government acted in a way that prevented defense counsel from functioning effectively, we have refused to require the defendant, in order to obtain a new trial, to demonstrate that he was injured. In *Glasser v. United States*, 315 U.S. 60, 75–76, 62 S.Ct. 457, 467–468, 86 L.Ed. 680 (1942), for example, we held:

"To determine the precise degree of prejudice sustained by [a defendant] as a result of the court's appointment of [the same counsel for two codefendants with conflicting interests] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

As the Court today acknowledges, *United States v. Cronic*, 466 U.S., at 662, n. 31, 104 S.Ct., at 2048, n. 31, whether the government or counsel himself is to blame for the inadequacy of the legal assistance received by a defendant should make no difference in deciding whether the defendant must prove prejudice.

7. See *United States v. Yelardy*, 567 F.2d 863, 865, n. 1 (CA6), cert. denied, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978); *Beasley v. United States*, 491 F.2d 687, 696 (CA6 1974); *Commonwealth v. Badger*, 482 Pa. 240, 243–244, 393 A.2d 642, 644 (1978).

I am not sure what these phrases mean, and I doubt that they will be self-explanatory to lower courts. If they denote nothing more than that a defendant claiming he was denied effective assistance of counsel has the burden of proof, I [718] would agree. See *United States v. Cronic*, 466 U.S., at 658, 104 S.Ct., at 2046. But the adjectives "strong" and "heavy" might be read as imposing upon defendants an unusually weighty burden of persuasion. If that is the majority's intent, I must respectfully dissent. The range of acceptable behavior defined by "prevailing professional norms," *ante*, at 2065, seems to me sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy. To afford attorneys more latitude, by "strongly presuming" that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.

The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits and "dampen the ardor" of defense counsel. See *ante*, at 2066. I have more confidence than the majority in the ability of state and federal courts expeditiously to dispose of meritless arguments and to ensure that responsible, innovative lawyering is not inhibited. In my view, little will be gained and much may be lost by instructing the lower courts to proceed on the assumption that a defendant's challenge to his lawyer's performance will be insubstantial.

B

For many years the lower courts have been debating the meaning of "effective" assistance of counsel. Different courts have developed different standards. On the issue of the level of performance required by the Constitution, some courts have adopted the forgiving "farce-and-mockery" standard,[8] while others have adopted various versions of [714] the "reasonable competence" standard.[9] On the issue of the level of prejudice necessary to compel a new trial, the courts have taken a wide variety of positions, ranging from the stringent "outcome-determinative" test,[10] to the rule that a showing of incompetence on the part of defense counsel automatically requires reversal of the conviction regardless of the injury to the defendant.[11]

The Court today substantially resolves these disputes. The majority holds that the Constitution is violated when defense counsel's representation falls below the level expected of reasonably competent defense counsel, *ante*, at 2064–2067, and so affects the trial that there is a "reasonable probability" that, absent counsel's error, the outcome would have been different, *ante*, at 2067–2069.

Curiously, though, the Court discounts the significance of its rulings, suggesting that its choice of standards matters little and that few if any cases would have been decided differently if the lower courts had always applied the tests announced today. See *ante*, at 2069. Surely the judges in the state and lower federal courts will be surprised to learn that the distinctions they have so fiercely debated for many years are in fact unimportant.

The majority's comments on this point seem to be prompted principally by a reluc-

8. See, *e.g.*, *State v. Pacheco*, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978); *Hoover v. State*, 270 Ark. 978, 980, 606 S.W.2d 749, 751 (1980); *Line v. State*, 272 Ind. 353, 354–355, 397 N.E.2d 975, 976 (1979).

9. See, *e.g.*, *Trapnell v. United States*, 725 F.2d 149, 155 (CA2 1983); *Cooper v. Fitzharris*, 586 F.2d 1325, 1328–1330 (CA9 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

10. See, *e.g.*, *United States v. Decoster*, 199 U.S. App.D.C., at 370, and n. 74, 624 F.2d, at 208, and n. 74 (plurality opinion); *Knight v. State*, 394 So.2d 997, 1001 (Fla.1981).

11. See n. 7, *supra*.

tance to acknowledge that today's decision will require a reassessment of many previously rejected ineffective-assistance-of-counsel claims. The majority's unhappiness on this score is understandable, but its efforts to mitigate the perceived problem will be ineffectual. Nothing the majority says can relieve lower courts that hitherto 715 have been using standards more tolerant of ineffectual advocacy of their obligation to scrutinize all claims, old as well as new, under the principles laid down today.

III

The majority suggests that, "[f]or purposes of describing counsel's duties," a capital sentencing proceeding "need not be distinguished from an ordinary trial." *Ante*, at 2064. I cannot agree.

The Court has repeatedly acknowledged that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases.

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion) (footnote omitted).[12]

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). The job of amassing that information and presenting it 716 in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts,[13] combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings.[14]

It matters little whether strict scrutiny of a claim that ineffectiveness of counsel resulted in a death sentence is achieved through modification of the Sixth Amendment standards or through especially careful application of those standards. Justice BRENNAN suggests that the necessary adjustment of the level of performance required of counsel in capital sentencing proceedings can be effected simply by construing the phrase, "reasonableness under prevailing professional norms," in a manner that takes into account the nature of the impending penalty. *Ante*, at 2073–2074. Though I would prefer a more specific iteration of counsel's duties in this special context,[15] I can accept that proposal. However, when instructing lower courts regard-

12. See also *Zant v. Stephens*, 462 U.S. 862, 884–885, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 110–112, 102 S.Ct. 869, 873–875, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion).

13. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 303 (1983).

14. As Justice BRENNAN points out, *ante*, at 2073, an additional reason for examining especially carefully a Sixth Amendment challenge when it pertains to a capital sentencing proceeding is that the result of finding a constitutional violation in that context is less disruptive than a finding that counsel was incompetent in the liability phase of a trial.

15. See Part I–A, *supra*. For a sensible effort to formulate guidelines for the conduct of defense counsel in capital sentencing proceedings, see Goodpaster, *supra*, at 343–345, 360–362.

ing the probability of impact upon the outcome that requires a resentencing, I think the Court would do best explicitly to modify the legal standard itself.[16] In my view, a person on death row, whose counsel's performance fell below constitutionally acceptable levels, should not be compelled to demonstrate a "reasonable probability" [717] that he would have been given a life sentence if his lawyer had been competent, see *ante*, at 2068; if the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate. Cf. *United States v. Agurs*, 427 U.S. 97, 121–122, 96 S.Ct. 2392, 2405–2406, 49 L.Ed.2d 342 (1976) (MARSHALL, J., dissenting).[17]

IV

The views expressed in the preceding section oblige me to dissent from the majority's disposition of the case before us.[18] It is undisputed that respondent's trial counsel made virtually no investigation of the possibility of obtaining testimony from respondent's relatives, friends, or former employers pertaining to respondent's character or background. Had counsel done so, he would have found several persons willing and able to testify that, in their experience, respondent was a responsible, nonviolent man, devoted to his family, and active in the affairs of his church. See App. 338–365. Respondent contends that his lawyer could have and should have used that testimony to "humanize" respondent, to counteract the impression conveyed by the trial that he was little more than a cold-blooded killer. Had this evidence been admitted, respondent argues, his chances of obtaining a life sentence would have been significantly better.

[718] Measured against the standards outlined above, respondent's contentions are substantial. Experienced members of the death-penalty bar have long recognized the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 300–303, 334–335 (1983). The State makes a colorable—though in my view not compelling—argument that defense counsel in this case might have made a reasonable "strategic" decision not to present such evidence at the sentencing hearing on the assumption that an unadorned acknowledgment of respondent's responsibility for his crimes would be more likely to appeal to the trial judge, who was reputed to respect persons who accepted responsibility for their actions.[19] But however justifiable

16. For the purposes of this and the succeeding section, I assume, solely for the sake of argument, that some showing of prejudice is necessary to state a violation of the Sixth Amendment. But cf. Part I–B, *supra*.

17. As I read the opinion of the Court, it does not preclude this kind of adjustment of the legal standard. The majority defines "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ante*, at 2068. In view of the nature of the sanction at issue; and the difficulty of determining how a sentencer would have responded if presented with a different set of facts, it could be argued that a lower estimate of the likelihood that the outcome of a capital sentencing proceeding was influenced by attorney error is sufficient to "undermine confidence" in that outcome than would be true in an ordinary criminal case.

18. Adhering to my view that the death penalty is unconstitutional under all circumstances, *Gregg v. Georgia*, 428 U.S. 153, 231, 96 S.Ct. 2909, 2973, 49 L.Ed.2d 859 (1976) (MARSHALL, J., dissenting), I would vote to vacate respondent's sentence even if he had not presented a substantial Sixth Amendment claim.

19. Two considerations undercut the State's explanation of counsel's decision. First, it is not apparent why adducement of evidence pertaining to respondent's character and familial connections would have been inconsistent with respondent's acknowledgement that he was responsible for his behavior. Second, the Florida Supreme Court possesses—and frequently exercises—the power to overturn death sentences it deems unwarranted by the facts of a case. See *State v. Dixon*, 283 So.2d 1, 10 (Fla.1973). Even if counsel's decision not to try to humanize respondent for the benefit of the trial judge were deemed reasonable, counsel's failure to create a record for the benefit of the State Supreme Court might well be deemed unreasonable.

such a choice might have been after counsel had fairly assessed the potential strength of the mitigating evidence available to him, counsel's failure to make any significant effort to find out what evidence might be garnered from respondent's relatives and acquaintances surely cannot be described as "reasonable." Counsel's failure to investigate is particularly suspicious in light of his candid admission that respondent's confessions and conduct in the course of the trial gave him a feeling of "hopelessness" regarding the possibility of saving respondent's life, see App. 383–384, 400–401.

[719] That the aggravating circumstances implicated by respondent's criminal conduct were substantial, see *ante*, at 2071, does not vitiate respondent's constitutional claim; judges and juries in cases involving behavior at least as egregious have shown mercy, particularly when afforded an opportunity to see other facets of the defendant's personality and life.[20] Nor is respondent's contention defeated by the possibility that the material his counsel turned up might not have been sufficient to establish a statutory mitigating circumstance under Florida law; Florida sentencing judges and the Florida Supreme Court sometimes refuse to impose death sentences in cases "in which, even though *statutory* mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment." *Barclay v. Florida*, 463 U.S. 939, 958, 103 S.Ct. 3418, 3431, 77 L.Ed.2d 1134 (1983) (STEVENS, J., concurring in judgment) (emphasis in original).

If counsel had investigated the availability of mitigating evidence, he might well have decided to present some such material at the hearing. If he had done so, there is a significant chance that respondent would have been given a life sentence. In my view, those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment and to entitle respondent to a new sentencing proceeding.

I respectfully dissent.

20. See, *e.g.*, Farmer & Kinard, The Trial of the Penalty Phase (1976), reprinted in 2 California State Public Defender, California Death Penalty Manual N–33, N–45 (1980).

466 U.S. 720, 80 L.Ed.2d 715

[720] **NATIONAL LABOR RELATIONS BOARD,**

v.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL–CIO.

No. 83–1202.

May 14, 1984.

Petition for certiorari was filed seeking review of an order of the Court of Appeals which modified an award of back pay by the National Labor Relations Board. The Supreme Court held that if Court of Appeals' modification of an award of back pay by National Labor Relations Board was based solely on ground that Board failed properly to specify the amounts of the award, such modification of award was impermissible.

Reversed and remanded.

Justice Marshall dissented.

1. Labor Relations ⇐479

Court of Appeals may not refuse to enforce a back-pay order merely because of National Labor Relations Board's delay subsequent to that order in formulating a back-pay specification.

2. Labor Relations ⇐486

If Court of Appeals' modification of an award of back pay by National Labor Rela-

APPENDIX B

The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Terry WILLIAMS, Petitioner,

v.

John TAYLOR, Warden.

No. 98-8384.

Argued Oct. 4, 1999.

Decided April 18, 2000.

After affirmance of conviction for capital murder and imposition of death penalty, 360 S.E.2d 361, and denial of his state petition for habeas corpus, 254 Va. 16, 487 S.E.2d 194, petitioner sought federal habeas relief. The United States District Court for the Eastern District of Virginia, James C. Cacheris, Senior District Judge, granted writ in part, and dismissed petitioner's remaining allegations, and cross-appeals were taken. The United States Court of Appeals for the Fourth Circuit, 163 F.3d 860 Williams, Circuit Judge, reversed, and petition for certiorari was filed. The Supreme Court, per Justice Stevens, held that: (1) petitioner was denied his constitutionally guaranteed right to effective assistance of counsel when his attorneys failed to investigate and present substantial mitigating evidence during sentencing phase of capital murder trial, and, per Justice O'Connor, held that: (2) Antiterrorism and Effective Death Penalty Act (AEDPA) placed new constraint on power of federal habeas court to grant state prisoner's application for writ of habeas corpus with respect to claims adjudicated on merits in state court, limiting issuance of writ to circumstances in which one of the two conditions is satisfied.

Reversed and remanded.

Justice O'Connor filed opinion concurring in part, and concurring in the judgment in which Justice Kennedy joined, Chief Justice Rehnquist and Justice Thomas joined in part, and Justice Scalia joined in part except as to footnote.

Chief Justice Rehnquist filed opinion concurring in part and dissenting in part in which Justice Scalia and Justice Thomas joined.

1. Habeas Corpus ⇨486(5)

Defendant's constitutionally guaranteed right to the effective assistance of counsel was "clearly established" at the time his state-court conviction became final, and therefore he was entitled to habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA) if his trial lawyers' failure to investigate and to present substantial mitigating evidence to the sentencing jury was either "contrary to, or involved an unreasonable application of," that established law. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 2254.

2. Criminal Law ⇨641.13(1)

To establish ineffectiveness, a defendant must show that counsel's representation fell below an objective standard of reasonableness, and to establish prejudice he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇨641.13(7)

Defendant was denied his constitutionally guaranteed right to effective assistance of counsel when his attorneys failed to investigate and present substantial mitigating evidence during sentencing phase of capital murder trial; the omitted evidence included a description of mistreatment, abuse, and neglect during defendant's early childhood, as well as testimony that he was "borderline mentally retarded," and

that experts believed that defendant, if kept in a "structured environment," would not pose a future danger to society, and counsel's error prejudiced defendant since the omitted evidence might have influenced jury's appraisal of defendant's moral culpability. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

Opinion of Justice O'Connor

4. Habeas Corpus ⇐450.1, 452

Antiterrorism and Effective Death Penalty Act (AEDPA) placed a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court, limiting issuance of the writ to circumstances in which one of two conditions is satisfied: the state-court adjudication resulted in a decision that (1) "was contrary to clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1).

5. Habeas Corpus ⇐452

Under the "contrary to" test, a federal habeas court may grant writ of habeas corpus with respect to claims adjudicated on the merits in state court if the state court arrives at a conclusion opposite to that reached by Supreme Court on a question of law or if the state court decides a case differently than Supreme Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d)(1).

6. Habeas Corpus ⇐450.1

Under the "unreasonable application" test, a federal habeas court may grant writ of habeas corpus with respect to claims adjudicated on the merits in state court if the state court identifies the correct governing legal principle from Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. 28 U.S.C.A. § 2254(d)(1).

Syllabus *

A Virginia jury convicted petitioner Williams of robbery and capital murder, and, after a sentencing hearing, found a probability of future dangerousness and unanimously fixed his punishment at death. Concluding that such punishment was "proper" and "just," the trial judge imposed the death sentence. The Virginia Supreme Court affirmed. In state habeas corpus proceedings, the same trial judge found, on the evidence adduced after hearings, that Williams' conviction was valid, but that his counsel's failure to discover and present significant mitigating evidence violated his right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In rejecting the trial judge's recommendation that Williams be resentenced, the State Supreme Court held, *inter alia*, that the trial judge had failed to recognize that *Strickland* had been modified by *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180, and that Williams had not suffered sufficient prejudice to warrant relief. In habeas corpus proceedings under 28 U.S.C. § 2254, the federal trial judge agreed with the state trial judge that the death sentence was constitutionally infirm on ineffective-assistance grounds. The federal judge identified five categories of mitigating evidence that counsel had failed to introduce and rejected the argument that such failure had been a strategic decision to rely primarily on the fact that Williams had confessed voluntarily. As to prejudice, the judge determined, among other things, that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

have been different, see *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052. Applying an amended version of § 2254(d)(1) enacted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the judge concluded that the Virginia Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Fourth Circuit reversed, construing § 2254(d)(1) to prohibit federal habeas relief unless the state court had interpreted or applied the relevant precedent in a manner that reasonable jurists would all agree is unreasonable. The court declared that it could not say that the Virginia Supreme Court's decision on prejudice was an unreasonable application of the *Strickland* or *Lockhart* standards established by the Supreme Court.

Held: The judgment is reversed, and the case is remanded.

163 F.3d 860, reversed and remanded.

Justice STEVENS delivered the opinion of the Court as to Parts I, III, and IV, concluding that Williams was denied his constitutionally guaranteed right to the effective assistance of counsel, as defined in *Strickland*, when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury. Pp. 1511–1516.

(a) The threshold question under AEDPA—whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final—is easily answered because the merits of his claim are squarely governed by *Strickland*. To establish ineffective assistance of counsel, the defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness, 466 U.S., at 688, 104 S.Ct. 2052; and (2) that the deficient performance prejudiced the defense, which requires a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, *id.*, at 694, 104 S.Ct. 2052. Because the *Strickland* test qualifies as "clearly established Federal law, as determined by the Supreme Court," this Court's precedent "dictated" that the Virginia Supreme Court apply that test in entertaining Williams' ineffective-assistance claim. See *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334. Pp. 1511–1512.

(b) Williams is entitled to relief because the Virginia Supreme Court's decision rejecting his ineffective-assistance claim is both "contrary to, [and] involved an unreasonable application of, clearly established Federal law." *Strickland* provides sufficient guidance for resolving virtually all ineffective-assistance claims, and the Virginia Supreme Court erred in holding that *Lockhart* modified or in some way supplanted *Strickland*. Although there are a few situations in which the overriding focus on fundamental fairness may affect the analysis, see *Strickland*, 466 U.S., at 692, 104 S.Ct. 2052, cases such as *Lockhart* and *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123, do not justify a departure from a straightforward application of *Strickland* when counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him. Here, Williams had a constitutionally protected right to provide mitigating evidence that his trial counsel either failed to discover or failed to offer. Moreover, the Virginia trial judge correctly applied both components of the *Strickland* standard to Williams' claim. The record establishes that counsel failed to prepare for sentencing until a week beforehand, to uncover extensive records graphically describing Williams' nightmarish childhood, to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade, to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, and to discover the testimony of prison officials who described Williams as

among the inmates least likely to act violently, dangerously, or provocatively, and of a prison minister that Williams seemed to thrive in a more regimented environment. Although not all of the additional evidence was favorable to Williams, the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of Williams' background. Moreover, counsel's unprofessional service prejudiced Williams within *Strickland's* meaning. The Virginia Supreme Court's prejudice analysis was unreasonable in at least two respects: (1) It was not only "contrary to," but also—inasmuch as it relied on the inapplicable *Lockhart* exception—an "unreasonable application of," the clear law as established in *Strickland;* and (2) it failed to evaluate the totality of, and to accord appropriate weight to, the available mitigation evidence. Pp. 1512–1516.

Justice O'CONNOR delivered the opinion of the Court as to Part II, concluding that § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant relief to a state prisoner with respect to claims adjudicated on the merits in state court: The habeas writ may issue only if the state-court adjudication (1) "was contrary to," or (2) "involved an unreasonable application of . . ." clearly established Federal law, as determined by the Supreme Court of the United States. Pp. 1518–1523.

(a) Because Williams filed his petition in 1997, his case is not governed by the pre–1996 version of the federal habeas statute, but by the statute as amended by AEDPA. Accordingly, for Williams to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1). That provision modifies the previously settled rule of independent federal review of state prisoners' habeas petitions in order to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law. In light of the cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute, this Court must give independent meaning to both the "contrary to" and "unreasonable application" clauses of § 2254(d)(1). Given the commonly understood definitions of "contrary" as "diametrically different," "opposite in character or nature," or "mutually opposed," § 2254(d)(1)'s first clause must be interpreted to mean that a federal habeas court may grant relief if the state court (1) arrives at a conclusion opposite to that reached by this Court on a question of law or (2) decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant relief if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Pp. 1518–1521.

(b) In defining what qualifies as an "unreasonable application of . . . clearly established Federal law," the Fourth Circuit erred in holding that a state-court decision involves such an application only if the state court has applied federal law in a manner that reasonable jurists would all agree is unreasonable. That standard would tend to mislead federal habeas courts by focusing on a subjective inquiry. Rather, the federal court should ask whether the state court's application of clearly established federal law was objectively unreasonable. Cf. *Wright v. West,* 505 U.S. 277, 304, 112 S.Ct. 2482, 120 L.Ed.2d 225. Although difficult to define, "unreasonable" is a common legal term familiar to federal judges. For present purposes, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. See, *e.g., id.,* at 305, 112 S.Ct. 2482. Because Congress specifically used the word "unreasonable," and not a term

like "erroneous" or "incorrect," a federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable. Finally, the phrase "clearly established Federal law, as determined by [this] Court" refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision. In this respect, the quoted phrase bears only a slight connection to this Court's jurisprudence under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334. Whatever would qualify as an "old rule" under *Teague* will constitute "clearly established Federal law, as determined by [this] Court," see, *e.g.*, *Stringer v. Black*, 503 U.S. 222, 228, 112 S.Ct. 1130, 117 L.Ed.2d 367, but with one caveat: Section 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence. Pp. 1521–1523.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts II and V, in which SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., delivered the opinion of the Court with respect to Part II (except as to the footnote), in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, and in which SCALIA, J. joined, except as to the footnote, and an opinion concurring in part and concurring in the judgment, in which KENNEDY, J., joined. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which SCALIA and THOMAS, JJ., joined.

Justice STEVENS announced the judgement of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, and an opinion with respect to Parts II and V.*

The questions presented are whether Terry Williams' constitutional right to the effective assistance of counsel as defined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), was violated, and whether the judgment of the Virginia Supreme Court refusing to set aside his death sentence "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III). We answer both questions affirmatively.

I

On November 3, 1985, Harris Stone was found dead in his residence on Henry Street in Danville, Virginia. Finding no indication of a struggle, local officials determined that the cause of death was blood alcohol poisoning, and the case was considered closed. Six months after Stone's death, Terry Williams, who was then incarcerated in the "I" unit of the city jail for an unrelated offense, wrote a letter to the police stating that he had killed " 'that man down on Henry Street' " and also stating that he " 'did it' " to that " 'lady down on West Green Street' " and was " 'very sorry.' " The letter was unsigned, but it closed with a reference to "I cell." App. 41. The police readily identified Williams as its author, and, on April 25, 1986, they obtained several statements from him. In one Williams admitted that, after Stone refused to lend him " 'a couple of dollars,' " he had killed Stone with a mattock and took the money from his wallet.[1] *Id.*, at 4.

* Justice SOUTER, Justice GINSBURG, and Justice BREYER join this opinion in its entirety. Justice O'CONNOR and Justice KENNEDY join Parts I, III, and IV of this opinion.

1. " 'I had gone to Dee Dee Stone's house on Henry Street, Dee Dee's father was there. No one else was there except him. He had been drinking a lot. He was on the bed. He asked me if I wanted a drink. I told him, 'No.' I asked him if I could borrow a couple of dollars and he told me, 'No.' We started arguing and things started going around in my

In September 1986, Williams was convicted of robbery and capital murder.

At Williams' sentencing hearing, the prosecution proved that Williams had been convicted of armed robbery in 1976 and burglary and grand larceny in 1982. The prosecution also introduced the written confessions that Williams had made in April. The prosecution described two auto thefts and two separate violent assaults on elderly victims perpetrated after the Stone murder. On December 4, 1985, Williams had started a fire outside one victim's residence before attacking and robbing him. On March 5, 1986, Williams had brutally assaulted an elderly woman on West Green Street—an incident he had mentioned in his letter to the police. That confession was particularly damaging because other evidence established that the woman was in a "vegetative state" and not expected to recover. *Id.*, at 60. Williams had also been convicted of arson for setting a fire in the jail while awaiting trial in this case. Two expert witnesses employed by the State testified that there was a "high probability" that Williams would pose a serious continuing threat to society. *Id.*, at 89.

The evidence offered by Williams' trial counsel at the sentencing hearing consisted of the testimony of Williams' mother, two neighbors, and a taped excerpt from a statement by a psychiatrist. One of the neighbors had not been previously interviewed by defense counsel, but was noticed by counsel in the audience during the proceedings and asked to testify on the spot. The three witnesses briefly described Williams as a "nice boy" and not a violent person. *Id.*, at 124. The recorded psychiatrist's testimony did little more than relate Williams' statement during an examination that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.

In his cross-examination of the prosecution witnesses, Williams' counsel repeatedly emphasized the fact that Williams had initiated the contact with the police that enabled them to solve the murder and to identify him as the perpetrator of the recent assaults, as well as the car thefts. In closing argument, Williams' counsel characterized Williams' confessional statements as "dumb," but asked the jury to give weight to the fact that he had "turned himself in, not on one crime but on four . . . that the [police otherwise] would not have solved." *Id.*, at 140. The weight of defense counsel's closing, however, was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life.[2]

The jury found a probability of future dangerousness and unanimously fixed Williams' punishment at death. The trial

head. I just wanted to get back at him. I don't know what. He just laid back like he had passed out. He was laying there talking and moaning to himself. I went into the kitchen. I saw the butcher knife. I didn't want to use it. I was looking for something to use. I went into the bathroom and I saw the mattock. I picked up the mattock and I came back into the room where he was at. He was laying on the bed. He was laying on his back. I took the mattock and I hit him on the chest with it. He raised up and was gasping for his breath. He fell over to his side and I hit him in the back with the mattock. He fell back on the bed. I went and put the mattock back in the bathroom. I came back into the room. I took his wallet from his pocket. He had three dollars in it. I got the three dollars from it. I left him there. He was still grasping for breath.'" App. 4–5.

2. In defense counsel's words: "I will admit too that it is very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself. I doubt very seriously that he thought much about mercy when he was in Mr. Stone's bedroom that night with him. I doubt very seriously that he had mercy very highly on his mind when he was walking along West Green and the incident with Alberta Stroud. I doubt very seriously that he had mercy on his mind when he took two cars that didn't belong to him. Admittedly it is very difficult to get us and ask that you give this man mercy when he has shown so little of it himself. But I would ask that you would." *Id.*, at 132–133.

judge concluded that such punishment was "proper" and "just" and imposed the death sentence. *Id.*, at 154. The Virginia Supreme Court affirmed the conviction and sentence. *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361 (1987), cert. denied, *Williams v. Virginia*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). It rejected Williams' argument that when the trial judge imposed sentence, he failed to give mitigating weight to the fact that Williams had turned himself in. 234 Va., at 181–182, 360 S.E.2d, at 369–370.

State Habeas Corpus Proceedings

In 1988 Williams filed for state collateral relief in the Danville Circuit Court. The petition was subsequently amended, and the Circuit Court (the same judge who had presided over Williams' trial and sentencing) held an evidentiary hearing on Williams' claim that trial counsel had been ineffective.[3] Based on the evidence adduced after two days of hearings, Judge Ingram found that Williams' conviction was valid, but that his trial attorneys had been ineffective during sentencing. Among the evidence reviewed that had not been presented at trial were documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was "borderline mentally retarded," had suffered repeated head injuries, and might have mental impairments organic in origin. App. 528–529, 595. The habeas hearing also revealed that the same experts who had testified on the State's behalf at trial believed that Williams, if kept in a "structured environment," would not pose a future danger to society. *Id.*, at 313–314.

Counsel's failure to discover and present this and other significant mitigating evidence was "below the range expected of reasonable, professional competent assistance of counsel." *Id.*, at 424. Counsels' performance thus "did not measure up to the standard required under the holding of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and [if it had,] there is a reasonable probability that the result of the sentencing phase would have been different." *Id.*, at 429. Judge Ingram therefore recommended that Williams be granted a rehearing on the sentencing phase of his trial.

The Virginia Supreme Court did not accept that recommendation. *Williams v. Warden*, 254 Va. 16, 487 S.E.2d 194 (1997). Although it assumed, without deciding, that trial counsel had been ineffective, *id.*, at 23–26, 487 S.E.2d, at 198, 200, it disagreed with the trial judge's conclusion that Williams had suffered sufficient prejudice to warrant relief. Treating the prejudice inquiry as a mixed question of law and fact, the Virginia Supreme Court accepted the factual determination that available evidence in mitigation had not been presented at the trial, but held that the trial judge had misapplied the law in two respects. First, relying on our decision in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), the court held that it was wrong for the trial judge to rely "'on mere outcome determination'" when assessing prejudice, 254 Va., at 23, 487 S.E.2d, at 198 (quoting *Lockhart*, 506 U.S., at 369, 113 S.Ct. 838). Second, it construed the trial judge's opinion as having "adopted a *per se* approach" that would establish prejudice whenever any mitigating evidence was omitted. 254 Va., at 26, 487 S.E.2d, at 200.

The court then reviewed the prosecution evidence supporting the "future dangerousness" aggravating circumstance, recit-

3. While Williams' petition was pending before the Circuit Court, Virginia amended its state habeas statute to vest in the State Supreme Court exclusive jurisdiction to award writs of habeas corpus in capital cases. Va.Code Ann. § 8.01-654(C)(1) (Supp.1999). Shortly after the Circuit Court held its evidentiary hearing, the Supreme Court assumed jurisdiction over Williams' petition and instructed the Circuit Court to issue findings of fact and legal recommendation regarding Williams' ineffective-assistance claims.

ing Williams' criminal history, including the several most recent offenses to which he had confessed. In comparison, it found that the excluded mitigating evidence—which it characterized as merely indicating "that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment," *ibid.*—"barely would have altered the profile of this defendant that was presented to the jury," *ibid.* On this basis, the court concluded that there was no reasonable possibility that the omitted evidence would have affected the jury's sentencing recommendation, and that Williams had failed to demonstrate that his sentencing proceeding was fundamentally unfair.

Federal Habeas Corpus Proceedings

Having exhausted his state remedies, Williams sought a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994 ed. and Supp. III). After reviewing the state habeas hearing transcript and the state courts' findings of fact and conclusions of law, the federal trial judge agreed with the Virginia trial judge: The death sentence was constitutionally infirm.

After noting that the Virginia Supreme Court had not addressed the question whether trial counsel's performance at the sentencing hearing fell below the range of competence demanded of lawyers in criminal cases, the judge began by addressing that issue in detail. He identified five categories of mitigating evidence that counsel had failed to introduce,[4] and he rejected the argument that counsel's failure to conduct an adequate investigation had been a strategic decision to rely almost entirely on the fact that Williams had voluntarily confessed.

According to Williams' trial counsel's testimony before the state habeas court, counsel did not fail to seek Williams' juvenile and social services records because he thought they would be counterproductive, but because counsel erroneously believed that "'state law didn't permit it.'" App. 470. Counsel also acknowledged in the course of the hearings that information about Williams' childhood would have been important in mitigation. And counsel's failure to contact a potentially persuasive character witness was likewise not a conscious strategic choice, but simply a failure to return that witness' phone call offering his service. *Id.*, at 470–471. Finally, even if counsel neglected to conduct such an investigation at the time as part of a tactical decision, the District Judge found, tactics as a matter of reasonable performance could not justify the omissions.

Turning to the prejudice issue, the judge determined that there was "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052." *Id.*, at 473. He found that the Virginia Supreme Court had erroneously assumed that *Lockhart* had modified the *Strickland* standard for determining prejudice, and that it had made an important error of fact in discussing its finding of no prejudice.[5]

4. "(i) Counsel did not introduce evidence of the Petitioner's background . . . .(ii) Counsel did not introduce evidence that Petitioner was abused by his father. (iii) Counsel did not introduce testimony from correctional officers who were willing to testify that defendant would not pose a danger while incarcerated. Nor did counsel offer prison commendations awarded to Williams for his help in breaking up a prison drug ring and for returning a guard's wallet. (iv) Several character witnesses were not called to testify . . . [T]he testimony of Elliott, a respected CPA in the community, could have been quite important to the jury . . . .(v) Finally, counsel did not introduce evidence that Petitioner was borderline mentally retarded, though he was found competent to stand trial." App. 465–469.

5. "Specifically, the Virginia Supreme Court found no prejudice, reasoning: 'The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured

Having introduced his analysis of Williams' claim with the standard of review applicable on habeas appeals provided by 28 U.S.C. § 2254(d) (1994 ed., Supp. III), the judge concluded that those errors established that the Virginia Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" within the meaning of § 2254(d)(1).

The Federal Court of Appeals reversed. 163 F.3d 860 (C.A.4 1998). It construed § 2254(d)(1) as prohibiting the grant of habeas corpus relief unless the state court "'decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.'" *Id.*, at 865 (quoting *Green v. French*, 143 F.3d 865, 870 (C.A.4 1998)). Applying that standard, it could not say that the Virginia Supreme Court's decision on the prejudice issue was an unreasonable application of the tests developed in either *Strickland* or *Lockhart*.[6] It explained that the evidence that Williams presented a future danger to society was "simply overwhelming," 163 F.3d, at 868, it endorsed the Virginia Supreme Court's interpretation of *Lockhart*, 163 F.3d, at 869, and it characterized the state court's understanding of the facts in this case as "reasonable," *id.*, at 870.

We granted certiorari, 526 U.S. 1050, 119 S.Ct. 1355, 143 L.Ed.2d 516 (1999), and now reverse.

environment.' *Williams*, 487 S.E.2d at 200. The Virginia Supreme Court ignored or overlooked the evidence of Williams' difficult childhood and abuse and his limited mental capacity. It is also unreasonable to characterize the additional evidence as coming from 'mostly relatives.' As stated, *supra*, Bruce Elliott, a respected professional in the community, and several correctional officers offered to testify on Williams behalf." *Id.*, at 476.

6. Like the Virginia Supreme Court, the Court of Appeals assumed, without deciding, that the performance of trial counsel fell below an objective standard of reasonableness. 163 F.3d, at 867.

II

In 1867, Congress enacted a statute providing that federal courts "shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . ." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Over the years, the federal habeas corpus statute has been repeatedly amended, but the scope of that jurisdictional grant remains the same.[7] It is, of course, well settled that the fact that constitutional error occurred in the proceedings that led to a state-court conviction may not alone be sufficient reason for concluding that a prisoner is entitled to the remedy of habeas. See, *e.g.*, *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). On the other hand, errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ. See, *e.g.*, *Teague v. Lane*, 489 U.S. 288, 311–314, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 692–694, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (opinion of Harlan, J., concurring in judgments in part and dissenting in part), and quoting *Rose v. Lundy*, 455 U.S. 509, 544, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (STEVENS, J., dis-

7. By Act of Congress: "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . . .(c) The writ of habeas corpus shall not extend to a prisoner unless—. . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ." 28 U.S.C. § 2241(c)(3). In parallel, § 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

senting)). The deprivation of the right to the effective assistance of counsel recognized in *Strickland* is such an error. *Strickland*, 466 U.S., at 686, 697–698, 104 S.Ct. 2052.

The warden here contends that federal habeas corpus relief is prohibited by the amendment to 28 U.S.C. § 2254 (1994 ed., Supp. III), enacted as a part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The relevant portion of that amendment provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . . ."

In this case, the Court of Appeals applied the construction of the amendment that it had adopted in its earlier opinion in *Green v. French*, 143 F.3d 865 (C.A.4 1998). It read the amendment as prohibiting federal courts from issuing the writ unless:

> "'(a) the state court decision is in 'square conflict' with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, 'the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts,'" 163 F.3d, at 865 (quoting *Green*, 143 F.3d, at 870).

Accordingly, it held that a federal court may issue habeas relief only if "the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable," 163 F.3d, at 865.[8]

We are convinced that that interpretation of the amendment is incorrect. It would impose a test for determining when a legal rule is clearly established that simply cannot be squared with the real practice of decisional law.[9] It would apply a standard for determining the "reasonableness" of state-court decisions that is not contained in the statute itself, and that Congress surely did not intend. And it

8. The warden's view is narrower. He argues that 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III) establishes a new general rule that prohibits federal courts from granting habeas corpus relief on the basis of any claim that a state court has adjudicated on the merits, and that § 2254(d)(1) merely identifies two narrow exceptions to the general rule—when a state court has issued a decision "contrary to" or an "unreasonable application of" clearly established federal law. Brief for Respondent 14–15. The first, "contrary to" exception, in his view, applies only to "starkly unreasonable" errors of law. The first category thus imposes "a standard of review far more limited than 'de novo,' 'independent' or 'plenary' review." *Id.*, at 24. The state-court judgment must thus be so far afield "as to make the 'unlawfulness' of the state court decision 'apparent.'" *Id.*, at 25. The second exception likewise replaces the "de novo" standard of reviewing mixed questions of law and fact with the standard of "objective reasonableness" as formulated by the Court of Appeals. *Id.*, at 30–31.

9. Although we explain our understanding of "clearly established law," *infra*, at 1505–1506, we note that the Fourth Circuit's construction of the amendment's inquiry in this respect is especially problematic. It separates cases into those for which a "controlling decision" exists and those for which no such decision exists. The former category includes very few cases, since a rule is "controlling" only if it matches the case before the court both "as to law and fact," and most cases are factually distinguishable in some respect. A literal application of the Fourth Circuit test would yield a particularly perverse outcome in cases involving the *Strickland* rule for establishing ineffective assistance of counsel, since that case, which established the "controlling" rule of law on the issue, contained facts insufficient to show ineffectiveness.

would wrongly require the federal courts, including this Court, to defer to state judges' interpretations of federal law.

As the Fourth Circuit would have it, a state-court judgment is "unreasonable" in the face of federal law only if all reasonable jurists would agree that the state court was unreasonable. Thus, in this case, for example, even if the Virginia Supreme Court misread our opinion in *Lockhart*, we could not grant relief unless we believed that none of the judges who agreed with the state court's interpretation of that case was a "reasonable jurist." But the statute says nothing about "reasonable judges," presumably because all, or virtually all, such judges occasionally commit error; they make decisions that in retrospect may be characterized as "unreasonable." Indeed, it is most unlikely that Congress would deliberately impose such a requirement of unanimity on federal judges. As Congress is acutely aware, reasonable lawyers and lawgivers regularly disagree with one another. Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other reasonable judges.

The inquiry mandated by the amendment relates to the way in which a federal habeas court exercises its duty to decide constitutional questions; the amendment does not alter the underlying grant of jurisdiction in § 2254(a), see n. 7, *supra*.[10] When federal judges exercise their federal-question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). At the core of this power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.

This basic premise informs our interpretation of both parts of § 2254(d)(1): first, the requirement that the determinations of state courts be tested only against "clearly established Federal law, as determined by the Supreme Court of the United States," and second, the prohibition on the issuance of the writ unless the state court's decision is "contrary to, or involved an unreasonable application of," that clearly established law. We address each part in turn.

The "clearly established law" requirement

In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), we held that the petitioner was not entitled to federal habeas relief because he was relying

10. Indeed, Congress roundly rejected an amendment to the bill eventually adopted that directly invoked the text of the jurisdictional grant, 28 U.S.C. § 2254(a) (providing that the federal courts "*shall entertain* an application for a writ of habeas corpus" (emphasis added)). The amendment read: "Notwithstanding any other provision of law, an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment or order of a State court *shall not be entertained* by a court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." 141 Cong. Rec. 14991 (1995) (amendment of Sen. Kyl) (emphasis added). In speaking against the Kyl amendment, Senator Specter (a key proponent of the eventual habeas reform) explained that when "dealing with the question of jurisdiction of the Federal courts to entertain questions on Federal issues, on constitutional issues, I believe it is necessary that the Federal courts retain that jurisdiction as a constitutional matter." *Id.*, at 15050 (statement of Sen. Specter).

on a rule of federal law that had not been announced until after his state conviction became final. The antiretroactivity rule recognized in *Teague*, which prohibits reliance on "new rules," is the functional equivalent of a statutory provision commanding exclusive reliance on "clearly established law." Because there is no reason to believe that Congress intended to require federal courts to ask both whether a rule sought on habeas is "new" under *Teague*—which remains the law—and also whether it is "clearly established" under AEDPA, it seems safe to assume that Congress had congruent concepts in mind.[11] It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.[12]

Teague's core principles are therefore relevant to our construction of this requirement. Justice Harlan recognized the "inevitable difficulties" that come with "attempting 'to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" *Mackey*, 401 U.S., at 695, 91 S.Ct. 1160 (quoting *Desist v. United States*, 394 U.S. 244, 263, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969)). But *Teague* established some guidance for making this determination, explaining that a federal habeas court operates within the bounds of comity and finality if it applies a rule "dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S., at 301, 109 S.Ct. 1060 (emphasis deleted). A rule that "breaks new ground or imposes a new obligation on the States or the Federal Government," *ibid.*, falls outside this universe of federal law.

To this, AEDPA has added, immediately following the "clearly established law" requirement, a clause limiting the area of relevant law to that "determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III). If this Court has not broken sufficient

11. It is not unusual for Congress to codify earlier precedent in the habeas context. Thus, for example, the exhaustion rule applied in *Ex parte Hawk*, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944) *(per curiam)*, and the abuse of the writ doctrine applied in *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), were later codified. See 28 U.S.C. § 2254(b) (1994 ed., Supp. III) (exhaustion requirement); 28 U.S.C. § 2254, Rule 9(b), Rules Governing § 2254 Cases in the United States District Courts. A previous version of § 2254, as we stated in *Miller v. Fenton*, 474 U.S. 104, 111, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985), "was an almost verbatim codification of the standards delineated in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), for determining when a district court must hold an evidentiary hearing before acting on a habeas petition."

12. We are not persuaded by the argument that because Congress used the words "clearly established law" and not "new rule," it meant in this section to codify an aspect of the doctrine of executive qualified immunity rather than *Teague's* antiretroactivity bar. Brief for Respondent 28–29, n. 19. The warden refers us specifically to § 2244(b)(2)(A) and 28 U.S.C. § 2254(e)(2) (1994 ed., Supp. III), in which the statute does in so many words employ the "new rule" language familiar to *Teague* and its progeny. Congress thus knew precisely the words to use if it had wished to codify *Teague per se*. That it did not use those words in § 2254(d) is evidence, the argument goes, that it had something else in mind entirely in amending that section. We think, quite the contrary, that the verbatim adoption of the *Teague* language in these other sections bolsters our impression that Congress had *Teague*—and not any unrelated area of our jurisprudence—specifically in mind in amending the habeas statute. These provisions, seen together, make it impossible to conclude that Congress was not fully aware of, and interested in codifying into law, that aspect of this Court's habeas doctrine. We will not assume that in a single subsection of an amendment entirely devoted to the law of habeas corpus, Congress made the anomalous choice of reaching into the doctrinally distinct law of qualified immunity, for a single phrase that just so happens to be the conceptual twin of a dominant principle in habeas law of which Congress was fully aware.

legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar. In this respect, we agree with the Seventh Circuit that this clause "extends the principle of *Teague* by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ." *Lindh v. Murphy*, 96 F.3d 856, 869 (C.A.7 1996). As that court explained:

> "This is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court. The novelty in this portion § 2254(d)(1) is not the 'contrary to' part but the reference to 'Federal law, as *determined by the Supreme Court of the United States*' (emphasis added). This extends the principle of *Teague [v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)] by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ. It does not, however, purport to limit the federal courts' independent interpretive authority with respect to federal questions." *Ibid.*

A rule that fails to satisfy the foregoing criteria is barred by *Teague* from application on collateral review, and, similarly, is not available as a basis for relief in a habeas case to which AEDPA applies.

In the context of this case, we also note that, as our precedent interpreting *Teague* has demonstrated, rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule. As Justice KENNEDY has explained:

> "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule .... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 308–309, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (opinion concurring in judgment).

Moreover, the determination whether or not a rule is clearly established at the time a state court renders its final judgment of conviction is a question as to which the "federal courts must make an independent evaluation." *Id.*, at 305, 109 S.Ct. 1060 (O'CONNOR, J., concurring in judgment); accord *id.*, at 307, 109 S.Ct. 1060 (KENNEDY, J., concurring).

It has been urged, in contrast, that we should read *Teague* and its progeny to encompass a broader principle of deference requiring federal courts to "validate[ ] 'reasonable, good-faith interpretations' of the law" by state courts. Brief for California et al. as *Amici Curiae* 6 (quoting *Butler v. McKellar*, 494 U.S. 407, 414, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990)). The position has been bolstered with references to our statements elucidating the 'new rule' inquiry as one turning on whether "reasonable jurists" would agree the rule was not clearly established. *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). This presumption of deference was in essence the position taken by three Members of this Court in *Wright*, 505 U.S., at 290–291, 112 S.Ct. 2482 (opinion of THOMAS, J.) ("[A] federal habeas court 'must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable' ") (quoting *Butler*, 494 U.S., at 422, 110 S.Ct. 1212 (Brennan, J., dissenting)).

Teague, however, does not extend this far. The often repeated language that *Teague* endorses "reasonable, good-faith interpretations" by state courts is an explanation of policy, not a statement of law. The *Teague* cases reflect this Court's view

that habeas corpus is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals. On the contrary, we have long insisted that federal habeas courts attend closely to those considered decisions, and give them full effect when their findings and judgments are consistent with federal law. See *Thompson v. Keohane*, 516 U.S. 99, 107–116, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). But as Justice O'CONNOR explained in *Wright*:

> "[T]he duty of the federal court in evaluating whether a rule is 'new' is not the same as deference; ... *Teague* does not direct federal courts to spend less time or effort scrutinizing the existing federal law, on the ground that they can assume the state courts interpreted it properly.
>
> "[T]he maxim that federal courts should 'give great weight to the considered conclusions of a coequal state judiciary' ... does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." 505 U.S., at 305, 112 S.Ct. 2482.

We are convinced that in the phrase, "clearly established law," Congress did not intend to modify that independent obligation.

The "contrary to, or an unreasonable application of," requirement

The message that Congress intended to convey by using the phrases, "contrary to" and "unreasonable application of" is not entirely clear. The prevailing view in the Circuits is that the former phrase requires *de novo* review of 'pure' questions of law and the latter requires some sort of "reasonability" review of so-called mixed questions of law and fact. See, *e.g.*, *Nadlig v. Nagle*, 138 F.3d 917 (C.A.11 1998); *Drinkard v. Johnson*, 97 F.3d 751 (C.A.5 1996); *Lindh v. Murphy*, 96 F.3d 856 (C.A.7 1996) (en banc), rev'd on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

We are not persuaded that the phrases define two mutually exclusive categories of questions. Most constitutional questions that arise in habeas corpus proceedings—and therefore most "decisions" to be made—require the federal judge to apply a rule of law to a set of facts, some of which may be disputed and some undisputed. For example, an erroneous conclusion that particular circumstances established the voluntariness of a confession, or that there exists a conflict of interest when one attorney represents multiple defendants, may well be described either as "contrary to" or as an "unreasonable application of" the governing rule of law. Cf. *Miller v. Fenton*, 474 U.S. 104, 116, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985); *Cuyler v. Sullivan*, 446 U.S. 335, 341–342, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). In constitutional adjudication, as in the common law, rules of law often develop incrementally as earlier decisions are applied to new factual situations. See *Wright*, 505 U.S., at 307, 112 S.Ct. 2482 (KENNEDY, J., concurring). But rules that depend upon such elaboration are hardly less lawlike than those that establish a bright-line test.

Indeed, our pre-AEDPA efforts to distinguish questions of fact, questions of law, and "mixed questions," and to create an appropriate standard of habeas review for each, generated some not insubstantial differences of opinion as to which issues of law fell into which category of question, and as to which standard of review applied to each. See *Thompson*, 516 U.S., at 110–111, 116 S.Ct. 457 (acknowledging " 'that the Court has not charted an entirely clear course in this area' " and that "the proper characterization of a question as one of fact or law is sometimes slippery") (quot-

ing *Miller*, 474 U.S., at 113, 106 S.Ct. 445). We thus think the Fourth Circuit was correct when it attributed the lack of clarity in the statute, in part, to the overlapping meanings of the phrases "contrary to" and "unreasonable application of." See *Green*, 143 F.3d, at 870.

The statutory text likewise does not obviously prescribe a specific, recognizable standard of review for dealing with either phrase. Significantly, it does not use any term, such as *"de novo"* or "plain error," that would easily identify a familiar standard of review. Rather, the text is fairly read simply as a command that a federal court not issue the habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law in a given case. The suggestion that a wrong state-court "decision"—a legal judgment rendered "after consideration of *facts, and* . . . *law,*" Black's Law Dictionary 407 (6th ed.1990) (emphasis added)—may no longer be redressed through habeas (because it is unreachable under the "unreasonable application" phrase) is based on a mistaken insistence that the § 2254(d)(1) phrases have not only independent, but mutually exclusive, meanings. Whether or not a federal court can issue the writ "under [the] 'unreasonable application' clause," the statute is clear that habeas may issue under § 2254(d)(1) if a state court "decision" is "contrary to . . . clearly established Federal law." We thus anticipate that there will be a variety of cases, like this one, in which both phrases may be implicated.

Even though we cannot conclude that the phrases establish "a body of rigid rules," they do express a "mood" that the federal judiciary must respect. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487, 71 S.Ct. 456, 95 L.Ed. 456 (1951). In this respect, it seems clear that Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ. Likewise, the statute in a separate provision provides for the habeas remedy when a state-court decision "was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding.*" 28 U.S.C. § 2254(d)(2) (1994 ed., Supp. III) (emphasis added). While this provision is not before us in this case, it provides relevant context for our interpretation of § 2254(d)(1); in this respect, it bolsters our conviction that federal habeas courts must make as the starting point of their analysis the state courts' determinations of fact, including that aspect of a "mixed question" that rests on a finding of fact. AEDPA plainly sought to ensure a level of "deference to the determinations of state courts," provided those determinations did not conflict with federal law or apply federal law in an unreasonable way. H.R. Conf. Rep. No. 104–518, p. 111 (1996). Congress wished to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law. When federal courts are able to fulfill these goals within the bounds of the law, AEDPA instructs them to do so.

On the other hand, it is significant that the word "deference" does not appear in the text of the statute itself. Neither the legislative history, nor the statutory text, suggests any difference in the so-called "deference" depending on which of the two phrases is implicated.[13] Whatever "deference" Congress had in mind with respect

13. As Judge Easterbrook has noted, the statute surely does not require the kind of "deference" appropriate in other contexts: "It does not tell us to 'defer' to state decisions, as if the Constitution means one thing in Wisconsin and another in Indiana. Nor does it tell us to treat state courts the way we treat federal administrative agencies. Deference after the fashion of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), depends on delegation. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990). Congress did not delegate interpretive or executive power to the state courts. They exercise powers under

to both phrases, it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error. As Judge Easterbrook noted with respect to the phrase "contrary to":

> "Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails." *Lindh*, 96 F.3d, at 869.[11]

their domestic law, constrained by the Constitution of the United States. 'Deference' to the jurisdictions bound by those constraints is not sensible." *Lindh v. Murphy*, 96 F.3d 856, 868 (C.A.7 1996) (en banc), rev'd on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

14. The Court advances three reasons for adopting its alternative construction of the phrase "unreasonable application of." First, the use of the word "unreasonable" in the statute suggests that Congress was directly influenced by the "patently unreasonable" standard advocated by Justice THOMAS in his opinion in *Wright v. West*, 505 U.S. 277, 287, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992), *post*, at 1522–1523; second, the legislative history supports this view, see *post*, at 1521, n.; and third, Congress must have intended to change the law more substantially than our reading 28 U.S.C. § 2254(d)(1) (1994, Supp. III) permits.

None of these reasons is persuasive. First, even though, as the Court recognizes, the term "unreasonable" is "difficult to define," *post*, at 1522, neither the statute itself nor the Court's explanation of it, suggests that AEDPA's "unreasonable application of" has the same meaning as Justice THOMAS' " 'patently unreasonable' " standard mentioned in his dictum in *Wright*. 505 U.S., at 291, 112 S.Ct. 2482 (quoting *Butler* v. *McKellar*, 494 U.S. 407, 422, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990) (Brennan, J., dissenting)). To the extent the "broader debate" in *Wright* touched upon the Court's novel distinction today between what is "wrong" and what is "unreasonable," it was in the context of a discussion not about the *standard of review* habeas courts should use for law-application questions, but about whether a rule is "new" or "old" such that *Teague's* retroactivity rule would bar habeas relief; Justice THOMAS contended that *Teague* barred habeas "whenever the state courts have interpreted old precedents reasonably, not [as Justice O'CONNOR suggested] only when they have done so 'properly.' " 505 U.S., at 291–292, n. 3, 112 S.Ct. 2482. *Teague*, of course, as Justice O'CONNOR correctly pointed out, "did not establish a standard of review at all," 505 U.S., at 303–304, 112 S.Ct. 2482; rather than instructing a court *how* to review a claim, it simply asks, in absolute terms, *whether* a rule was clear at the time of a state-court decision. We thus do not think *Wright* "confirms" anything about the meaning of § 2254(d)(1), which is, as our division reflects, anything but "clear." *Post*, at 1523.

As for the other bases for Justice O'CONNOR's view, the only two specific citations to the legislative history upon which she relies, *post*, at 1520–1521, do no more than beg the question. One merely quotes the language of the statute without elaboration, and the other goes to slightly greater length in stating that state-court judgments must be upheld unless "unreasonable." Neither sheds any light on what the content of the hypothetical category of "decisions" that are wrong but nevertheless not "unreasonable." Finally, while we certainly agree with the Court, *post*, at 1518, that AEDPA wrought substantial changes in habeas law, see *supra*, at 1509; see also, *e.g.*, 28 U.S.C. § 2244(b) (1994 ed., Supp. III) (strictly limiting second or successive petitions); § 2244(d) (1-year statute of limitations for habeas petitions); § 2254(e)(2) (limiting availability of evidentiary hearings on habeas); §§ 2263, 2266 (strict deadlines for habeas court rulings), there is an obvious fallacy in the assumption that because the statute changed pre-existing law in some respects, it must have rendered this specific change here.

Our disagreement with Justice O'CONNOR about the precise meaning of the phrase "contrary to," and the word "unreasonable," is, of course, important, but should affect only a narrow category of cases. The simplest and first definition of "contrary to" as a phrase is "in conflict with." Webster's Ninth New Collegiate Dictionary 285 (1983). In this sense, we think the phrase surely capacious enough to include a finding that the state-court "decision" is simply "erroneous" or wrong. (We hasten to add that even "diametrically different" from, or "opposite" to, an established federal law would seem to include

"decisions" that are wrong in light of that law.) And there is nothing in the phrase "contrary to"—as Justice O'CONNOR appears to agree—that implies anything less than independent review by the federal courts. Moreover, state-court decisions that do not "conflict" with federal law will rarely be "unreasonable" under either her reading of the statute or ours. We all agree that state-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated. Our difference is as to the cases in which, at first-blush, a state-court judgment seems entirely reasonable, but thorough analysis by a federal court produces a firm conviction that that judgment is infected by constitutional error. In our view, such an erroneous judgment is "unreasonable" within the meaning of the act even though that conclusion was not immediately apparent.

In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution, that independent judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way,[15] we are convinced that Congress did not intend the statute to produce such a result.

III

[1] In this case, Williams contends that he was denied his constitutionally guaranteed right to the effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury. The threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final. That question is easily answered because the merits of his claim are squarely governed by our holding in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[2] We explained in *Strickland* that a violation of the right on which Williams relies has two components:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687, 104 S.Ct. 2052.

To establish ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688, 104 S.Ct. 2052. To establish prejudice he "must show that

15. See, *e.g.*, *Mackey v. United States*, 401 U.S. 667, 689, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971); *Felker v. Turpin*, 518 U.S. 651, 667, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (SOUTER, J., concurring). Indeed, a contrary rule would be in substantial tension with the interest in uniformity served by Congress' modification in AEDPA of our previous *Teague* jurisprudence—now the law on habeas review must be "clearly established" by this Court alone. See *supra*, at 1506. It would thus seem somewhat perverse to ascribe to Congress the entirely inconsistent policy of perpetuating disparate readings of our decisions under the guise of deference to anything within a conceivable spectrum of reasonableness.

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694, 104 S.Ct. 2052.

It is past question that the rule set forth in *Strickland* qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States." That the *Strickland* test "of necessity requires a case-by-case examination of the evidence," *Wright*, 505 U.S., at 308, 112 S.Ct. 2482 (KENNEDY, J., concurring), obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court. This Court's precedent "dictated" that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams' ineffective-assistance claim. *Teague*, 489 U.S., at 301, 109 S.Ct. 1060. And it can hardly be said that recognizing the right to effective counsel "breaks new ground or imposes a new obligation on the States," *ibid.* Williams is therefore entitled to relief if the Virginia Supreme Court's decision rejecting his ineffective-assistance claim was either "contrary to, or involved an unreasonable application of," that established law. It was both.

IV

[3] The Virginia Supreme Court erred in holding that our decision in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), modified or in some way supplanted the rule set down in *Strickland*. It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as *Strickland* itself explained, there are a few situations in which prejudice may be presumed. 466 U.S., at 692, 104 S.Ct. 2052. And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. *Nix v. Whiteside*, 475 U.S. 157, 175–176, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

Similarly, in *Lockhart*, we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in *Strickland*. The death sentence that Arkansas had imposed on Bobby Ray Fretwell was based on an aggravating circumstance (murder committed for pecuniary gain) that duplicated an element of the underlying felony (murder in the course of a robbery). Shortly before the trial, the United States Court of Appeals for the Eighth Circuit had held that such "double counting" was impermissible, see *Collins v. Lockhart*, 754 F.2d 258, 265 (1985), but Fretwell's lawyer (presumably because he was unaware of the *Collins* decision) failed to object to the use of the pecuniary gain aggravator. Before Fretwell's claim for federal habeas corpus relief reached this Court, the *Collins* case was overruled.[16] Accordingly, even though the Arkansas trial judge probably would have sustained a timely objection to the double counting, it had become clear that the State had a right to rely on the disputed aggravating circumstance. Because the ineffectiveness of

16. In *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), we held that an aggravating circumstance may duplicate an element of the capital offense if the class of death-eligible defendants is sufficiently narrowed by the definition of the offense itself. In *Perry v. Lockhart*, 871 F.2d 1384 (1989), the Eighth Circuit correctly decided that our decision in *Lowenfield* required it to overrule *Collins*.

Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his claim did not satisfy the "prejudice" component of the *Strickland* test.[17]

Cases such as *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him.[18] In the instant case, it is undisputed that Williams had a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.

Nevertheless, the Virginia Supreme Court read our decision in *Lockhart* to require a separate inquiry into fundamental fairness even when Williams is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding. It wrote:

> " 'The prisoner argues there 'is a "reasonable probability" that at least one juror would have been moved to spare Petitioner's life had he heard' the mitigation evidence developed at the habeas hearing that was not presented at the trial. Summarizing, he contends there 'is a "reasonable probability" that had at least one juror heard *any* of this evidence—let alone all of this evidence—the outcome of this case would have been different.'
>
> "We reject these contentions. The prisoner's discussion flies in the face of the Supreme Court's admonition in *Lockhart*, *supra*, that 'an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.' " *Williams*, 254 Va., at 25, 487 S.E.2d, at 199.

Unlike the Virginia Supreme Court, the state trial judge omitted any reference to *Lockhart* and simply relied on our opinion in *Strickland* as stating the correct standard for judging ineffective-assistance claims. With respect to the prejudice component, he wrote:

> "Even if a Petitioner shows that counsel's performance was deficient, however, he must also show prejudice. Petitioner must show 'that there is a reasonable probability that but for counsel's unprofessional errors, the result ... would have been different.' *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. 'A reasonable probability is a probability sufficient to undermine con-

17. "But the 'prejudice' component of the *Strickland* test does not implicate these concerns. It focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. [466 U.S., at 687, 104 S.Ct. 2052]; see *Kimmelman*, 477 U.S., at 393, 106 S.Ct. 2574 (Powell, J., concurring). Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him. As we have noted, it was the premise of our grant in this case that *Perry* was correctly decided, *i.e.*, that respondent was not entitled to an objection based on 'double counting.' Respondent therefore suffered no prejudice from his counsel's deficient performance." *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

18. In her concurring opinion in *Lockhart*, Justice O'CONNOR stressed this precise point. "I write separately only to point out that today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The determinative question—whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' *id.*, at 694, 104 S.Ct. 2052—remains unchanged. This case, however, concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Id.*, at 373, 113 S.Ct. 838.

fidence in the outcome." *Id.* Indeed, it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. *Id.* at 693, 104 S.Ct. 2052. The petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice." App. 417.

The trial judge analyzed the ineffective-assistance claim under the correct standard; the Virginia Supreme Court did not.

We are likewise persuaded that the Virginia trial judge correctly applied both components of that standard to Williams' ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards—a judgment barely disputed by the State in its brief to this Court. The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. *Id.*, at 207, 227. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings,[19] that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school. *Id.*, at 595. They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." *Id.*, at 569, 588. Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison. *Id.*, at 563–566.

Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system—for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. *Id.*, at 534–536. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demon-

19. Juvenile records contained the following description of his home:

"The home was a complete wreck .... There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash .... The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them .... The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey." App. 528–529.

strate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed.1980).

We are also persuaded, unlike the Virginia Supreme Court, that counsel's unprofessional service prejudiced Williams within the meaning of *Strickland*. After hearing the additional evidence developed in the postconviction proceedings, the very judge who presided at Williams' trial and who once determined that the death penalty was "just" and "appropriate," concluded that there existed "a reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence. App. 429. We do not agree with the Virginia Supreme Court that Judge Ingram's conclusion should be discounted because he apparently adopted "a *per se* approach to the prejudice element" that placed undue "emphasis on mere outcome determination." 254 Va., at 26–27, 487 S.E.2d, at 200. Judge Ingram did stress the importance of mitigation evidence in making his "outcome determination," but it is clear that his predictive judgment rested on his assessment of the totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing.

The Virginia Supreme Court's own analysis of prejudice reaching the contrary conclusion was thus unreasonable in at least two respects. First, as we have already explained, the State Supreme Court mischaracterized at best the appropriate rule, made clear by this Court in *Strickland*, for determining whether counsel's assistance was effective within the meaning of the Constitution. While it may also have conducted an "outcome determinative" analysis of its own, 254 Va., at 27, 487 S.E.2d, at 200, it is evident to us that the court's decision turned on its erroneous view that a "mere" difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel. See *supra*, at 1511. Its analysis in this respect was thus not only "contrary to," but also, inasmuch as the Virginia Supreme Court relied on the inapplicable exception recognized in *Lockhart*, an "unreasonable application of" the clear law as established by this Court.

Second, the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation. See *Clemons v. Mississippi*, 494 U.S. 738, 751–752, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). This error is apparent in its consideration of the additional mitigation evidence developed in the postconviction proceedings. The court correctly found that as to "the factual part of the mixed question," there was "really . . . n[o] . . . dispute" that available mitigation evidence was not presented at trial. 254 Va., at 24, 487 S.E.2d, at 198. As to the prejudice determination comprising the "legal part" of its analysis, *id.*, at 23–25, 487 S.E.2d, at 198–199, it correctly emphasized the strength of the prosecution evidence supporting the future dangerousness aggravating circumstance.

But the state court failed even to mention the sole argument in mitigation that trial counsel did advance—Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability. See *Boyde v. California*, 494 U.S. 370, 387, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). The circumstances recited in his

several confessions are consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation. Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case. The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.

V

In our judgment, the state trial judge was correct both in his recognition of the established legal standard for determining counsel's effectiveness, and in his conclusion that the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised "a reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented and explained the significance of all the available evidence. It follows that the Virginia Supreme Court rendered a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Williams' constitutional right to the effective assistance of counsel as defined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), was violated.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice O'CONNOR delivered the opinion of the Court with respect to Part II (except as to the footnote), concurred in part, and concurred in the judgment.*

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). In that Act, Congress placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners. The relevant provision, 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III), prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Court holds today that the Virginia Supreme Court's adjudication of Terry Williams' application for state habeas corpus relief resulted in just such a decision. I agree with that determination and join Parts I, III, and IV of the Court's opinion. Because I disagree, however, with the interpretation of § 2254(d)(1) set forth in Part II of Justice STEVENS' opinion, I write separately to explain my views.

I

Before 1996, this Court held that a federal court entertaining a state prisoner's application for habeas relief must exercise its independent judgment when deciding both questions of constitutional law and mixed constitutional questions (*i.e.*, application of constitutional law to fact). See, *e.g.*, *Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). In other words, a federal habeas court owed no deference to a state court's resolution of such questions of law or mixed questions. In 1991, in the case of *Wright v. West*, 502 U.S. 1021, 112 S.Ct. 672, 116 L.Ed.2d 763, we revisited our prior holdings by asking the parties to address the following question in their briefs:

"In determining whether to grant a petition for writ of habeas corpus by a per-

* Justice KENNEDY joins this opinion in its entirety. THE CHIEF JUSTICE and Justice THOMAS join this opinion with respect to Part II. Justice SCALIA joins this opinion with respect to Part II, except as to the footnote, *infra*, at 1521.

son in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?" *Ibid.*

Although our ultimate decision did not turn on the answer to that question, our several opinions did join issue on it. See *Wright v. West*, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992).

Justice THOMAS, announcing the judgment of the Court, acknowledged that our precedents had "treat[ed] as settled the rule that mixed constitutional questions are 'subject to plenary federal review' on habeas." *Id.*, at 289, 112 S.Ct. 2482 (quoting *Miller*, *supra*, at 112, 106 S.Ct. 445). He contended, nevertheless, that those decisions did not foreclose the Court from applying a rule of deferential review for reasonableness in future cases. See 505 U.S., at 287–290, 112 S.Ct. 2482. According to Justice THOMAS, the reliance of our precedents on *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), was erroneous because the Court in *Brown* never explored in detail whether a federal habeas court, to deny a state prisoner's application, must conclude that the relevant state-court adjudication was "correct" or merely that it was "reasonable." *Wright*, *supra*, at 287, 112 S.Ct. 2482. Justice THOMAS suggested that the time to revisit our decisions may have been at hand, given that our more recent habeas jurisprudence in the nonretroactivity context, see, *e.g.*, *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), had called into question the then-settled rule of independent review of mixed constitutional questions. *Wright*, 505 U.S., at 291–292, 294, 112 S.Ct. 2482.

I wrote separately in *Wright* because I believed Justice THOMAS had "understate[d] the certainty with which *Brown v. Allen* rejected a deferential standard of review of issues of law." *Id.*, at 300, 112 S.Ct. 2482. I also explained that we had considered the standard of review applicable to mixed constitutional questions on numerous occasions and each time we concluded that federal habeas courts had a duty to evaluate such questions independently. *Id.*, at 301–303, 112 S.Ct. 2482. With respect to Justice THOMAS' suggestion that *Teague* and its progeny called into question the vitality of the independent-review rule, I noted that "*Teague* did not establish a 'deferential' standard of review" because "[i]t did not establish a standard of review at all." 505 U.S., at 303–304, 112 S.Ct. 2482. While *Teague* did hold that state prisoners could not receive "the retroactive benefit of new rules of law," it "did *not* create any deferential standard of review with regard to old rules." 505 U.S., at 304, 112 S.Ct. 2482 (emphasis in original).

Finally, and perhaps most importantly for purposes of today's case, I stated my disagreement with Justice THOMAS' suggestion that *de novo* review is incompatible with the maxim that federal habeas courts should "give great weight to the considered conclusions of a coequal state judiciary," *Miller*, *supra*, at 112, 106 S.Ct. 445. Our statement in *Miller* signified only that a state-court decision is due the same respect as any other "persuasive, well-reasoned authority." *Wright*, 505 U.S., at 305, 112 S.Ct. 2482. "But this does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." *Ibid.* Under the federal habeas statute as it stood in 1992, then, our precedents dictated that a federal court should grant a state prisoner's petition for habeas relief if that court were to conclude in its independent judgment that the relevant state court had erred on a question of constitutional law or on a mixed constitutional question.

If today's case were governed by the federal habeas statute prior to Congress' enactment of AEDPA in 1996, I would agree with Justice STEVENS that Williams' petition for habeas relief must be granted if we, in our independent judgment, were to conclude that his Sixth Amendment right to effective assistance of counsel was violated. See *ante*, at 1511.

II

A

[4] Williams' case is *not* governed by the pre–1996 version of the habeas statute. Because he filed his petition in December 1997, Williams' case is governed by the statute as amended by AEDPA. Section 2254 now provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Accordingly, for Williams to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1). That provision modifies the role of federal habeas courts in reviewing petitions filed by state prisoners.

Justice STEVENS' opinion in Part II essentially contends that § 2254(d)(1) does not alter the previously settled rule of independent review. Indeed, the opinion concludes its statutory inquiry with the somewhat empty finding that § 2254(d)(1) does no more than express a " 'mood' that the federal judiciary must respect." *Ante*, at 1509. For Justice STEVENS, the congressionally enacted "mood" has two important qualities. First, "federal courts [must] attend to every state-court judgment with utmost care" by "carefully weighing all the reasons for accepting state court's judgment." *Ante*, at 1511. Second, if a federal court undertakes that careful review and yet remains convinced that a prisoner's custody violates the Constitution, "that independent judgment should prevail." *Ibid.*

One need look no further than our decision in *Miller* to see that Justice STEVENS' interpretation of § 2254(d)(1) gives the 1996 amendment no effect whatsoever. The command that federal courts should now use the "utmost care" by "carefully weighing" the reasons supporting a state court's judgment echoes our pre-AEDPA statement in *Miller* that federal habeas courts "should, of course, give great weight to the considered conclusions of a coequal state judiciary." 474 U.S., at 112, 106 S.Ct. 445. Similarly, the requirement that the independent judgment of a federal court must in the end prevail essentially repeats the conclusion we reached in the very next sentence in *Miller* with respect to the specific issue presented there: "But, as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution *is a matter for independent federal determination.*" *Ibid.* (emphasis added).

That Justice STEVENS would find the new § 2254(d)(1) to have no effect on the prior law of habeas corpus is remarkable given his apparent acknowledgment that Congress wished to bring change to the field. See *ante*, at 1509 ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law"). That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved.

Justice STEVENS arrives at his erroneous interpretation by means of one critical misstep. He fails to give independent meaning to both the "contrary to" and "unreasonable application" clauses of the statute. See, *e.g.*, *ante*, at 1508 ("We are not persuaded that the phrases define two mutually exclusive categories of questions"). By reading § 2254(d)(1) as one general restriction on the power of the federal habeas court, Justice STEVENS manages to avoid confronting the specific meaning of the statute's "unreasonable application" clause and its ramifications for the independent-review rule. It is, however, a cardinal principle of statutory construction that we must "'give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538–539, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (quoting *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883)). Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "*contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States." (Emphases added.)

[5] The Court of Appeals for the Fourth Circuit properly accorded both the "contrary to" and "unreasonable application" clauses independent meaning. The Fourth Circuit's interpretation of § 2254(d)(1) in Williams' case relied, in turn, on that court's previous decision in *Green v. French*, 143 F.3d 865 (1998), cert. denied, 525 U.S. 1090, 119 S.Ct. 844, 142 L.Ed.2d 698 (1999). See 163 F.3d 860, 866 (C.A.4 1998) ("[T]he standard of review enunciated in *Green v. French* continues to be the binding law of this Circuit"). With respect to the first of the two statutory clauses, the Fourth Circuit held in *Green* that a state-court decision can be "contrary to" this Court's clearly established precedent in two ways. First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours. See 143 F.3d, at 869–870.

The word "contrary" is commonly understood to mean "diametrically different," "opposite in character or nature," or "mutually opposed." Webster's Third New International Dictionary 495 (1976). The text of § 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court. The Fourth Circuit's interpretation of the "contrary to" clause accurately reflects this textual meaning. A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052. A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set

of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s "contrary to" clause. Assume, for example, that a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state-court decision would be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim, even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself. It is difficult, however, to describe such a run-of-the-mill state-court decision as "diametrically different" from, "opposite in character or nature" from, or "mutually opposed" to *Strickland*, our clearly established precedent. Although the state-court decision may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case, the decision is not "mutually opposed" to *Strickland* itself.

Justice STEVENS would instead construe § 2254(d)(1)'s "contrary to" clause to encompass such a routine state-court decision. That construction, however, saps the "unreasonable application" clause of any meaning. If a federal habeas court can, under the "contrary to" clause, issue the writ whenever it concludes that the state court's *application* of clearly established federal law was incorrect, the "unreasonable application" clause becomes a nullity. We must, however, if possible, give meaning to every clause of the statute. Justice STEVENS not only makes no attempt to do so, but also construes the "contrary to" clause in a manner that ensures that the "unreasonable application" clause will have no independent meaning. See *ante*, at 1509, 1510–1511. We reject that expansive interpretation of the statute. Reading § 2254(d)(1)'s "contrary to" clause to permit a federal court to grant relief in cases where a state court's error is limited to the manner in which it *applies* Supreme Court precedent is suspect given the logical and natural fit of the neighboring "unreasonable application" clause to such cases.

The Fourth Circuit's interpretation of the "unreasonable application" clause of § 2254(d)(1) is generally correct. That court held in *Green* that a state-court decision can involve an "unreasonable application" of this Court's clearly established precedent in two ways. First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. See 143 F.3d, at 869–870.

A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision "involv[ing] an unreasonable application of ... clearly established Federal law." Indeed, we used the almost identical phrase "application of law" to describe a state court's application of

law to fact in the certiorari question we posed to the parties in *Wright*.*

The Fourth Circuit also held in *Green* that state-court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (or unreasonably refuse to extend a legal principle to a new context where it should apply) should be analyzed under § 2254(d)(1)'s "unreasonable application" clause. See 143 F.3d, at 869–870. Although that holding may perhaps be correct, the classification does have some problems of precision. Just as it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context. Indeed, on the one hand, in some cases it will be hard to distinguish a decision involving an unreasonable extension of a legal principle from a decision involving an unreasonable application of law to facts. On the other hand, in many of the same cases it will also be difficult to distinguish a decision involving an unreasonable extension of a legal principle from a decision that "arrives at a conclusion opposite to that reached by this Court on a question of law," *supra*, at 1519. Today's case does not require us to decide how such "extension of legal principle" cases should be treated under § 2254(d)(1). For now it is sufficient to hold that when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provision's "unreasonable application" clause.

B

[6] There remains the task of defining what exactly qualifies as an "unreasonable application" of law under § 2254(d)(1). The Fourth Circuit held in *Green* that a state-court decision involves an "unreasonable application of ... clearly established Federal law" only if the state court has applied federal law "in a manner that reasonable jurists would all agree is unreasonable." 143 F.3d, at 870. The placement of this additional overlay on the "unreasonable application" clause was erroneous. It is difficult to fault the Fourth Circuit for using this language given the fact that we have employed nearly identical terminology to describe the related inquiry undertaken by federal courts in applying the nonretroactivity rule of *Teague*. For example, in *Lambrix v. Singletary*, 520 U.S. 518, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997), we stated that a new rule is not dictated by precedent unless it would be "apparent to *all reasonable jurists*." *Id.*, at 528, 117 S.Ct. 1517 (emphasis added). In *Graham v. Collins*, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), another nonretroactivity case, we employed similar language, stating that we could not say "that *all reasonable jurists* would have deemed themselves compelled to accept Graham's claim in 1984." *Id.*, at 477, 113 S.Ct. 892 (emphasis added).

Defining an "unreasonable application" by reference to a "reasonable jurist," however, is of little assistance to the courts that must apply § 2254(d)(1) and, in fact, may be misleading. Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a

* The legislative history of § 2254(d)(1) also supports this interpretation. See, *e.g.*, 142 Cong. Rec. 7799 (1996) (remarks of Sen. Specter) ("[U]nder the bill deference will be owed to State courts' decisions on the application of Federal law to the facts. Unless it is unreasonable, a State court's decision applying the law to the facts will be upheld"); 141 Cong. Rec. 14666 (1995) (remarks of Sen. Hatch) ("[W]e allow a Federal court to overturn a State court decision only if it is contrary to clearly established Federal law or if it involves an 'unreasonable application' of clearly established Federal law to the facts").

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subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. The "all reasonable jurists" standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one. For example, the Fifth Circuit appears to have applied its "reasonable jurist" standard in just such a subjective manner. See *Drinkard v. Johnson*, 97 F.3d 751, 769 (1996) (holding that state court's application of federal law was not unreasonable because the Fifth Circuit panel split 2–1 on the underlying mixed constitutional question), cert. denied, 520 U.S. 1107, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997). As I explained in *Wright* with respect to the "reasonable jurist" standard in the *Teague* context, "[e]ven though we have characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." 505 U.S., at 304, 112 S.Ct. 2482 (citation omitted).

The term "unreasonable" is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning. For purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. Our opinions in *Wright*, for example, make that difference clear. Justice THOMAS' criticism of this Court's subsequent reliance on *Brown* turned on that distinction. The Court in *Brown*, Justice THOMAS contended, held only that a federal habeas court must determine whether the relevant state-court adjudication resulted in a "'satisfactory conclusion.'" 505 U.S., at 287, 112 S.Ct. 2482 (quoting *Brown*, 344 U.S., at 463, 73 S.Ct. 397). In Justice THOMAS' view, *Brown* did not answer "the question whether a 'satisfactory' conclusion was one that the habeas court considered *correct*, as opposed to merely *reasonable*." 505 U.S., at 287, 112 S.Ct. 2482 (emphases in original). In my separate opinion in *Wright*, I made the same distinction, maintaining that "a state court's *incorrect* legal determination has [never] been allowed to stand because it was *reasonable*. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." *Id.*, at 305, 112 S.Ct. 2482 (emphases added). In § 2254(d)(1), Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Justice STEVENS turns a blind eye to the debate in *Wright* because he finds no indication in § 2254(d)(1) itself that Congress was "directly influenced" by Justice THOMAS' opinion in *Wright*. *Ante*, at 1510, n. 14. As Justice STEVENS himself apparently recognizes, however, Congress need not mention a prior decision of this Court by name in a statute's text in order to adopt either a rule or a meaning given a certain term in that decision. See *ante*, at 1506, n. 11. In any event, whether Congress intended to codify the standard of review suggested by Justice THOMAS in *Wright* is beside the point. *Wright* is important for the light it sheds on § 2254(d)(1)'s requirement that a federal habeas court inquire into the reasonableness of a state court's application of clearly established federal law. The separate opinions in *Wright* concerned the very issue addressed by § 2254(d)(1)'s "unreasonable application" clause—whether, in reviewing a state-court decision on a state prisoner's claims under federal law, a fed-

eral habeas court should ask whether the state-court decision was correct or simply whether it was reasonable. Justice STEVENS' claim that the debate in *Wright* concerned only the meaning of the *Teague* nonretroactivity rule is simply incorrect. See *ante*, at 1510, n. 14. As even a cursory review of Justice THOMAS' opinion and my own opinion reveals, both the broader debate and the specific statements to which we refer, see *supra*, at 1522, concerned precisely the issue of the standard of review to be employed by federal habeas courts. The *Wright* opinions confirm what § 2254(d)(1)'s language already makes clear—that an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law.

Throughout this discussion the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" has been put to the side. That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision. In this respect, the "clearly established Federal law" phrase bears only a slight connection to our *Teague* jurisprudence. With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1). See, *e.g.*, *Stringer v. Black*, 503 U.S. 222, 228, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (using term "old rule"). The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.

In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied—the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

III

Although I disagree with Justice STEVENS concerning the standard we must apply under § 2254(d)(1) in evaluating Terry Williams' claims on habeas, I agree with the Court that the Virginia Supreme Court's adjudication of Williams' claim of ineffective assistance of counsel resulted in a decision that was both contrary to and involved an unreasonable application of this Court's clearly established precedent. Specifically, I believe that the Court's discussion in Parts III and IV is correct and that it demonstrates the reasons that the Virginia Supreme Court's decision in Williams' case, even under the interpretation of § 2254(d)(1) I have set forth above, was both contrary to and involved an unreasonable application of our precedent.

First, I agree with the Court that our decision in *Strickland* undoubtedly qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of § 2254(d)(1). See *ante*, at 1511–1512. Second, I agree that the Virginia Supreme Court's decision was contrary to that

clearly established federal law to the extent it held that our decision in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), somehow modified or supplanted the rule set forth in *Strickland*. See *ante*, at 1512–1513, 1515. Specifically, the Virginia Supreme Court's decision was contrary to *Strickland* itself, where we held that a defendant demonstrates prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S., at 694, 104 S.Ct. 2052. The Virginia Supreme Court held, in contrast, that such a focus on outcome determination was insufficient standing alone. See *Williams v. Warden of Mecklenburg Correctional Center*, 254 Va. 16, 25, 27, 487 S.E.2d 194, 199, 200 (1997). *Lockhart* does not support that broad proposition. As I explained in my concurring opinion in that case, "in the vast majority of cases . . . [t]he determinative question—whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'—remains unchanged." 506 U.S., at 373, 113 S.Ct. 838 (quoting *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052). In his attempt to demonstrate prejudice, Williams did not rely on any "considerations that, as a matter of law, ought not inform the [prejudice] inquiry." *Lockhart*, *supra*, at 373, 113 S.Ct. 838 (O'CONNOR, J., concurring). Accordingly, as the Court ably explains, the Virginia Supreme Court's decision was contrary to *Strickland*.

To be sure, as THE CHIEF JUSTICE notes, *post*, at 1525–1526 (dissenting opinion), the Virginia Supreme Court did also inquire whether Williams had demonstrated a reasonable probability that, but for his trial counsel's unprofessional errors, the result of his sentencing would have been different. See 254 Va., at 25–26, 487 S.E.2d, at 199–200. It is impossible to determine, however, the extent to which the Virginia Supreme Court's error with respect to its reading of *Lockhart* affected its ultimate finding that Williams suffered no prejudice. For example, at the conclusion of its discussion of whether Williams had demonstrated a reasonable probability of a different outcome at sentencing, the Virginia Supreme Court faulted the Virginia Circuit Court for its "emphasis on mere outcome determination, without proper attention to whether the result of the criminal proceeding was fundamentally unfair or unreliable." 254 Va., at 27, 487 S.E.2d, at 200. As the Court explains, however, see *ante*, at 1513, Williams' case did not implicate the unusual circumstances present in cases like *Lockhart* or *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Accordingly, for the very reasons I set forth in my *Lockhart* concurrence, the emphasis on outcome was entirely appropriate in Williams' case.

Third, I also agree with the Court that, to the extent the Virginia Supreme Court did apply *Strickland*, its application was unreasonable. See *ante*, at 1513–1516. As the Court correctly recounts, Williams' trial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation evidence. See *ante*, at 1513–1515. For example, speaking only of that evidence concerning Williams' "nightmarish childhood," *ante*, at 1514, the mitigation evidence that trial counsel failed to present to the jury showed that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody," *ante*, at 1514 (footnote omitted). See also *ante*, at 1514, n. 19. The consequence of counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique

personal circumstances manifested itself during his generic, unapologetic closing argument, which provided the jury with no reasons to spare petitioner's life. More generally, the Virginia Circuit Court found that Williams' trial counsel failed to present evidence showing that Williams "had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; ... that he was borderline mentally retarded;" and that "[his] conduct had been good in certain structured settings in his life (such as when he was incarcerated)." App. 422–423. In addition, the Circuit Court noted the existence of "friends, neighbors and family of [Williams] who would have testified that he had redeeming qualities." *Id.*, at 423. Based on its consideration of all of this evidence, the same trial judge that originally found Williams' death sentence "justified and warranted," *id.*, at 155, concluded that trial counsel's deficient performance prejudiced Williams, *id.*, at 424, and accordingly recommended that Williams be granted a new sentencing hearing, *ibid.* The Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence. See 254 Va., at 26, 487 S.E.2d, at 200 ("At most, this evidence would have shown that numerous people, mostly relatives, thought that [Williams] was nonviolent and could cope very well in a structured environment"). For that reason, and the remaining factors discussed in the Court's opinion, I believe that the Virginia Supreme Court's decision "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States."

Accordingly, although I disagree with the interpretation of § 2254(d)(1) set forth in Part II of Justice STEVENS' opinion, I join Parts I, III, and IV of the Court's opinion and concur in the judgment of reversal.

CHIEF JUSTICE REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, concurring in part and dissenting in part.

I agree with the Court's interpretation of 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III), see *ante*, at 1501–1505 (opinion of O'CONNOR, J.), but disagree with its decision to grant habeas relief in this case.

There is "clearly established Federal law, as determined by [this Court]" that governs petitioner's claim of ineffective assistance of counsel: *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, we must determine whether the Virginia Supreme Court's adjudication was "contrary to" or an "unreasonable application of" *Strickland*.

Generally, in an ineffective-assistance-of-counsel case where the state court applies *Strickland*, federal habeas courts can proceed directly to "unreasonable application" review. But, according to the substance of petitioner's argument, this could be one of the rare cases where a state court applied the wrong Supreme Court precedent, and, consequently, reached an incorrect result. Petitioner argues, and the Court agrees, that the Virginia Supreme Court improperly held that *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), "modified or in some way supplanted" the rule set down in *Strickland*. See *ante*, at 1512. I agree that such a holding would be improper. But the Virginia Supreme Court did not so hold as it did not rely on *Lockhart* to reach its decision.

Before delving into the evidence presented at the sentencing proceeding, the Virginia Supreme Court stated:

"We shall demonstrate that the criminal proceeding sentencing defendant to death was not fundamentally unfair or unreliable, and that the prisoner's assertions about the potential effects of the omitted proof do not establish a 'reasonable probability' that the result of the proceeding would have been different,

nor any probability sufficient to undermine confidence in the outcome. Therefore, any ineffective assistance of counsel did not result in actual prejudice to the accused." *Williams v. Warden*, 254 Va. 16, 25, 487 S.E.2d 194, 199 (1997).

While the first part of this statement refers to *Lockhart*, the rest of the statement is straight out of *Strickland*. Indeed, after the initial allusion to *Lockhart*, the Virginia Supreme Court's analysis explicitly proceeds under *Strickland* alone.* See 254 Va., at 26–27, 487 S.E.2d, at 200. Because the Virginia Supreme Court did not rely on *Lockhart* to make its decision, and, instead, appropriately relied on *Strickland*, that court's adjudication was not "contrary to" this Court's clearly established precedent.

The question then becomes whether the Virginia Supreme Court's adjudication resulted from an "unreasonable application of" *Strickland*. In my view, it did not.

I, like the Virginia Supreme Court and the Federal Court of Appeals below, will assume without deciding that counsel's performance fell below an objective standard of reasonableness. As to the prejudice inquiry, I agree with the Court of Appeals that evidence showing that petitioner presented a future danger to society was overwhelming. As that court stated:

"The murder of Mr. Stone was just one act in a crime spree that lasted most of Williams's life. Indeed, the jury heard evidence that, in the months following the murder of Mr. Stone, Williams savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw." 163 F.3d 860, 868 (C.A.4 1998).

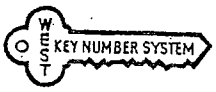
In *Strickland*, *supra*, we said that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. 466 U.S., at 698, 104 S.Ct. 2052. It is with this kind of a question that the "unreasonable application of" clause takes on meaning. While the determination of "prejudice" in the legal sense may be a question of law, the subsidiary inquiries are heavily factbound.

Here, there was strong evidence that petitioner would continue to be a danger to society, both in and out of prison. It was not, therefore, unreasonable for the Virginia Supreme Court to decide that a jury would not have been swayed by evidence demonstrating that petitioner had a terrible childhood and a low IQ. See *ante*, at 1514. The potential mitigating evidence that may have countered the finding that petitioner was a future danger was testimony that petitioner was not dangerous

* In analyzing the evidence that was presented to the sentencing jury, the Virginia Supreme Court stated: "Drawing on *Strickland*, we hold that, even assuming the challenged conduct of counsel was unreasonable, the prisoner 'suffered insufficient prejudice to warrant setting aside his death sentence,' " 254 Va., at 26, 487 S.E.2d, at 200 (quoting *Strickland v. Washington*, 466 U.S. 668, 698–699, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); "[w]hat the Supreme Court said in *Strickland* applies with full force here: 'Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed;' " 254 Va., at 26, 487 S.E.2d, at 200 (quoting *Strickland*, *supra*, at 700, 104 S.Ct. 2052); and "[i]n conclusion, employing the language of *Strickland*, the prisoner 'has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. [The prisoner's] sentencing proceeding was not fundamentally unfair,' " 254 Va., at 27, 487 S.E.2d, at 200 (quoting *Strickland*, *supra*, at 700, 104 S.Ct. 2052).

while in detention. See *ibid.* But, again, it is not unreasonable to assume that the jury would have viewed this mitigation as unconvincing upon hearing that petitioner set fire to his cell while awaiting trial for the murder at hand and has repeated visions of harming other inmates.

Accordingly, I would hold that habeas relief is barred by 28 U.S.C. § 2254(d) (1994 ed., Supp. III).



APPENDIX C

with district 24 and would soon justify the extra representative. This factual determination

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not being challenged here, we accept the ruling of the District Court regarding these districts.

The judgment is reversed in part and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

Judgment reversed and case remanded.

Mr. Justice DOUGLAS, concurring.

While I join the opinion of the Court, I reserve decision on one aspect of the problem concerning multi-member districts.

Under the present regime each voter in the district has one vote for each office to be filled. This allows the majority to defeat the minority on all fronts. It is suggested that in multi-member districts each person be able to vote for only one legislator, the theory being that in that way a minority, either political or otherwise, would have a chance to elect at least one representative.

I am not sure in my own mind how this problem should be resolved. But in view of the fact that appellants claim that multi-member districts of Texas are constructed in such a manner that Negroes are effectively disenfranchised, I would reserve that question for consideration when the case is once again before the District Court.

Mr. Justice CLARK would affirm the judgment of the District Court.

Mr. Justice HARLAN and Mr. Justice STEWART would affirm the judgment of the District Court in its entirety, on the basis of the reasoning contained in Mr. Justice HARLAN's dissenting opinion in Swann v. Adams, 385 U.S. 440, 447, 87 S.Ct. 569, 574, 17 L.Ed. 2d 501.

386 U.S. 18

Ruth Elizabeth CHAPMAN and Thomas LeRoy Teale, Petitioners,

v.

STATE OF CALIFORNIA.

No. 95.

Argued Dec. 7 and 8, 1966.

Decided Feb. 20, 1967.

Rehearing Denied March 27, 1967.

See 386 U.S. 987, 87 S.Ct. 1283.

Defendants were convicted in the Superior Court, San Joaquin County, of first-degree murder, first-degree robbery, and simple kidnapping, and they appealed. The Supreme Court of California affirmed in part and reversed in part, 63 Cal.2d 178, 45 Cal.Rptr. 729, 404 P.2d 209. On writ of certiorari the Supreme Court, Mr. Justice Black, held that before a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt, and that comment on failure of defendants to testify was not harmless error where state prosecutor's argument and trial judge's instruction to jury continuously and repeatedly impressed jury that from refusal of defendants to testify, to all intents and purposes, the inferences from facts in evidence had to be drawn in state's favor, and where state failed to demonstrate beyond reasonable doubt that such comments and instructions did not contribute to defendants' convictions.

Reversed and remanded.

Mr. Justice Harlan dissented.

1. Courts ⇐394(1)

Whether a conviction in state court should stand when state has failed to accord federal constitutionally guaranteed rights is as much a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.

2. Courts ⇐394(1)

Formulation of authoritative laws, rules, and remedies designed to protect

people from infractions by the states of federally guaranteed rights cannot be left to the states themselves.

3. Constitutional Law ⇐67

Right of defendants not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent is a federal right which, in the absence of appropriate congressional action, is the responsibility of Supreme Court to protect by fashioning the necessary rule. U.S.C.A.Const. Amends. 5, 14.

4. Criminal Law ⇐1162

There may be some constitutional errors in a conviction which, in the setting of a particular case, are so unimportant and insignificant that they may, consistent with Federal Constitution, be deemed harmless and which will not require automatic reversal of the conviction.

5. Criminal Law ⇐1162

Before a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt.

6. Criminal Law ⇐1171(5)

Comment on failure of defendants to testify was not harmless error where state prosecutor's argument and trial judge's instruction to jury continuously and repeatedly impressed jury that from refusal of defendants to testify, to all intents and purposes, the inferences from facts in evidence had to be drawn in state's favor, and where state failed to demonstrate beyond reasonable doubt that such comments and instructions did not contribute to defendants' convictions. U.S.C.A.Const. Amends. 5, 14; West's Ann.Cal.Pen.Code, § 1258; West's Ann. Cal.Const. art. 1, § 13; art. 6, § 4½.

Morris Lavine, Los Angeles, Cal., for petitioners.

Arlo E. Smith, San Francisco, Cal., for respondent.

Mr. Justice BLACK delivered the opinion of the Court.

Petitioners, Ruth Elizabeth Chapman and Thomas LeRoy Teale, were convicted in a California state court

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upon a charge that they robbed, kidnaped, and murdered a bartender. She was sentenced to life imprisonment and he to death. At the time of the trial, Art. I, § 13, of the State's Constitution provided that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Both petitioners in this case chose not to testify at their trial, and the State's attorney prosecuting them took full advantage of his right under the State Constitution to comment upon their failure to testify, filling his argument to the jury from beginning to end with numerous references to their silence and inferences of their guilt resulting therefrom.[1] The trial court also charged the jury that it could draw adverse inferences from petitioners' failure to testify.[2] Shortly after the trial, but before petitioners' cases had been considered on appeal by the California Supreme Court, this Court decided Grif-

1. Excerpts of the prosecutor's argument are reproduced in the Appendix to this opinion.

2. The trial judge charged the jury:
"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely on his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. * * *"

fin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, in which we held California's constitutional provision and practice invalid on the ground that they put a penalty on the exercise of a person's right not to be compelled to be a witness against himself, guaranteed by the Fifth Amendment to the

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United States Constitution and made applicable to California and the other States by the Fourteenth Amendment. See Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. On appeal, the State Supreme Court, 63 Cal.2d 178, 45 Cal.Rptr. 729, 404 P.2d 209, admitting that petitioners had been denied a federal constitutional right by the comments on their silence, nevertheless affirmed, applying the State Constitution's harmless-error provision, which forbids reversal unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." [3] We granted certiorari limited to these questions:

> "Where there is a violation of the rule of Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?" Chapman v. California, 383 U.S. 956–957, 86 S.Ct. 1228, 16 L. Ed.2d 300.

In this Court petitioners contend that both these questions are federal ones to be decided under federal law; that under federal law we should hold that denial of a federal constitutional right, no matter how unimportant, should automatically result in reversal of a conviction, without regard to whether the error is considered harmless; and that, if wrong in this, the various comments on petitioners' silence cannot, applying a federal standard, be considered harmless here.

I.

[1–3] Before deciding the two questions here—whether there can ever be harmless constitutional error and whether the error here was harmless—we must first decide whether

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state or federal law governs. The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the "independent" federal courts would be the "guardians of those rights." [4] Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment

3. Cal.Const., Art. VI, § 4½:
"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

4. "If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789).

right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.

II.

[4] We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding,

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as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111.[5] None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

III.

In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What

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harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible.

[5] The federal rule emphasizes "substantial rights" as do most others. The California constitutional rule emphasizes "a miscarriage of justice," [6] but the California courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the court's view of "overwhelming evidence." [7] We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id., at 86–87, 84 S.Ct. at 230. Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be

5. 28 U.S.C. § 2111 provides:
"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."
Fed.Rule Crim.Proc. 52(a) provides:
"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."
See also Fed.Rule Civ.Proc. 61.

6. The California statutory rule, like the federal rule, provides that "[a]fter hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." Cal.Pen.Code § 1258.

7. The California Supreme Court in this case did not find a "miscarriage of justice" as to petitioner Teale, because it found from "other substantial evidence, [that] the proof of his guilt must be deemed overwhelming." 63 Cal.2d, at 197, 45 Cal.Rptr., at 740, 404 P.2d, at 220.

treated as harmless error,[8] this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived

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of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.[9] There is little, if any, difference between our statement in Fahy v. State of Connecticut about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy*, case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test,[10] it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case.

IV.

[6] Applying the foregoing standard, we have no doubt that the error in these cases was not harmless to petitioners. To reach this conclusion one need only glance at the prosecutorial comments compiled from the record by petitioners' counsel and (with minor omissions) set forth in the Appendix. The California Supreme Court

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fairly summarized the extent of these comments as follows:

> "Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman, funds or the lack thereof in Mr. Teale's possession immediately prior to the killing, the amount of intoxicating liquors consumed by defendants at the Spot Club and other taverns, the circumstances of the shooting in the automobile and the removal of the victim's body therefrom, who fired the fatal shots, why defendants used a false registration at a motel shortly after the killing, the meaning of a letter written by Mrs. Chapman several days after the killing, why Teale had a loaded weapon in his possession when apprehended, the meaning of statements made by Teale after his apprehension, why certain clothing and articles of personal property were shipped by defendants to Missouri, what clothing Mrs. Chapman wore at the time of the killing, conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing and, generally, the overall commission of the crime." 63 Cal.2d,

8. See, e. g., Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (coerced confession); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (right to counsel); Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (impartial judge).

9. See generally 1 Wigmore, Evidence § 21 (3d ed. 1940).

10. Cf. Woodby v. Immigration Service, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362.

at 196, 45 Cal.Rptr., at 740, 404 P.2d, at 220.

Thus, the state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State—in short, that by their silence petitioners had served as irrefutable witnesses against themselves. And though the case in which this occurred presented a reasonably strong "circumstantial web of evidence" against petitioners, 63 Cal.2d, at 197, 45 Cal.Rptr., at 740, 404 P.2d, at 220, it was also a case in which, absent the constitutionally forbidden

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comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession. See, e. g., Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844. Petitioners are entitled to a trial free from the pressure of unconstitutional inferences.

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT.

Argument and Comments by the Prosecutor on the Failure of the Defendants to Take the Witness Stand

"Now, ladies and gentlemen, I don't know which one of these weapons was purchased first, I don't know that it particularly makes any difference, but as you know, we have had no testimony at all in that regard, in fact, I might add that the only person or persons that could give testimony in that regard would be, of course, the defendants themselves.

* * * * * *

"Now, this, there's no question about what this represents, or for the record here, no question in your minds, this is not the weapon that Ruth Elizabeth Chapman purchased in Reno, Nevada, on October the 12th, 1962. I don't know where that weapon is, ladies and gentlemen, and you don't know where it is, you've heard no testimony from the stand at all, and once again, the only

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person or persons that could tell us about where the original .22-caliber Vestpocket is today would be one or the other of the defendants or both.

* * * * * *

"This would indicate that there was no small struggle—it would indicate that the body, almost lifeless, was dragged or left in some fashion which would cause a shirt or an article of clothing to tear, one or the other. Once again, ladies and gentlemen, I don't know, I wasn't out there, you were not out there. You heard no testimony on the stand. The only individuals that could give you that information would be the defendants, either one or both of them, Thomas Leroy Teale and Ruth Elizabeth Chapman. And of course you know that you have not heard from them.

"Now, I will comment throughout my entire opening argument to you in reference to the fact that neither one of these defendants has seen fit to go up, raise their right hand, take that witness stand, tell you ladies and gentlemen of the jury exactly what did occur, explain to you any facts or details within their knowledge so that you would know. You would not have to—by His Honor's instructions you can draw an adverse inference to any fact within their knowledge that they couldn't testify to, and they have not subjected themselves, either one or both, to cross-examination. Now, that is—so there is no question in your mind,

once again with reference to a defendant taking the stand, none—you are—you or I or anyone else is not required under our legal system in these United States and under the Constitution, you can not be made to testify against yourself or for yourself, as far as that goes.

"So, it is a Constitutional right, and both of these defendants have seen fit to avail themselves of that Constitutional right, but I say to you ladies and gentlemen, there are many things in this case, and I will try to point

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them out to you, at least some, probably not all, that these defendants are in a position to take that stand and to testify under oath and give you facts concerning. They have not seen fit to avail themselves of that opportunity.

* * * * * *

"Now whether or not Mr. Teale had any other money at the time or was in the habit of concealing his money in different departments, I don't know, and ladies and gentlemen, you don't know, because you have not had any testimony from that witness stand, and the only person that could clear this up for us ladies and gentlemen is the defendant Thomas Leroy Teale. Ladies and gentlemen, he has not seen fit to tell you about that. But certainly we know that bogus checks are being written, and as I recall we know that—I don't—we may infer, if you wish to believe there is an inference which Mr. Teale could have cleared up, that that was all the money that he had, and he didn't clear it up, so you may draw an adverse inference from that, that that was all the money he had, or in fact that he—at that time he was in desperate need of funds, and you know that through some kind of a discussion between these two defendants in regard to Mr. Teale shooting dice, that this was all he had.

* * * * * *

"Now, ladies and gentlemen, in reference to the weapons being purchased in Reno, Nevada on October 12th, you have heard, ladies and gentlemen, no testimony, and you will recall clearly, you are going to have some difficulty, you really are in reference to what is and what isn't evidence in this case, and believe me I have a few comments to say on that a little later on, but if you will recall as far as evidence is concerned of the truth of anything at all, you don't have any evidence on why

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these—why these pistols were purchased. Why did Ruth Elizabeth Chapman buy two weapons? Well, you do recall that she told on one occasion that she had had a pistol stolen from her vehicle, her automobile, when she was taking a little trip across country, you remember that testimony, and you can rely on the testimony that you actually hear, ladies and gentlemen, from the stand. She told that, and of course you can only rely that she told the gentleman that, that she had had another one stolen, and so that she needed one to replace it. But why two, ladies and gentlemen? You don't need two. If she is going to be attacked she wasn't going to use one in each hand I assume to defend herself, and there is another area, ladies and gentlemen, besides this that I mentioned to you before, that since you have no testimony from the stand, you must surmise from all facts and circumstances as to the exact reason why they were purchased, because the only one in this room that could tell you why these guns were purchased is either one or both of the defendants. Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. Once again she has not chosen to do this. So any inference you may draw therefrom will be an adverse inference under the circumstances, and under the instructions of the Court.

* * *

"So, we know, ladies and gentlemen, that they had the motive, we know that they had the means, we know that they had the opportunity. We also know that

they were at that scene, ladies and gentlemen, they were with that man just a matter of minutes before he was shot in the head three times with a gun similar to People's Exhibit No. 12. Now, if they weren't there, and I think the evidence clearly shows they were, scientific evidence,

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that we'll talk about a little later. Once again, why don't they come up and raise their right hand and tell you about it?

"To me they are charged with serious crimes, ladies and gentlemen. They can come up and testify and then it will be evidence for you to consider in this case. If they had just come up and told you about this, because they were there. If they left the Spot Club and just went on their way, well, of course they didn't, the evidence clearly shows they didn't, but you may draw the adverse inference from their refusal to come before you and raise that right hand and incidentally, of course, subject themselves to cross-examination.

* * * * * *

"I think it is not an unreasonable inference to infer at this time if the defendants were drinking beer earlier in the evening in Croce's, it's not unreasonable to infer they continued drinking the same thing, therefore the two glasses remaining that had been washed, but not put up were the defendants'. I don't know, it is an inference, I wasn't there, we have had no testimony whatsoever as to what they were drinking at the Spot Club, once again, neither one of the defendants have seen their way clear to come up and tell you what they were drinking if it was beer.

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"So you can see that whichever one of these defendants shot him, and once again, ladies and gentlemen, here is an area that I don't know who shot him, and you don't know who shot him, because we have had no testimony from that witness stand to tell you who shot him, and the only two persons in this courtroom that could tell you which one of them it was that shot him are the two defendants; but once again, they have both decided that they will not get up and raise their right

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hand and testify in this regard and subject themselves to cross-examination, so all we know is that one of them shot him.

* * * * * *

"We don't know the time here, it doesn't say. We don't have any testimony, ladies and gentlemen, in this regard, and I might say once again in reference to this last, the use of the name, T. L. Rosenthal, Mr. and Mrs., we don't know why, ladies and gentlemen, that name was used. We don't know why, ladies and gentlemen, that UZV 155—was 156 originally on here. You don't know that, and I don't because we haven't had the testimony from the witness stand on it. Now we know it is in the handwriting of Ruth Elizabeth Chapman, and there is no question about that. She wrote it. It could be evidence, ladies and gentlemen, for you. It could be evidence as to why she wrote that name, and why that five was changed to a six. We could have it. But we don't because either one or both of the defendants, neither one, have even seen fit to take the stand and to testify in that regard. Then this would be evidence that you can consider. But also ladies and gentlemen, subject to taking the oath and subject to cross-examination.

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"We see it here in Mountain View, the Mountain View Motel, the name of Teale, but we don't have the testimony of the defendants and ladies and gentlemen they are the only ones here in this case that could get up there and tell you why they used a phony name two hours after the crime and why they didn't put the correct license down and whatever inference you draw you are permitted to draw since they do not choose to tell you an adverse interest, and I would say, ladies and gentlemen, that

it is an adverse interest to the defendants. It shows a consciousness of guilt.

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"Now, ladies and gentlemen, what is this—first of all, 'I thought I'd better let you know that Tom arrived here today and we're going south tomorrow'? Now, what does that mean? Well, I think without saying a great deal more about it that each one of you can certainly infer as to what it very readily could mean, especially if one has in fact committed a robbery and kidnapped someone from the premises and that individual has ended up dead, shot three times in the head. And further, ladies and gentlemen, the only other thing I can say about it is this, who can really tell you and who could have told you from evidence, from the witness stand, what that letter meant? Well, the only one is Ruth Elizabeth Chapman, ladies and gentlemen. If it didn't mean what you can reasonably infer that it means then I say, ladies and gentlemen, she could have come up here and testified, gotten on the witness chair. We have had many witnesses in this case, no one I would assume more interested than Ruth Elizabeth Chapman, or the co-defendant, neither one took the stand. She in no way, nor has there been any way, ladies and gentlemen, any kind of evidence that has actually been admitted for the truth of the evidence, in no way is there any evidence as to why she wrote that letter, and what she meant by 'Tom is arriving today and we're going south.' Once again, she did not choose to tell you. So, we may only infer, and this will be, of course, you will have to in your final analysis draw any inferences from that that you feel are appropriate and are proper—

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"He was a fugitive from justice, and he knew he was a fugitive from justice, and he never—let's face it, there were four F.B.I. agents and these fellows are professional and they know what they are doing and one of them had a gun out and he never had an opportunity

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to use it, and none of us here will ever know from all the testimony, from the actual testimony on the stand why he had the weapon with him fully loaded, because Mr. Teale has never taken the stand in this case and testified for you. These things are things only within his knowledge, ladies and gentlemen. If there is any fact in this case of any relevancy of any importance it is within the knowledge of a defendant, and they chose not to take the stand and tell you about it, where incidentally they are under oath and can be cross-examined. You may draw an adverse inference from the fact that they do not take it. I think the inference is very clear, too, why they had this weapon here and why he never—why it was fully loaded. Remember there was never an opportunity to use it. The weapon was purchased by Ruth Elizabeth Chapman. Now when he is apprehended and fleeing from the State he had it with him and it was fully loaded. Once again, I don't know where the original is here, and you know the only two that can tell us where that is.

"Now, you recall also that when Mr. Basham took him back in, was fingerprinting him, etc., he told him he was wanted in California and no one mentioned anything about Lodi, and he said that he would waive extradition, and he also did say he said, 'They will have a hard time proving I was there.' And Teale himself did mention Lodi. Well, I don't know what he meant by that statement. I certainly can draw my own conclusion, and you sure will draw yours as the triers of the facts and the judges of the facts, ladies and gentlemen, but once again Mr. Teale did not take the stand and testify under oath in this case, and Mr. Teale has not desired to take the stand and explain what he meant by it. He didn't have to, of course, but once again you can draw whatever inferences you may feel, and the law is clear that

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you may draw an adverse—where a defendant does not explain and he does not

choose to take the stand and explain it to you you can draw an adverse inference.

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"Photographs. You've seen them, ladies and gentlemen, but as you recall the doctor now is pointing, and this is the picture of the deceased, the back of his head, as to where he was shot in the back of the head, you recall the other one as to where he was shot in the side of the head, right here on the left in the general area of where the glasses would be, I think it's a most reasonable inference, ladies and gentlemen. Now, once again we have had no testimony except what would seem clearly logical from the experts, the way the body was found, where he'd been shot, what he'd been shot with, and the position of the glasses in relation to the body at the death scene, we had no other testimony. Certainly none from the defendants in this case.

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"* * * Agent Gilmore has drawn and made some notations in reference to where that blood was located, blood found on these shoes. Now, all we know, ladies and gentlemen, as far as evidence in this case is concerned, is that these shoes belonged to Ruth Elizabeth Chapman and they were in her possession when she was apprehended in St. Joseph, Missouri, and why do I say that's all you know? That's all you may take into consideration, ladies and gentlemen, because we have no other testimony on this witness stand in relation to any of these articles of clothing that are actually admitted into evidence.

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"You have two box lids, two of them, and you've heard the questions concerning them, they would indicate that they were sent to a Mrs. Howard Smith at 2206 Castle Avenue, St. Joseph, Missouri, and I believe it was on

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the 11th of October, says from Thomas Teale, 1105 Del Norte, Eureka, California, they both say essentially the same thing, 10–11, there's no year, but I think we can surely infer it was in 1962, and apparently from Reno.

"Now, ladies and gentlemen, there's been a lot of talk, suggestion, and whatever you want to call it, I'll call it a smoke screen, in reference to these two lids that came off, and we'll assume there was a box underneath them, I don't think there's any question about that. Where have you ever heard from that witness stand, ladies and gentlemen, what was ever in those boxes? Now, you've heard some self-serving declarations that are not admitted into evidence because they come through someone else who in some fashion gets testimony before you, but no cross-examination of the original party who is giving that kind of testimony, and you can't consider it.

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"Thank you, Your Honor. Counsel has interjected himself into this, and he'll have every opportunity to make his own comments, and I'm sure he'll most adequately express himself when the times comes. I'm telling you, ladies and gentlemen, that the only evidence that you have is that you have two box tops. Now, he's just suggested to you, so I'll answer this ahead of time, but the evidence is clear that Mr. Sperling packed these boxes, but you will recall Mr. Sperling was not at the original scene when they were taken. Maybe it isn't unusual to infer there may have been clothes, but what I'm getting at is this is what clothing? You don't even know there was clothing in them when they were shipped. It could have been other household articles. And even if we assume it was clothing, and that's not unreasonable because basically these are the items we found and brought back with us to Lodi, we don't know which clothing she shipped at this time. Couldn't this be cleared up for us, though? It could be cleared up so

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easily. Ruth Elizabeth Chapman is sitting right over here, she is one of the defendants in this case and she is the one certainly if anyone, if anyone in this room, or in this

state knows what was in those boxes she is the one, but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all, ladies and gentlemen, she could have come up and told us exactly what articles were sent, so you may draw any inferences from that that you wish to, as long as they are reasonable.

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"Now, anything that—is clearly, and I'm sure you know by now and I don't have to repeat it too often, anything in this case that Mr. Teale could get up here now, he don't have to get up here, but all of the things that have been said in this trial and all of the physical evidence and the testimony, he's right here in Court and could he not get up and if there is anything to be said he has the opportunity to say it. Otherwise, you may draw the adverse inference from the fact that he doesn't get up there and tell you about it, and that, ladies and gentlemen, is his defense. Mr. Fransen said in the beginning that what happened in this case is not as the prosecution described it. That the facts will show an entirely different version. Well, I haven't heard any facts, ladies and gentlemen, that show an entirely different version.

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"We went through a business with a —dress. We held it up, and then we pointed out the one that she's wearing now, and frankly, ladies and gentlemen, the only one in the Court room that can tell you whether or not it is the same dress is Ruth Elizabeth Chapman, because you know from the evidence no one has ever had an opportunity to examine that dress to see whether it has been dry cleaned, whether or not it was purchased —when

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it was purchased or the labels on it or anything else. All that has been done in this thing is to wear a blue knit dress, ladies and gentlemen, which is similar to the one that—she in fact apparently wore on that night.

"So. I suppose that just through the wearing of it, having it in Court, it is hoped that you will draw something from it, which I have heard no testimony on the stand, except that it looks like or is similar to it. * * *

"But what she told that doctor is not evidence in this case, and yet you know that repeatedly and over and over and over again Mr. Johnson in every way that he could, he would get the story again before you. Now, why? You know why. He did it because he hopes that you wouldn't forget it, although he could put it and make it evidence in this case, which it is not, and if you put Ruth Elizabeth Chapman up on that stand to testify, so it is one way of doing, ladies and gentlemen, if you are going to be taken in by it, indirectly what you can't do directly, because there is no other way that he can get that thing before you without putting her up on that stand.

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"But she gave a story on the night of the 17th and early hours of the 18th. She was in San Francisco. Now, why pick on that date so specifically if you are not—if not to beware of that date, that you want to beware. Well, he says, 'You have given two different stories. Do you have problems with blackouts or excessive drinking', and she says 'No.' And I tell you, ladies and gentlemen, that anybody, and there is no evidence to the contrary in this case, if you don't honestly remember what occurred and you know, you are in a situation where there is a fugitive warrant and you have just been arrested and you in all honesty don't remember where you were, that is the first thing that you are going to say. You're not going to sit up and trump up excuses

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and make out a story which you know to be a lie about specific dates and times. And, ladies and gentlemen, there is no legal evidence before you that it is anything to the contrary, because the only one now that can come up and tell you has not seen fit to do so.

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"* * * Mr. Johnson would have you believe that everything she said was the

truth. I think there are some instances that indicate already—I have indicated some, the purpose of the guns, two different ideas there as to why they were purchased, but that is the only legal purpose for that. So it's not evidence, although Mr. Johnson again I say argued and referred to it as though it was. We have no evidence from the lips of Mrs. Chapman. Now, as Mr. Ferguson told you, it is their constitutional right, and I won't go into that again, because I think he handled it very clearly as well as the others, but that is within her right to do as she sees fit. But, you can consider it for the purposes and under the circumstances that Mr. Ferguson indicated a number of times.

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"Originally when Dr. Winkler examined her on the 31st, I believe it was, of October, 1962, she told him that she had forgotten after the first shot was fired, after the first shot was fired. Since that time what has happened? The amnesia, or disassociative state, or disassociative reaction, which ever way you want to look at it, psychiatrically or otherwise, seems to have backed up from Dillard Road back up to the Spot Club, back up down Highway 99 south to just outside of Croce's, and by the time we get through cross-examining Dr. Sheuerman it even backed in to Croce's. A vague area. Very interesting. We could have put it on, put the statement in. It's evidence? It's not. Again, the sanctity and

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worthiness of evidence would have to come from her lips, hers on the stand here. Why? Here again, because witnesses would be under oath again, and I repeat, and I repeat for emphasis, they would have to be under oath subject to cross-examination before your very eyes so that you could evaluate it. Oh yes. She said this and she said that. Who said it? Who said it? Ruth Elizabeth Chapman on the stand? No. Dr. Sheuerman said that she said it. Dr. Winkler said that she said. Mr. Johnson said that she said. Well, it's an interesting thing that the only witnesses who weren't here, or weren't on the stand to be cross-examined, the only witnesses who are alive today to the perpetration of these offenses, are these two defendants. That's all. They don't have to take the stand. That's been gone over many times, but you know it would be a fine thing, very fine deed if persons who perpetrated offenses gave a story, put a story on by somebody else, have somebody else speak for you—wouldn't it? It would be a very interesting thing. You would never have the benefit of evaluating their credibility. This is what Mr. Johnson would have you believe that we should have done. Monday morning quarterbacking. And I submit to you—you know, you—you have heard much about lawyers being referred to as 'mouthpieces.' It's actually a very rare thing, really, that that type of appellation is applicable to lawyers really. But, I think you have seen a demonstration here, and I'm not saying it in rancor, not anything of it at all, because this is a demonstration where actually Ruth Elizabeth Chapman is speaking through Mr. Johnson. A 'mouthpiece.'

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"Maybe there is another reasonable one, other than the fact that it was Adcock's blood, because all three who were in the car had type A. Maybe there is, but

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you haven't heard it. You haven't heard any reasonable explanation of that. So, you can draw an adverse inference that it was Billy Dean Adcock's blood.

* * *

"Mr. Johnson said these several things which I will go over again. The evidence showed here that she bought two guns for Teale. What evidence? No witness on the stand got up there and said specifically under oath, and the only one that could do it would be Elizabeth Chapman herself. This is hearsay, what she told somebody else for the sole purpose of determining what her state of mind was at the time. It's not evidence. There's some evidence from her own lips through Dennis Mack as to the reason she bought the gun, which is different than what she

said otherwise. Mr. Johnson said the evidence shows there was an argument in Fresno. Here again I would say, 'What evidence?' The next one—there are only two people there to that argument, and the only way it would be evidence, or testimony in this case, would be if either one or both of them got up there and said there was an argument. They chose not to do it. You can draw an adverse inference that that being within their knowledge, that they could explain, whether it was or not. You can draw an inference that it wasn't the type of argument that Mr. Johnson claims the evidence shows, because the evidence doesn't show that at all.

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"So far as the motive is concerned for murder in a perpetration of a robbery, the motive was set, to gain for their own desires and lusts and so forth, to gain from it. It was a crime of gain, and perhaps another thing too, in deciding—we don't know who pulled the trigger—we may never know. The defendants haven't indicated it, except through Teale in one—Mr. Vowell's testimony, as to what Mr. Teale said, but that is not admissible

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against, and you shouldn't consider it against, Ruth Elizabeth Chapman, but maybe the circumstances of who pulled the trigger might have been a factor that might have been important to you. Only two people know. They didn't tell you. That is the way they want to proceed. But nonetheless, you can consider that too.

* * * * * *

"So, in considering what happened here as to why this person was killed, you see you can weigh these things and decide what the motive was. You might have had some help in deciding this very difficult task from the very only two people remaining who were at the scene, but in their best judgment they didn't choose to get up and tell you about it, which you certainly can consider that fact that they did not in the light of using your reason as I have indicated here too.

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"You know that somebody shot Billy Dean Adcock, and you know that it was either—it was one or even both of these defendants, in view of your verdict, but which one you don't know. Now, this is something that perhaps might have been of help to you in deciding what punishment to mete out, whether both should be punished equally in this case, or whether there should be some distinction between the two. It might have been helpful to know who pulled that trigger, for if it was Ruth Elizabeth Chapman you could well deduce that it was either her intoxication or emotional stress or a jealousy of Teale, or anger, and a lot of things other than the motive to destroy a witness; whereas, with respect to Mr. Teale it would seem to be a logical thing to conclude that he wanted to get rid of the only eyewitness. Differences there, you see. But you don't know. You don't know whether they did it in consort [*sic*]. You don't know that as far as pulling the trigger. But, this is a

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factor which has not been brought to light, and you can consider that factor which has not been, from the standpoint there have been two people that might have explained that.

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"I have gone into the statement here and why it hasn't been presented. If you are going to decide things such as character and sympathy, the law says you may take into consideration, how can you do it by a statement? Now, we are talking about this phase of the case. This now. You like to know that persons get—if there is something about their character that they can tell you, or something about their background that they can tell you, you like to hear it from them, because you have a very serious and difficult task, and the fact that they chose to rest upon whatever evidence there is here in the case in chief is something that you can consider in deciding whether or not they had been fair with you.

"This is the chance that they take by not having taken the stand."

Mr. Justice STEWART, concurring in the result.

In devising a harmless-error rule for violations of federal constitutional rights, both the Court and the dissent proceed as if the question were one of first impression. But in a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were "harmless." Illustrations of the principle are legion.

When involuntary confessions have been introduced at trial, the Court has always reversed convictions regardless of other evidence of guilt. As we stated in Lynumn v. State of Illinois, 372 U.S. 528, 537, 83 S.Ct. 917, 922, 9 L.Ed.2d 922, the argument that the error in admitting such a confession "was a harmless one * * * is an impermissible doctrine." That conclusion

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has been accorded consistent recognition by this Court. Malinski v. People of State of New York, 324 U.S. 401, 404, 65 S.Ct. 781, 783, 89 L.Ed. 1029; Payne v. State of Arkansas, 356 U.S. 560, 568, 78 S.Ct. 844, 850; Spano v. People of State of New York, 360 U.S. 315, 324, 79 S.Ct. 1202, 1207, 3 L.Ed.2d 1265; Haynes v. State of Washington, 373 U.S. 503, 518–519, 83 S.Ct. 1336, 1345, 10 L.Ed.2d 513; Jackson v. Denno, 378 U.S. 368, 376–377, 84 S.Ct. 1774, 1780, 12 L.Ed.2d 908. Even when the confession is completely "unnecessary" to the conviction, the defendant is entitled to "a new trial free of constitutional infirmity." Haynes v. State of Washington, supra, 373 U.S., at 518–519, 83 S.Ct., at 1346.[1]

When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680. That, indeed, was the whole point of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, overruling Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595. Even before trial, when counsel has not been provided at a critical stage, "we do not stop to determine whether prejudice resulted." Hamilton v. State of Alabama, 368 U.S. 52, 55, 82 S.Ct. 157, 159, 7 L.Ed. 2d 114; White v. State of Maryland, 373 U.S. 59, 60, 83 S.Ct. 1050, 10 L.Ed.2d 193.

A conviction must be reversed if the trial judge's remuneration is based on a scheme giving him a financial interest in the result, even if no particular prejudice is shown and even if the defendant was clearly guilty. Tumey v. Ohio, 273 U.S. 510, 535, 47 S.Ct. 437, 445. To try a defendant in a community that has been exposed to publicity highly

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adverse to the defendant is *per se* ground for reversal of his conviction; no showing need be made that the jurors were in fact prejudiced against him. Sheppard v. Maxwell, 384 U.S. 333, 351–352, 86 S.Ct. 1507, 1515, 16 L.Ed.2d 600; cf. Rideau v. State of Louisiana, 373 U.S. 723, 727, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663. See also Estes v. State of Texas, 381 U.S. 532, 542–544, 85 S.Ct. 1628, 1632–1633, 14 L.Ed.2d 543; 381 U.S. 562–564, 85 S.Ct. 1642–1643 (Warren, C. J., concurring); 381 U.S. 593–594, 85 S.Ct. 1665–1666 (Harlan, J., concurring).

1. None of these decisions suggests that the rejection of a harmless error rule turns on any unique evidentiary impact that confessions may have. Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, specifically contradicts that notion. In addition to the confession found inadmissible by this Court, the defendant in *Haynes* had given two prior confessions, the admissibility of which was not disputed, and "substantial independent evidence" of guilt existed. The Court accepted the prosecution's contention that the inadmissible confession played little if any role in the conviction.

When a jury is instructed in an unconstitutional presumption, the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict. Bollenbach v. United States, 326 U.S. 607, 614–615, 66 S.Ct. 402, 405–406, 90 L.Ed. 350. Reversal is required when a conviction may have been rested on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained. Stromberg v. People of State of California, 283 U.S. 359, 367–368, 51 S.Ct. 532, 535, 75 L.Ed. 1117; Williams v. State of North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.Ed. 279. In a long line of cases leading up to and including Whitus v. Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599, it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendant.

To be sure, constitutional rights are not fungible goods. The differing values which they represent and protect may make a harmless-error rule appropriate for one type of constitutional error and not for another. I would not foreclose the possibility that a harmless-error rule might appropriately be applied to some constitutional violations.[2] Indeed, one source of my disagreement with the

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Court's opinion is its implicit assumption that the same harmless-error rule should apply indiscriminately to all constitutional violations.

But I see no reason to break with settled precedent in this case, and promulgate a novel rule of harmless error applicable to clear violations of Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229.[3] The adoption of any harmless-error rule, whether the one proposed by the Court, or by the dissent, or some other rule, commits this Court to a case-by-case examination to determine the extent to which we think unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial. This burdensome obligation is one that we here are hardly qualified to discharge.

A rule of automatic reversal would seem best calculated to prevent clear violations of Griffin v. State of California. This case is one in which the trial occurred before the *Griffin* decision but which was not final on appeal until afterwards, so the doctrine of prospectivity announced in Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453, does not reach it. But the number of such cases is strictly limited. Prosecutors are unlikely to indulge in clear violations of *Griffin* in the future, and if they do I see no reason why the sanction of reversal should not be the result.

For these reasons I believe it inappropriate to inquire whether the violation of Griffin v. State of California that occurred in this case was harmless by any standard, and accordingly I concur in the reversal of the judgment.

2. For example, quite different considerations are involved when evidence is introduced which was obtained in violation of the Fourth and Fourteenth Amendments. The exclusionary rule in that context balances the desirability of deterring objectionable police conduct against the undesirability of excluding relevant and reliable evidence. The resolution of these values with interests of judicial economy might well dictate a harmless-error rule for such violations. Cf. Fahy v. State of Connecticut, 375 U.S. 85, 92, 84 S.Ct. 229, 233 (dissenting opinion).

3. Earlier this Term, in O'Connor v. Ohio, 385 U.S. 92, 87 S.Ct. 252, 17 L.Ed.2d 189, we reversed a conviction on the basis of Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, without pausing to consider whether the comment on the defendant's silence might have been harmless error under the rule the Court announces today, or any other harmless-error rule.

Mr. Justice HARLAN, dissenting.

The Court today holds that the harmlessness of a trial error in a state criminal prosecution, such error

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resulting from the allowance of prosecutorial comment barred by the Fourteenth Amendment, must be determined under a "necessary rule" of federal law. The Court imposes a revised version of the standard utilized in Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, on state appellate courts, not because the Constitution requires that particular standard, but because the Court prefers it.

My understanding of our federal system, and my view of the rationale and function of harmless-error rules and their status under the Fourteenth Amendment, lead me to a very different conclusion. I would hold that a state appellate court's reasonable application of a constitutionally proper state harmless-error rule to sustain a state conviction constitutes an independent and adequate state ground of judgment. Believing this to be the situation here, I would dismiss the writ. Viator v. Stone, 336 U.S. 948, 69 S.Ct. 882, 93 L.Ed. 1104.

I.

The key to the Court's opinion can, I think, be found in its statement that it cannot "leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights," and that "in the absence of appropriate congressional action" the Court must fashion protective rules. The harmless-error rule now established flows from what is seemingly regarded as a power inherent in the Court's constitutional responsibilities rather than from the Constitution itself. The Court appears to acknowledge that other harmless-error formulations would be constitutionally permissible. It certainly indicates that Congress, for example, could impose a different formulation.[1]

I regard the Court's assumption of what amounts to a general supervisory power over the trial of federal

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constitutional issues in state courts as a startling constitutional development that is wholly out of keeping with our federal system and completely unsupported by the Fourteenth Amendment where the source of such a power must be found. The Fourteenth Amendment guarantees individuals against invasions by the States of fundamental rights, Palko v. State of Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 and under more recent decisions of this Court some of the specifics of the Bill of Rights as well. See, e.g., in the context of this case, Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229. It thus serves as a limitation on the actions of the States, and lodges in this Court the same power over state "laws, rules, and remedies" as the Court has always had over the "laws, rules, and remedies" created by Congress. This power was classically described by Chief Justice Marshall in Marbury v. Madison, 1 Cranch 137, 178, 2 L.Ed. 60:

> "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. * * *"

Nothing in the Fourteenth Amendment purports to give federal courts supervisory powers, in the affirmative sense of McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, over state courts. See id., at 340–341, 63 S.Ct..

1. For myself, I intimate no view on congressional power with respect to state courts in this regard.

at 612–613. Moreover, where the constitutional power described by Marshall has been invoked, the Court has always been especially reluctant to interfere with state procedural practices. See Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606. From the beginning of the federal Union, state courts have had power to decide issues of federal law and to formulate "authoritative laws, rules, and remedies" for the trial of those issues. The primary responsibility for the trial of state criminal cases still rests

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upon the States, and the only constitutional limitation upon these trials is that the laws, rules, and remedies applied must meet constitutional requirements. If they do not, this Court may hold them invalid. The Court has no power, however, to declare which of many admittedly constitutional alternatives a State may choose.[2] To impose uniform national requirements when alternatives are constitutionally permissible would destroy that opportunity for broad experimentation which is the genius of our federal system.

Even assuming that the Court has the power to fashion remedies and procedures binding on state courts for the protection of particular constitutional rights, I could not agree that a general harmless-error rule falls into that category. The harmless-error rules now utilized by all the States and in the federal judicial system are the product of judicial reform early in this century. Previously most American appellate courts, concerned about the harshness of criminal penalties, followed the rule imposed on English courts through the efforts of Baron Parke, and held that any error of substance required a reversal of conviction. See Orfield, Criminal Appeals in America 190. The reform movement, led by authorities like Roscoe Pound and Learned Hand, resulted in allowing courts to discontinue

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using reversal as a "necessary" remedy for particular errors and "to substitute judgment for the automatic application of rules * * *." 4 Barron, Federal Practice and Procedure § 2571, at 438. This Court summarized the need for that development in the leading case of Kotteakos v. United States, 328 U.S. 750, 759, 66 S.Ct. 1239, 1245, 90 L.Ed. 1557:

> "§ 269 [a federal harmless error provision] and similar state legislation grew out of widespread and deep conviction over the general course of appellate review in American criminal causes. This was shortly, as one trial judge put it after § 269 had become law, that courts of review, 'tower above the trials of criminal cases as impregnable citadels of technicality.' * * * [C]riminal trial became a game for sowing reversible error in the record."

Holding, as is done today, that a special harmless-error rule is a necessary remedy for a particular kind of error revives the unfortunate idea that appellate courts must act on particular errors rather than decide on reversal by an evaluation of the entire proceeding to determine whether the cause as a whole has been determined according to properly applicable law. In this case, California has recognized the impropriety of the trial comment here involved, and has given clear direction to state trial courts for the future. Certainly this is the appropriate

2. Cases in which lower federal courts, acting under the authority of the Fourteenth Amendment, as expanded by this Court's decision in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, have promulgated their own reapportionment plans may superficially be thought to support such a power. E. g., Reynolds v. State Election Board, D.C., 233 F.Supp. 323. But such cases are quite apart from the present one because they arise from a situation where some positive constitutional action is a necessity and thus require the exercise of special equity powers. Here the ordinary remedy of striking down unconstitutional harmless-error rules and applications is sufficient to deal with any problem that may arise. There is no necessity for a State to have a harmless-error rule at all.

remedy for the constitutional error committed. The challenged decision has no direct relation to federal constitutional provisions, rather it is an analysis of the question whether this admittedly improper comment had any significant impact on the outcome of the trial. In *Kotteakos*, supra, this Court described the "material factors" in harmless-error determinations as "the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole * * *." Id., 50 at 762, 66 S.Ct., at 1246. None of these factors has any relation to substantive constitutional provisions, and I think the Court errs in conceiving of an application of harmless-error rules as a remedy designed to safeguard particular constitutional rights.[3] It seems clear to me that harmless-error rules concern, instead, the fundamental integrity of the judicial proceedings as a whole.

As indicated above, I am of the opinion that the validity of a challenged state harmless-error rule itself is a federal constitutional question. Harmless-error rules may, as the Court says, "work very unfair and mischievous results." And just concern can be expressed over the possibility that state harmless-error decisions may result in the dilution of new constitutional doctrines because of state hostility to them. However, the record is barren of any showing that the California courts, which have been in the vanguard in the development of individual safeguards in criminal trials,[4] are using their harmless-error rule to destroy or dilute constitutional guarantees. If the contrary were the case and the harmless-error rule itself were shown to have resulted in a course of convictions significantly influenced by constitutionally impermissible factors, I think it clear that constitutional due process could not countenance the continued application 51 of the rule.[5] And individual applications of a permissible rule would still be subject to scrutiny as to the tenability of the independent and adequate state ground. See Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654; Terre Haute & Indianapolis Railroad Co. v. State of Indiana ex rel. Ketcham, 194 U.S. 579, 24 S.Ct. 767, 48 L.Ed. 1124; Note, The Untenable Non-federal Ground in the Supreme Court, 74 Harv.L.Rev. 1375.

I thus see no need for this new constitutional doctrine.[6] Decision of this case should turn instead on the answers to two questions: Is the California harmless-error provision consistent with the guarantee of fundamental fairness embodied in the Due Process Clause of the Four-

3. The Court indeed recognizes, as does my Brother STEWART in his concurring opinion, that errors of constitutional dimension can be harmless, a proposition supported by ample precedent. See Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674; Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150; Haines v. United States, 9 Cir., 188 F.2d 546; United States v. Donnelly, 7 Cir., 179 F.2d 227. Presumably all errors in the federal courts will continue to be evaluated under the single standard of 28 U.S.C. § 2111 as interpreted today. Certainly there is nothing in the substantive provisions of the Bill of Rights which suggests any standard for assessing the impact of their violation.

4. See, e. g., People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513; People v. Dorado, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361.

5. It is clear enough that this is not the rationale that the Court is employing. The Court would leave California free to apply its harmless-error rule to errors of state law and must thus consider the rule itself consistent with constitutional due process. This leaves the anomalous situation where the impact of a particular piece of evidence is to be assessed by a different "constitutional" standard depending only on whether state law or federal constitutional law barred its admittance.

6. Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, should not be deemed dispositive on such a far-reaching matter, which was entirely passed over in the Court's opinion in that case.

teenth Amendment? See Palko v. Connecticut, supra. Was its application in this instance by the California Supreme Court a reasonable one or was the rule applied arbitrarily to evade the underlying constitutional mandate of fundamental fairness? These issues will now be considered.

II.

The California harmless-error rule, is incorporated in that State's constitution. It was first adopted by a vote of the people in 1911 and readopted as part of the revised constitution in 1966. While its language allows reversal only where there has been a "miscarriage of justice," a long course of judicial decisions has shaped the rule in a manner which cannot be ignored. California courts

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will not allow a conviction based upon an improperly obtained confession to stand. See, e. g., People v. Dorado, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361; People v. Sears, 62 Cal.2d 737, 44 Cal. Rptr. 330, 401 P.2d 938. Nor will the fact that sufficient evidence to support the conviction is present absent the tainted evidence preclude a reversal. See, e. g., People v. Patubo, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303; People v. Mahoney, 201 Cal. 618, 258 P. 607. And reversal will be required when the tainted evidence is introduced in intentional violation of constitutional standards. See People v. Sarazzawski, 27 Cal.2d 7, 161 P.2d 934. Thus the California rule and the "federal rule" today declared applicable to state adjudication are parallel in these special instances [7] and their divergence, if any,

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arises from the general formulation found in the opinions of the California Supreme Court.

In People v. Watson, 46 Cal.2d 818, 299 P.2d 243, the California Supreme Court undertook a general discussion of the application of the state harmless-error rule. It declared that the "final test" was "the 'opinion' of the reviewing court, in the sense of its belief or conviction, as to the effect of the error; and that ordinarily where the result appears just, and it further appears that such result would have been reached if the error had not been committed, a reversal will not be ordered." Reversal would be required only when "it is reasonably probable that a re-

7. Some special limitations on harmless error have always been respected by this Court and seem to me essential to the fundamental fairness guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments. These limitations stem from what I perceive as two distinct considerations. The first is a recognition that particular types of error have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless. E. g., Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844 (confessions); see Fahy v. State of Connecticut, supra, at 95, 84 S.Ct. at 234 (dissenting opinion of Harlan, J.); cf. Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402 (independently sufficient evidence). The second is a recognition that certain types of official misbehavior require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct. E. g., Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (prosecutorial misconduct). Although they have never been viewed in this light, I would see violations of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed.2d 799, as falling in the first category, and violations of Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, as falling in the second. However, as I understand my Brother STEWART's opinion concurring in the result, he would read all such limitations into the content of the Due Process Clause and limit the application of harmless-error rules with respect to constitutional errors to an undefined category of instances. I think it preferable to resolve these special problems from an analysis of the nature of the error involved rather than by an attempt to discover limitations in the policy underlying the substantive constitutional provisions. The latter course seems to me to blur analysis and lead to distinction by fiat among equally specific constitutional guarantees.

sult more favorable to the appealing party would have been reached," and this judgment "must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated." 46 Cal.2d, at 835–837, 299 P.2d, at 254–255. This formulation may sound somewhat different from that announced today, but on closer analysis the distinction between probability and possibility becomes essentially esoteric. In fact, California courts have at times equated the California standard with the standard utilized by this Court in Fahy v. State of Connecticut, supra. See, e. g., People v. Jacobson, 63 Cal.2d 319, 331, 46 Cal.Rptr. 515, 523, 405 P.2d 555, 563.

Similarly members of this Court have used a variety of verbal formulae in deciding questions of harmless error in federal cases, ranging from today's "reasonable doubt" standard to the ability to "say with fair assurance * * * that the jury was not substantially swayed * * *." Fiswick v. United States, 329 U.S. 211, 218, 67 S.Ct. 224, 228, 91 L.Ed. 196. And the circuit courts have been equally varied in their expressions.

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See United States v. Brown, 79 F.2d 321; United States v. Feinberg, 2 Cir., 140 F.2d 592; United States v. McMaster, 6 Cir., 343 F.2d 176.

Against this background the California rule can hardly be said to be out of keeping with fundamental fairness, and I see no reason for striking it down on its face as a violation of the guarantee of "due process." [8]

III.

A summary of the evidence introduced against the petitioners and events of the trial will make it apparent that the application of the California rule in this case was not an unreasonable one. California courts have not hesitated to declare that comment has caused a miscarriage of justice when that conclusion has been warranted by the circumstances, see, e. g., People v. Keller, 234 Cal.App.2d 395, 44 Cal.Rptr. 432; People v. Sigal, 235 Cal.App.2d 449, 45 Cal.Rptr. 481, but the posture of this case minimized the possible impact of the comment.

Petitioners were tried for the murder of a night club bartender in the course of a robbery of the club. The State established that petitioners were the last customers remaining in the club on the night of the murder. Three people with descriptions matching those of Chapman, Teale, and the victim were seen leaving the club together. The club had been ransacked and its condition indicated that the victim had been forced out of it. He was later shot from close range with a .22-caliber weapon and left beside a country road. It was shown that Chapman had purchased a similar weapon five days before the murder and this weapon was in Teale's possession when he was arrested. Blood matching the type of the victim was found on the floormat of the vehicle in which Chapman and Teale had been traveling. Other scientific testimony

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established that the victim had been in petitioners' car. Blood (untypable) was found on Chapman's clothes, and blood matching the victim's was found on her shoes. Similar evidence connected Teale with the murder.

After his arrest Teale made admissions, amounting almost to a full confession, to a fellow prisoner and these were introduced against him. The jury was cautioned to disregard them as

8. The rule was upheld by the Ninth Circuit in Sampsell v. People of State of California, 9 Cir., 191 F.2d 721, against an attack on its constitutionality.

against Chapman. Petitioners pleaded not guilty, but offered no defense on the merits. The only defense witness was a Dr. Sheuerman who was called by Chapman in an effort to establish a defense of lack of capacity to form the requisite intent because of "disassociative reaction."

The prosecutor's comment on petitioners' failure to explain away or challenge the evidence presented against them was admittedly extensive.[9] The California Supreme Court found it harmless error for a number of reasons. First the court noted the convincing and unchallenged evidence presented by the State. It next observed that the jurors were certain to take notice of petitioners' silence whether or not there was comment since the evidence itself cried for an explanation. I think this point crucial, since it seems to me that this Court has confused the impact of petitioners' silence on the jury with the impact of the prosecution's comment upon that silence. The added impact of that comment would seem marginal in a case of this type where the jury must inevitably look to petitioners for an explanation of the innuendo of the real evidence and in Teale's case of his damaging admissions. Finally the California Supreme Court noted that Chapman, against whom the

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evidence was less strong, had keyed her defense to evidence of her mental defect, a subject upon which the comment had not touched. From this discriminating analysis it was concluded that another result was not "reasonably probable" absent the erroneous comments.

I cannot see how this resolution can be thought other than a reasonable, and therefore constitutional, application of the California harmless-error rule.

IV.

When we consider how little is empirically known about the workings of a jury, see Kalven & Zeisel, The American Jury, *passim*, it seems to me highly inappropriate for this Court to presume to take upon itself the power to pass directly on the correctness of impact evaluations coming from 50 different jurisdictions. Juries must invariably react differently to particular items of evidence because of local predispositions and experience factors. The state courts, manned by local judges aware of and in touch with the special factors affecting local criminal trials, seem the best, and the constitutionally required, final authority for ruling on the effect of the admission of inadmissible evidence in state criminal proceedings, absent the application of a fundamentally unfair rule, or any unreasonable application of a proper rule manifesting a purpose to defeat federal constitutional rights. Once it appears that neither of these factors is present in a state harmless-constitutional-error decision, federal judicial responsibility should be at an end. This decision, however, encompasses much more. It imposes on this Court, in cases coming here directly from state courts, and on the lower federal courts, in cases arising on habeas corpus, the duty of determining for themselves whether a constitutional error was harmless. In all but insubstantial instances, this will entail a *de novo* assessment of the entire state trial record.

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For one who believes that among the constitutional values which contribute to the preservation of our free society none ranks higher than the principles of fed-

9. The decision in Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, was not announced until after the trial of the case. Hence the trial was conducted according to what was, at the time, constitutional California law. No implication of prosecutorial misconduct can be drawn from these circumstances.

eralism, and that this Court's responsibility for keeping such principles intact is no less than its responsibility for maintaining particular constitutional rights, the doctrine announced today is a most disturbing one. It cuts sharply into the finality of state criminal processes; it bids fair to place an unnecessary substantial burden of work on the federal courts; and it opens the door to further excursions by the federal judiciary into state judicial domains. I venture to hope that as time goes on this new doctrine, even in its present manifestation, will be found to have been strictly contained, still more that it will not be pushed to its logical extremes.

I respectfully dissent.

APPENDIX D

imposing a penalty. It would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer more likely knows its conduct to be illegal, knowledge alone does not suffice for liquidated damages. We therefore reaffirm that the *Thurston* definition of "willful"—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—applies to all disparate treatment cases under the ADEA. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision.

The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice KENNEDY, with whom THE CHIEF JUSTICE and Justice THOMAS join, concurring.

I agree with the Court that the Court of Appeals placed improper reliance on respondent's evidence of pension interference and that the standard for determining willfulness announced in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), applies to individual acts of age discrimination as well as age discrimination manifested in formal, company-wide policy. I write to underscore that the only claim based upon the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, asserted by respondent in this litigation is that petitioners discriminated against him because of his age. He has advanced no claim that petitioners' use of an employment practice that has a disproportionate effect on older workers violates the ADEA. See App. 29–30 (amended complaint); 5 Record 71–76 (jury instructions). As a result, nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e–17. As the Court acknowledges, *ante*, at 5, we have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA. See *Markham v. Geller*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981) (REHNQUIST, J., dissenting from denial of certiorari); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1216–1220 (CA7 1987) (Easterbrook, J., dissenting); Note, Age Discrimination and the Disparate Impact Doctrine, 34 Stan.L.Rev. 837 (1982). It is on the understanding that the Court does not reach this issue that I join in its opinion.

WEST KEY NUMBER SYSTEM

507 U.S. 619

Todd A. BRECHT, Petitioner

v.

Gordon A. ABRAHAMSON, Superintendent, Dodge Correctional Institution.

No. 91–7358.

Argued Dec. 1, 1992.

Decided April 21, 1993.

Following setting aside by Wisconsin Court of Appeals, 138 Wis.2d 158, 405 N.W.2d 718, of murder conviction, and reinstatement of conviction by the Wisconsin Supreme Court, 143 Wis.2d 297, 421 N.W.2d 96, petitioner sought habeas corpus relief. The United States District Court for the Western District of Wisconsin, 759 F.Supp. 500, set aside conviction. On appeal, the Court of Appeals for the Seventh Circuit, 944 F.2d 1363, reversed, and certio-

rari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) in determining whether habeas relief must be granted for prosecution's use for impeachment purposes of petitioner's post-*Miranda* silence, standard is whether error had substantial and injurious effect or influence in determining jury's verdict, rather than whether error was harmless beyond reasonable doubt, and (2) state's improper use of defendant's post-*Miranda* silence to impeach defendant's claim that shooting was accidental did not have substantial and injurious effect or influence in determining jury's verdict.

Affirmed.

Justice Stevens filed concurring opinion.

Justice White filed dissenting opinion in which Justice Blackmun joined and in which Justice Souter joined in part.

Justices Blackmun, O'Connor and Souter filed dissenting opinions.

1. Witnesses ⇐347

Constitution does not prohibit use for impeachment purposes of defendant's silence prior to arrest, or after arrest if no *Miranda* warnings are given.

2. Criminal Law ⇐720(1), 721(4)
Witnesses ⇐347

Where defendant claimed that shooting was an accident for the first time when he took stand for trial, it was proper, and probative, for state to impeach his testimony by pointing out that defendant had failed to tell anyone before time he received his *Miranda* warnings at his arraignment about the shooting being an accident; on the other hand, state's references to defendant's silence after that point in time, or more generally to his failure to come forward with his version of events at any time before trial, was improper. U.S.C.A. Const.Amend. 14.

3. Habeas Corpus ⇐495

In determining whether habeas relief must be granted for prosecution's use for impeachment purposes of petitioner's post-*Miranda* silence, standard is whether error had substantial and injurious effect or influence in determining jury's verdict, rather than whether error was harmless beyond reasonable doubt. U.S.C.A. Const. Amend. 14; 28 U.S.C.A. §§ 2111, 2254.

4. Statutes ⇐220

Generally, Supreme Court is reluctant to draw inferences from Congress' failure to act.

5. Courts ⇐100(1)

New rules always have retroactive application to criminal cases on direct review.

6. Habeas Corpus ⇐495

State's improper use of defendant's post-*Miranda* silence to impeach defendant's claim that shooting was accidental did not have substantial and injurious effect or influence in determining jury's verdict, and thus habeas relief was not warranted, where state's references to defendant's post-*Miranda* silence were infrequent, state made extensive and permissible references to defendant's pre-*Miranda* silence, and evidence of guilt was weighty. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 2111, 2254.

Syllabus *

At his first-degree murder trial in Wisconsin state court, petitioner Brecht admitted shooting the victim, but claimed it was an accident. In order to impeach this testimony, the State, *inter alia*, made several references to the fact that, before he was given his *Miranda* warnings at an arraignment, Brecht failed to tell anyone with whom he came in contact that the shooting was accidental. The State also made several references to his post-*Miranda*-warning silence in this regard. The jury returned a

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

guilty verdict and Brecht was sentenced to life in prison, but the State Court of Appeals set the conviction aside on the grounds that the State's references to his post-*Miranda* silence violated due process under *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 and this error was sufficiently "prejudicial" to require reversal. The State Supreme Court reinstated the conviction, holding that the error was "'harmless beyond a reasonable doubt'" under the standard set forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705. The Federal District Court disagreed and set aside the conviction on habeas review. In reversing, the Court of Appeals held that the proper standard of harmless-error review was that set forth in *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 *i.e.*, whether the *Doyle* violation "'had substantial and injurious effect or influence in determining the jury's verdict.'" Applying this standard, the court concluded that Brecht was not entitled to relief.

Held:

1. The *Kotteakos* harmless-error standard, rather than the *Chapman* standard, applies in determining whether habeas relief must be granted because of unconstitutional "trial error" such as the *Doyle* error at issue. Pp. 1716–1722.

(a) The State's references to Brecht's post-*Miranda* silence violated *Doyle*. The *Doyle* rule rests on the *Miranda* warnings' implicit assurance that a suspect's silence will not be used against him, and on the fundamental unfairness of using postwarning silence to impeach an explanation subsequently offered at trial. It is conceivable that, once Brecht was given his warnings, he decided to stand on his right to remain silent because he believed his silence would not be used against him at trial. The prosecution's references to his pre-*Miranda* silence were, however, entirely proper. Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty. Pp. 1716–1717.

(b) *Doyle* error fits squarely into the category of constitutional violations characterized by this Court as "trial error." See *Arizona v. Fulminante*, 499 U.S. ——, ——, 111 S.Ct. 1246, ——, 113 L.Ed.2d 302. Such error occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence to determine its effect on the trial. See *id.*, at ——, 111 S.Ct. at ——. This Court has consistently applied the *Chapman* standard in reviewing claims of constitutional error of the trial type on direct review of state and federal criminal proceedings. Pp. 1717–1718.

(c) It is for the Court to determine what harmless-error standard applies on collateral review of Brecht's *Doyle* claim. Although the Court has applied the *Chapman* standard in a handful of federal habeas cases, *stare decisis* does not preclude adoption of the *Kotteakos* standard here, since the decisions in question never squarely addressed, but merely assumed, *Chapman*'s applicability on collateral review. Nor has Congress provided express guidance on the question. The federal habeas statute is silent as to the applicable standard, and while the federal harmless-error statute appears to echo the *Kotteakos* standard, it has been limited in its application to claims of nonconstitutional error in federal criminal cases. In line with the traditional rule, the Court finds no reason to draw inferences from Congress' failure to enact post-*Chapman* proposals that would have provided a less stringent harmless-error standard on collateral review of constitutional error. Pp. 1717–1719.

(d) The *Kotteakos* standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and is more likely to promote the considerations underlying this Court's recent habeas jurisprudence. In recognition of the historical distinction between direct review as

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the principal way to challenge a conviction and collateral review as an extraordinary remedy whose role is secondary and limited, the Court has often applied different standards on habeas than on direct review. It scarcely seems logical to require federal habeas courts to engage in the same approach that *Chapman* requires of state courts on direct review, since the latter courts are fully qualified to identify constitutional error and are often better situated to evaluate its prejudicial effect on the trial process. Absent affirmative evidence that state-court judges are ignoring their oath, Brecht's argument is unpersuasive that such courts will respond to the application of *Kotteakos* on federal habeas by violating their Article VI duty to uphold the Constitution. In any event, the additional deterrent effect, if any, of applying *Chapman* on federal habeas is outweighed by the costs of that application, which undermines the States' interest in finality and infringes upon their sovereignty over criminal matters; is at odds with habeas' purpose of affording relief only to those grievously wronged; imposes significant "social costs," including the expenditure of additional time and resources by all of the parties, the erosion of memory and the dispersion of witnesses, and the frustration of society's interest in the prompt administration of justice; and results in retrials that take place much later than those following reversal on direct appeal. This imbalance of costs and benefits counsels in favor of application of the less onerous *Kotteakos* standard on collateral review, under which claimants are entitled to relief for trial error only if they can establish that "actual prejudice" resulted. See *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814. Because the *Kotteakos* standard is grounded in the federal harmless-error rule (28 U.S.C. § 2111), federal courts may turn to an existing body of case law and, thus, are unlikely to be confused in applying it. Pp. 1719–1722.

2. It is clear that the *Doyle* error at Brecht's trial did not "substantially influence" the jury's verdict within the meaning of *Kotteakos*, since the record, considered as a whole, demonstrates that the State's references to Brecht's post-*Miranda* silence were infrequent and were, in effect, merely cumulative of the extensive and permissible references to his pre-*Miranda* silence; that the evidence of his guilt was, if not overwhelming, certainly weighty; and that circumstantial evidence also pointed to his guilt. Thus, Brecht is not entitled to habeas relief. Pp. 1722–1723.

944 F.2d 1363 (CA7 1991), affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a concurring opinion. WHITE, J., filed a dissenting opinion, in which BLACKMUN, J., joined, and in which SOUTER, J., joined except for the footnote and Part III. BLACKMUN, O'CONNOR, and SOUTER, JJ., filed dissenting opinions.

Allen E. Shoenberger, Chicago, IL, (Court-appointed) for petitioner.

Sally L. Wellman, Madison, WI, for respondent.

Atty. Gen. William P. Barr, Washington, DC, for the U.S. as amicus curiae by special leave of the Court.

Chief Justice REHNQUIST delivered the opinion of the Court.

In *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), we held that the standard for determining whether a conviction must be set aside because of federal constitutional error is whether the error "was harmless beyond a reasonable doubt." In this case we must decide whether the *Chapman* harmless-error standard applies in determining whether the prosecution's use for impeachment purposes of petitioner's post-*Miranda* [1] si-

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

lence, in violation of due process under *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), entitles petitioner to habeas corpus relief. We hold that it does not. Instead, the standard for determining whether habeas relief must be granted is whether the *Doyle* error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946). The *Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence. Applying this standard, we conclude that petitioner is not entitled to habeas relief.

Petitioner Todd A. Brecht was serving time in a Georgia prison for felony theft when his sister and her husband, Molly and Roger Hartman, paid the restitution for petitioner's crime and assumed temporary custody of him. The Hartmans brought petitioner home with them to Alma, Wisconsin, where he was to reside with them before entering a halfway house. This caused some tension in the Hartman household because Roger Hartman, a local district attorney, disapproved of petitioner's heavy drinking habits and homosexual orientation, not to mention his previous criminal exploits. To make the best of the situation, though, the Hartmans told petitioner, on more than one occasion, that he was not to drink alcohol or engage in homosexual activities in their home. Just one week after his arrival, however, petitioner violated this house rule.

While the Hartmans were away, petitioner broke into their liquor cabinet and began drinking. He then found a rifle in an upstairs room and began shooting cans in the backyard. When Roger Hartman returned home from work, petitioner shot him in the back and sped off in Mrs. Hartman's car. Hartman crawled to a neighbor's house to summon help. (The downstairs phone in the Hartmans' house was inoperable because petitioner had taken the receiver on the upstairs phone off the hook.) Help came, but Hartman's wound proved fatal. Meanwhile, petitioner had driven Mrs. Hartman's car into a ditch in a nearby town. When a police officer stopped to offer assistance, petitioner told him that his sister knew about his car mishap and had called a tow truck. Petitioner then hitched a ride to Winona, Minnesota, where he was stopped by police. At first he tried to conceal his identity, but he later identified himself and was arrested. When he was told that he was being held for the shooting, petitioner replied that "it was a big mistake" and asked to talk with "somebody that would understand [him]." App. 39, 78. Petitioner was returned to Wisconsin, and thereafter was given his *Miranda* warnings at an arraignment.

Then petitioner was charged with first-degree murder. At trial in the Circuit Court for Buffalo County, he took the stand and admitted shooting Hartman, but claimed it was an accident. According to petitioner, when he saw Hartman pulling into the driveway on the evening of the shooting, he ran to replace the gun in the upstairs room where he had found it. But as he was running toward the stairs in the downstairs hallway, he tripped, causing the rifle to discharge the fatal shot. After the shooting, Hartman disappeared, so petitioner drove off in Mrs. Hartman's car to find him. Upon spotting Hartman at his neighbor's door, however, petitioner panicked and drove away.

The State argued that petitioner's account was belied by the fact that he had failed to get help for Hartman, fled the Hartmans' home immediately after the shooting, and lied to the police officer who came upon him in the ditch about having called Mrs. Hartman. In addition, the State pointed out that petitioner had failed to mention anything about the shooting being an accident to either the officer who found him in the ditch, the man who gave him a ride to Winona, or the officers who

eventually arrested him. Over the objections of defense counsel, the State also asked petitioner during cross-examination whether he had told anyone at any time before trial that the shooting was an accident, to which petitioner replied "no," and made several references to petitioner's pretrial silence during closing argument.[2] Finally, the State offered extrinsic evidence tending to contradict petitioner's story, including the path the bullet traveled through Mr. Hartman's body (horizontal to slightly downward) and the location where the rifle was found after the shooting (outside), as well as evidence of motive (petitioner's hostility toward Mr. Hartman because of his disapproval of petitioner's sexual orientation).

The jury returned a guilty verdict and petitioner was sentenced to life imprisonment. The Wisconsin Court of Appeals set
626 the conviction aside on the ground that the State's references to petitioner's post-*Miranda* silence, see n. 2, *supra*, violated due process under *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and that this error was sufficiently "prejudicial" to require reversal. *State v. Brecht*, 138 Wis.2d 158, 168–169, 405 N.W.2d 718, 723 (1987). The Wisconsin Supreme Court reinstated the conviction. Although it agreed that the State's use of petitioner's post-*Miranda* silence was impermissible, the court determined that this error " 'was harmless beyond a reasonable doubt.' " *State v. Brecht*, 143 Wis.2d 297, 317, 421 N.W.2d 96, 104 (1988) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). In finding the *Doyle* violation harmless, the court noted that the State's "improper references to Brecht's silence were infrequent," in that they "comprised less than two pages of a 900 page transcript, or a few minutes in a four day trial in which twenty-five witnesses testified," and that the State's evidence of guilt was compelling. 143 Wis.2d, at 317, 421 N.W.2d, at 104.

Petitioner then sought a writ of habeas corpus under 28 U.S.C. § 2254, reasserting his *Doyle* claim. The District Court agreed that the State's use of petitioner's post-*Miranda* silence violated *Doyle*, but disagreed with the Wisconsin Supreme Court that this error was harmless beyond a reasonable doubt, and set aside the conviction. *Brecht v. Abrahamson*, 759 F.Supp. 500 (WD Wis.1991). The District Court based its harmless-error determination on its view that the State's evidence of guilt was not "overwhelming," and that the State's references to petitioner's post-*Miranda* silence, though "not extensive," were "crucial" because petitioner's defense turned on his credibility. *Id.*, at 508. The Court of Appeals for the Seventh Circuit reversed. It, too, concluded that the State's references to petitioner's post-*Miranda* silence violated *Doyle*, but it disagreed with both the standard that the District Court had ap-

2. The State's cross-examination of petitioner included the following exchange:

"Q. In fact the first time you have ever told this story is when you testified here today was it not?

. . . . .

"A. You mean the story of actually what happened?

"Q. Yes.

"A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir." App. 22–23.

Then on re-cross-examination, the State further inquired:

"Q. Did you tell anyone about what had happened in Alma?

"A. No I did not." *Id.*, at 23.

During closing argument, the State urged the jury to "remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence...." *Id.*, at 30. It also made the following statement with regard to petitioner's pre-trial silence: "He sits back here and sees all of our evidence go in and then he comes out with this crazy story...." *Id.*, at 31. Finally, during its closing rebuttal, the State said: "I know what I'd say [had I been in petitioner's shoes], I'd say, 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story." *Id.*, at 36.

plied in conducting its harmless-error inquiry and the result it reached. 944 F.2d 1363, 1368 and 1375–1376 (1991).

The Court of Appeals held that the *Chapman* harmless-error standard does not apply in reviewing *Doyle* error on federal habeas. Instead, because of the "prophylactic" nature of the *Doyle* rule, 944 F.2d, at 1370, as well as the costs attendant to reversing state convictions on collateral review, *id.*, at 1373, the Court of Appeals held that the standard for determining whether petitioner was entitled to habeas relief was whether the *Doyle* violation "'had substantial and injurious effect or influence in determining the jury's verdict,'" 944 F.2d, at 1375 (quoting *Kotteakos v. United States*, 328 U.S., at 776, 66 S.Ct., at 1253). Applying this standard, the Court of Appeals concluded that petitioner was not entitled to relief because, "given the many more, and entirely proper, references to [petitioner's] silence preceding arraignment," he could not contend with a "straight face" that the State's use of his post-*Miranda* silence had a "substantial and injurious effect" on the jury's verdict. *Id.*, at 1376.

We granted certiorari to resolve a conflict between the Courts of Appeals on the question whether the *Chapman* harmless-error standard applies on collateral review of *Doyle* violations, 504 U.S. ——, 112 S.Ct. 2937, 119 L.Ed.2d 563 (1992),[3] and now affirm.

We are the sixth court to pass on the question whether the State's use for impeachment purposes of petitioner's post-*Miranda* silence requires reversal of his murder conviction. Petitioner urges us to even the count, and decide matters in his favor once and for all. He argues that the *Chapman* harmless-error standard applies with equal force on collateral review of *Doyle* error. According to petitioner, the need to prevent state courts from relaxing their standards on direct review of *Doyle* claims, and the confusion which would ensue were we to adopt the *Kotteakos* harmless-error standard on collateral review, require application of the *Chapman* standard here. Before considering these arguments, however, we must first characterize the nature of *Doyle* error itself.

[1] In *Doyle v. Ohio*, 426 U.S., at 619, 96 S.Ct., at 2245, we held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." This rule "rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" *Wainwright v. Greenfield*, 474 U.S. 284, 291, 106 S.Ct. 634, 638, 88 L.Ed.2d 623 (1986) (quoting *South Dakota v. Neville*, 459 U.S. 553, 565, 103 S.Ct. 916, 923, 74 L.Ed.2d 748 (1983)). The "implicit assurance" upon which we have relied in our *Doyle* line of cases is the right-to-remain-silent component of *Miranda*. Thus, the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest, *Jenkins v. Anderson*, 447 U.S. 231, 239, 100 S.Ct. 2124, 2129, 65 L.Ed.2d 86 (1980), or after arrest if no *Miranda* warnings are given, *Fletcher v. Weir*, 455 U.S. 603, 606–607, 102 S.Ct. 1309, 1312, 71 L.Ed.2d 490 (1982) (*per curiam*). Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty. See 447 U.S., at 239, 100 S.Ct., at 2129.

[2] This case illustrates the point well. The first time petitioner claimed that the shooting was an accident was when he took the stand at trial. It was entirely proper—and probative—for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone before the time he received his *Miranda* warnings at his arraignment about the shooting being an ac-

3. Compare *Bass v. Nix*, 909 F.2d 297 (CA8 1990) (The *Chapman* harmless-error standard governs in reviewing *Doyle* violations on collateral review).

cident. Indeed, if the shooting was an accident, petitioner had every reason—including to clear his name and preserve evidence supporting his version of the events—to offer his account immediately following the shooting. On the other hand, the State's references to petitioner's silence after that point in time, or more generally to petitioner's failure to come forward with his version of events at any time before trial, see n. 2, *supra*, crossed the *Doyle* line. For it is conceivable that, once petitioner had been given his *Miranda* warnings, he decided to stand on his right to remain silent because he believed his silence would not be used against him at trial.

The Court of Appeals characterized *Doyle* as "a prophylactic rule." 944 F.2d, at 1370. It reasoned that, since the need for *Doyle* stems from the implicit assurance that flows from *Miranda* warnings, and "the warnings required by *Miranda* are not themselves part of the Constitution," "*Doyle* is ... a prophylactic rule designed to protect another prophylactic rule from erosion or misuse." *Ibid.* But *Doyle* was not simply a further extension of the *Miranda* prophylactic rule. Rather, as we have discussed, it is rooted in fundamental fairness and due process concerns. However real these concerns, *Doyle* does not " 'overprotec[t]' " them. *Duckworth v. Eagan*, 492 U.S. 195, 209, 109 S.Ct. 2875, 2883, 106 L.Ed.2d 166 (1989) (O'CONNOR, J., concurring). Under the rationale of *Doyle*, due process is violated whenever the prosecution uses for impeachment purposes a defendant's post-*Miranda* silence. *Doyle* thus does not bear the hallmarks of a prophylactic rule.

[3] Instead, we think *Doyle* error fits squarely into the category of constitutional violations which we have characterized as " 'trial error.' " See *Arizona v. Fulminante*, 499 U.S. ——, ——, 111 S.Ct. 1246, 1249, 113 L.Ed.2d 302 (1991). Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." *Id.*, at ——, 111 S.Ct., at 1249. At the other end of the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.*, at ——, 111 S.Ct., at 1254 The existence of such defects—deprivation of the right to counsel,[4] for example—requires automatic reversal of the conviction because they infect the entire trial process. See *id.*, at ——, 111 S.Ct., at ——. Since our landmark decision in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), we have applied the harmless-beyond-a-reasonable-doubt standard in reviewing claims of constitutional error of the trial type.

In *Chapman*, we considered whether the prosecution's reference to the defendants' failure to testify at trial, in violation of the Fifth Amendment privilege against self-incrimination,[5] required reversal of their convictions. We rejected the argument that the Constitution requires a blanket rule of automatic reversal in the case of constitutional error, and concluded instead "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.*, at 22, 87 S.Ct., at 827. After examining existing harmless-error rules, including the federal rule (28 U.S.C. § 2111), we held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, at 24, 87 S.Ct., at 828. The State bears the burden of proving that an error passes muster under this standard.

4. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

5. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

Chapman reached this Court on direct review, as have most of the cases in which we have applied its harmless-error standard. Although we have applied the *Chapman* standard in a handful of federal habeas cases, see, *e.g.*, *Yates v. Evatt*, 500 U.S. ——, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991); *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972); *Anderson v. Nelson*, 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968) (*per curiam*), we have yet squarely to address its applicability on collateral review.[6] Petitioner contends that we are bound by these habeas cases, by way of *stare decisis*, from holding that the *Kotteakos* harmless-error standard applies on habeas review of *Doyle* error. But since we have never squarely addressed the issue, and have at most assumed the applicability of the *Chapman* standard on habeas, we are free to address the issue on the merits. See *Edelman v. Jordan*, 415 U.S. 651, 670–671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662 (1974).

The federal habeas corpus statute is silent on this point. It permits federal courts to entertain a habeas petition on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), and directs simply that the court "dispose of the matter as law and justice require," § 2243. The statute says nothing about the standard for harmless-error review in habeas cases. Respondent urges us to fill this gap with the *Kotteakos* standard, under which an error requires reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S., at 776, 66 S.Ct., at 1253. This standard is grounded in the federal harmless-error statute. 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").[7] On its face § 2111 might seem to address the situation at hand, but to date we have limited its application to claims of nonconstitutional error in federal criminal cases. See, *e.g.*, *United States v. Lane*, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986).

Petitioner asserts that Congress' failure to enact various proposals since *Chapman* was decided that would have limited the availability of habeas relief amounts to legislative disapproval of application of a less stringent harmless-error standard on collateral review of constitutional error. Only

6. In *Greer v. Miller*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987), we granted certiorari to consider the same question presented here but did not reach this question because we concluded that no *Doyle* error had occurred in that case. See 483 U.S., at 761, n. 3, and 765, 107 S.Ct., at 3113, n. 3, and 3108. But see *id.*, at 768, 107 S.Ct., at 3110 (STEVENS, J., concurring in judgment) ("I believe the question presented in the certiorari petition—whether a federal court should apply a different standard in reviewing *Doyle* errors *in a habeas corpus action*—should be answered in the affirmative") (emphasis in original).

7. In *Kotteakos*, we construed § 2111's statutory predecessor, 28 U.S.C. § 391. Section 391 provided: "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U.S.C. § 391 (1925–1926 ed.). In formulating § 391's harmless-error standard, we focused on the phrase "affect the substantial rights of the parties," and held that the test was whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S., at 776, 66 S.Ct., at 1253. Although Congress tinkered with the language of § 391 when it enacted § 2111 in its place in 1949, Congress left untouched the phrase "affect the substantial rights of the parties." Thus, the enactment of § 2111 did not alter the basis for the harmless-error standard announced in *Kotteakos*. If anything, Congress' deletion of the word "technical," makes § 2111 more amenable to harmless-error review of constitutional violations. Cf. *United States v. Hasting*, 461 U.S. 499, 509–510, n. 7, 103 S.Ct. 1974, 1981, n. 7, 76 L.Ed.2d 96 (1983).

one of these proposals merits discussion here. In 1972, a bill was proposed that would have amended 28 U.S.C. § 2254 to require habeas petitioners to show that "a different result would probably have obtained if such constitutional violation had not occurred." 118 Cong.Rec. 24936 (1972) (quoting S. 3833, 92d Cong., 2d Sess. (1972)). In response, the Attorney General suggested that the above provision be modified to make habeas relief available only where the petitioner " 'suffered a substantial deprivation of his constitutional rights at his trial.' " 118 Cong.Rec. 24939 (1972) (quoting letter from Richard G. Kleindienst, Attorney General, to Emanuel Celler, Chairman of the House Committee on the Judiciary (June 21, 1972)). This language of course parallels the federal harmless-error rule. But neither the Attorney General's suggestion nor the proposed bill itself was ever enacted into law.

[4] As a general matter, we are "reluctant to draw inferences from Congress' failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306, 108 S.Ct. 1145, 1154, 99 L.Ed.2d 316 (1988) (citing *American Trucking Assns., Inc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416–418, 87 S.Ct. 1608, 1618–1619, 18 L.Ed.2d 847 (1967)); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, n. 11, 89 S.Ct. 1794, 1802, n. 11, 23 L.Ed.2d 371 (1969)). We find no reason to depart from this rule here. In the absence of any express statutory guidance from Congress, it remains for this Court to determine what harmless-error standard applies on collateral review of petitioner's *Doyle* claim. We have filled the gaps of the habeas corpus statute with respect to other matters, see, *e.g.*, *McCleskey v. Zant*, 499 U.S. ——, ——, 111 S.Ct. 1454, ——, 113 L.Ed.2d 517 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 81, 97 S.Ct. 2497, 2503, 53 L.Ed.2d 594 (1977); *Sanders v. United States*, 373 U.S. 1, 15, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963); *Townsend v. Sain*, 372 U.S. 293, 312–313, 83 S.Ct. 745, 757, 9 L.Ed.2d 770 (1963), and find it necessary to do so here. As always, in defining the scope of the writ, we look first to the considerations underlying our habeas jurisprudence, and then determine whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefits of its application on collateral review.

The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence. See, *e.g.*, *Wright v. West*, 505 U.S. ——, ——, 112 S.Ct. 2482, ——, 120 L.Ed.2d 225 (1992) (opinion of THOMAS, J.); *Teague v. Lane*, 489 U.S. 288, 306, 109 S.Ct. 1060, 1072, 103 L.Ed.2d 334 (1989) (opinion of O'CONNOR, J.); *Pennsylvania v. Finley*, 481 U.S. 551, 556–557, 107 S.Ct. 1990, 1994, 95 L.Ed.2d 539 (1987); *Mackey v. United States*, 401 U.S. 667, 682, 91 S.Ct. 1160, 1174, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). Direct review is the principal avenue for challenging a conviction. "When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3392, 77 L.Ed.2d 1090 (1983).

In keeping with this distinction, the writ of habeas corpus has historically been regarded as an extraordinary remedy, "a bulwark against convictions that violate 'fundamental fairness.' " *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 1571, 71 L.Ed.2d 783 (1982) (quoting *Wainwright v. Sykes*, *supra*, 433 U.S., at 97, 97 S.Ct., at 2511 (STEVENS, J., concurring)). "Those few who are ultimately successful [in obtaining habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Fay v. Noia*, 372 U.S. 391, 440–441, 83 S.Ct. 822, 850, 9 L.Ed.2d 837

(1963). See also *Kuhlmann v. Wilson*, 477 U.S. 436, 447, 106 S.Ct. 2616, 2623, 91 L.Ed.2d 364 (1986) (plurality opinion) ("The Court uniformly has been guided by the proposition that the writ should be available to afford relief to those 'persons whom society has grievously wronged' in light of modern concepts of justice") (quoting *Fay v. Noia*, *supra*, 372 U.S., at 440–441, 83 S.Ct., at 850); *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5, 99 S.Ct. 2781, 2785, n. 5, 61 L.Ed.2d 560 (1979) (STEVENS, J., concurring in judgment) (Habeas corpus "is designed to guard against extreme malfunctions in the state criminal justice systems"). Accordingly, it hardly bears repeating that " 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.' " *United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816 (1982) (quoting *United States v. Addonizio*, 442 U.S. 178, 184, 99 S.Ct. 2235, 2239, 60 L.Ed.2d 805 (1979)).[8]

[5] Recognizing the distinction between direct and collateral review, we have applied different standards on habeas than would be applied on direct review with respect to matters other than harmless-error analysis. Our recent retroactivity jurisprudence is a prime example. Although new rules always have retroactive application to criminal cases on direct review, *Griffith v. Kentucky*, 479 U.S. 314, 320–328, 107 S.Ct. 708, 711–716, 93 L.Ed.2d 649 (1987), we have held that they seldom have retroactive application to criminal cases on federal habeas, *Teague v. Lane*, *supra*, 489 U.S., at 305–310, 109 S.Ct. at 1072–1075 (opinion of O'CONNOR, J.). Other examples abound throughout our habeas cases. See, *e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 555–556, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987) (Although the Constitution guarantees the right to counsel on direct appeal, *Douglas v. California*, 372 U.S. 353, 355, 83 S.Ct. 814, 815, 9 L.Ed.2d 811 (1963), there is no "right to counsel when mounting collateral attacks"); *United States v. Frady*, *supra*, 456 U.S., at 162–169, 102 S.Ct., at 1591–1595 (While the federal "plain error" rule applies in determining whether a defendant may raise a claim for the first time on direct appeal, the "cause and prejudice" standard applies in determining whether that same claim may be raised on habeas); *Stone v. Powell*, 428 U.S. 465, 489–496, 96 S.Ct. 3037, 3050–3053, 49 L.Ed.2d 1067 (1976) (Claims under *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), are not cognizable on habeas as long as the state courts have provided a full and fair opportunity to litigate them at trial or on direct review).

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The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. See, *e.g.*, *Wright v. West*, *supra*, 505 U.S., at ——, 112 S.Ct., at —— (opinion of THOMAS, J.); *McCleskey v. Zant*, 499 U.S., at ——, 111 S.Ct., at ——; *Wainwright v. Sykes*, 433 U.S., at 90, 97 S.Ct., at 2508. We have also spoken of comity and federalism. "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle v. Isaac*, *supra*, 456 U.S., at 128, 102 S.Ct., at 1572. See also *Coleman v. Thompson*, 501 U.S. ——, ——, 111 S.Ct. 2546, ——, 115 L.Ed.2d 640 (1991); *McCleskey*, *supra*, 499 U.S., at ——, 111 S.Ct., at ——. Finally, we have recognized that "[l]iberal allowance of the writ ... degrades the promi-

8. For instance, we have held that an error of law does not provide a basis for habeas relief under 28 U.S.C. § 2255 unless it constitutes " 'a fundamental defect which inherently results in a complete miscarriage of justice.' " *United States v. Timmreck*, 441 U.S. 780, 783, 99 S.Ct. 2085, 2087, 60 L.Ed.2d 634 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962)).

nence of the trial itself," *Engle, supra,* 456 U.S., at 127, 102 S.Ct., at 1571, and at the same time encourages habeas petitioners to relitigate their claims on collateral review. See *Rose v. Lundy,* 455 U.S. 509, 547, 102 S.Ct. 1198, 1218, 71 L.Ed.2d 379 (1982) (STEVENS, J., dissenting).

In light of these considerations, we must decide whether the same harmless-error standard that the state courts applied on direct review of petitioner's *Doyle* claim also applies in this habeas proceeding. We are the sixth court to pass on the question whether the State's use for impeachment purposes of petitioner's post-*Miranda* silence in this case requires reversal of his conviction. Each court that has reviewed the record has disagreed with the court before it as to whether the State's *Doyle* error was "harmless." State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman,* and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. See *Rushen v. Spain,* 464 U.S. 114, 120, 104 S.Ct. 453, 456, 78 L.Ed.2d 267 (1983) (*per curiam*). For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

Petitioner argues that application of the *Chapman* harmless-error standard on collateral review is necessary to deter state courts from relaxing their own guard in reviewing constitutional error and to discourage prosecutors from committing error in the first place. Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner's argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution. See *Robb v. Connolly,* 111 U.S. 624, 637, 4 S.Ct. 544, 551, 28 L.Ed. 542 (1884). Federalism, comity, and the constitutional obligation of state and federal courts all counsel against any presumption that a decision of this Court will "deter" lower federal or state courts from fully performing their sworn duty. See *Engle, supra,* 456 U.S., at 128, 102 S.Ct., at 1572; *Schneckloth v. Bustamonte,* 412 U.S. 218, 263–265, 93 S.Ct. 2041, 2066–2067, 36 L.Ed.2d 854 (1973) (Powell, J., concurring). In any event, we think the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, which would be derived from its application on collateral review.

Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a " 'reasonable possibility' " that trial error contributed to the verdict, see *Chapman v. California,* 386 U.S., at 24, 87 S.Ct., at 828 (quoting *Fahy v. Connecticut,* 375 U.S. 85, 86, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)), is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has "grievously wronged." Retrying defendants whose convictions are set aside also imposes significant "social costs," including the expenditure of additional time and resources for all the parties involved, the "erosion of memory" and "dispersion of witnesses" which accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of "society's interest in the prompt administration of justice." *United States v. Mechanik,* 475 U.S. 66, 72, 106 S.Ct. 938, 942, 89 L.Ed.2d 50 (1986) (internal quotation marks omitted). And since there is no statute of limitations governing federal habeas, and the only laches recognized are those which affect the State's ability to defend against the claims raised on habeas, retrials following the grant of habeas relief ordinarily take place much later than do retrials following reversal on direct review.

The imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in

favor of applying a less onerous standard on habeas review of constitutional error. The *Kotteakos* standard, we believe, fills the bill. The test under *Kotteakos* is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S., at 776, 66 S.Ct., at 1253. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice." See *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986). The *Kotteakos* standard is thus better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases. Moreover, because the *Kotteakos* standard is grounded in the federal harmless-error rule (28 U.S.C. § 2111), federal courts may turn to an existing body of case law in applying it. Therefore, contrary to the assertion of petitioner, application of the *Kotteakos* standard on collateral review is unlikely to confuse matters for habeas courts.

[6] For the foregoing reasons, then, we hold that the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type.[9] All that remains to be decided is whether petitioner is entitled to relief under this standard based on the State's *Doyle* error. Because the Court of Appeals applied the *Kotteakos* standard below, we proceed to this question ourselves rather than remand the case for a new harmless-error determination. Cf. *Yates v. Evatt*, 500 U.S. ——, ——, 111 S.Ct. 1884, ——, 114 L.Ed.2d 432 (1991). At trial, petitioner admitted shooting Hartman, but claimed it was an accident. The principal question before the jury, therefore, was whether the State met its burden in proving beyond a reasonable doubt that the shooting was intentional. Our inquiry here is whether, in light of the record as a whole, the State's improper use for impeachment purposes of petitioner's post-*Miranda* silence, see n. 2, *supra*, "had substantial and injurious effect or influence in determining the jury's verdict." We think it clear that it did not.

The State's references to petitioner's post-*Miranda* silence were infrequent, comprising less than two pages of the 900-page trial transcript in this case. And in view of the State's extensive and permissible references to petitioner's pre-*Miranda* silence—*i.e.*, his failure to mention anything about the shooting being an accident to either the officer who found him in the ditch, the man who gave him a ride to Winona, or the officers who eventually arrested him—its references to petitioner's post-*Miranda* silence were, in effect, cumulative. Moreover, the State's evidence of guilt was, if not overwhelming, certainly weighty. The path of the bullet through Mr. Hartman's body was inconsistent with petitioner's testimony that the rifle had discharged as he was falling. The police officers who searched the Hartmans' home found nothing in the downstairs hallway which could have caused petitioner to trip. The rifle was found outside the house (where Hartman was shot), not inside where petitioner claimed it had accidently fired, and there was a live round rammed in the gun's chamber, suggesting that petitioner had tried to fire a second shot. Finally, other circumstantial evidence, including the motive proffered by the State, also pointed to petitioner's guilt.

In light of the foregoing, we conclude that the *Doyle* error which occurred at petitioner's trial did not "substantially influence" the jury's verdict. Petitioner is

9. Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. Cf. *Greer v. Miller*, 483 U.S. 756, 769, 107 S.Ct. 3102, 3110, 97 L.Ed.2d 618 (1987) (STEVENS, J., concurring in judgment). We, of course, are not presented with such a situation here.

therefore not entitled to habeas relief, and the judgment of the Court of Appeals is

Affirmed.

Justice STEVENS, concurring.

The Fourteenth Amendment prohibits the deprivation of liberty "without due process of law"; that guarantee is the source of the federal right to challenge state criminal convictions that result from fundamentally unfair trial proceedings. Neither the term "due process," nor the concept of fundamental unfairness itself, is susceptible of precise and categorical definition, and no single test can guarantee that a judge will grant or deny habeas relief when faced with a similar set of facts. Every allegation of due process denied depends on the specific process provided, and it is familiar learning that all "claims of constitutional error are not fungible." *Rose v. Lundy*, 455 U.S. 509, 543, 102 S.Ct. 1198, 1216, 71 L.Ed.2d 379 (1982) (STEVENS, J., dissenting). As the Court correctly notes, constitutional due process violations vary dramatically in significance; harmless trial errors are at one end of a broad spectrum, and what the Court has characterized as "structural" defects—those that make a trial fundamentally unfair even if they do not affect the outcome of the proceeding—are at "the other end of the spectrum," *ante*, at 1717. Although Members of the Court have disagreed about the seriousness of the due process violation identified in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), in this case we unanimously agree that a constitutional violation occurred; moreover, we also all agree that some version of harmless-error analysis is appropriate.

We disagree, however, about whether the same form of harmless-error analysis should apply in a collateral attack as on a direct appeal, and, if not, what the collateral attack standard should be for an error of this kind. The answer to the first question follows from our long history of distinguishing between collateral and direct review, see, *e.g.*, *Sunal v. Large*, 332 U.S. 174, 178, 67 S.Ct. 1588, 1590, 91 L.Ed. 1982 (1947), and confining collateral relief to cases that involve fundamental defects or omissions inconsistent with the rudimentary demands of fair procedure. See, *e.g.*, *United States v. Timmreck*, 441 U.S. 780, 783, 99 S.Ct. 2085, 2087, 60 L.Ed.2d 634 (1979), and cases cited therein. The Court answers the second question by endorsing Justice Rutledge's thoughtful opinion for the Court in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). *Ante*, at 1714, 1722. Because that standard accords with the statutory rule for reviewing other trial errors that affect substantial rights; places the burden on prosecutors to explain why those errors were harmless; requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts, I am convinced that our answer is correct. I write separately only to emphasize that the standard is appropriately demanding.

As the Court notes, *ante*, at 1718, n. 7, the *Kotteakos* standard is grounded in the 1919 federal harmless-error statute. Congress had responded to the widespread concern that federal appellate courts had become "impregnable citadels of technicality," *Kotteakos*, 328 U.S., at 759, 66 S.Ct., at 1245, by issuing a general command to treat error as harmless unless it "is of such a character that its natural effect is to prejudice a litigant's substantial rights." *Id.*, at 760–761, 66 S.Ct., at 1246. *Kotteakos* plainly stated that unless an error is merely "technical," the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution.[1] A constitutional violation, of course,

1. "It is also important to note that the purpose of the bill in its final form was stated authoritatively to be 'to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be

would never fall in the "technical" category.

Of particular importance, the statutory command requires the reviewing court to evaluate the error in the context of the entire trial record. As the Court explained: "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Id.*, at 762, 66 S.Ct., at 1246.

To apply the *Kotteakos* standard properly, the reviewing court must, therefore, make a *de novo* examination of the trial record. The Court faithfully engages in such *de novo* review today, see *ante*, at 1722–1723, just as the plurality did in the dispositive portion of its analysis in *Wright v. West*, 505 U.S. ——, ——–——, 112 S.Ct. 2482, 2492–2493, 120 L.Ed.2d 225 (1992) (opinion of THOMAS, J.) The *Kotteakos* requirement of *de novo* review of errors that prejudice substantial rights—as all constitutional errors surely do—is thus entirely consistent with the Court's long-standing commitment to the *de novo* standard of review of mixed questions of law and fact in habeas corpus proceedings. See *Wright v. West*, 505 U.S., at ——–——, 112 S.Ct., at 2493–2497 (O'CONNOR, J., concurring in judgment).

The purpose of reviewing the entire record is, of course, to consider all the ways that error can infect the course of a trial. Although THE CHIEF JUSTICE properly quotes the phrase applied to the errors in *Kotteakos* (" 'substantial and injurious effect or influence in determining the jury's verdict' "), *ante*, at 1714, 1716, 1722, we would misread *Kotteakos* itself if we endorsed only a single-minded focus on how the error may (or may not) have affected the jury's verdict. The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place.[2] *Kotteakos* is full of warnings to avoid that result. It requires a reviewing court to decide that "the error did not influence the jury," *id.*, at 764, 66 S.Ct., at 1248, and that "the judgment was not substantially swayed by the error," *id.*, at 765, 66 S.Ct., at 1248. In a passage that should be kept in mind by all courts that review trial transcripts, Justice Rutledge wrote that the question is *not*

> "were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> "This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record." *Id.*, at 764, 66 S.Ct., at 1248 (citations omitted).

The *Kotteakos* standard that will now apply on collateral review is less stringent than the *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), standard applied on direct review. Given

disregarded.' H.R.Rep. No. 913, 65th Cong., 3d Sess., 1. But that this burden does not extend to all errors appears from the statement which follows immediately. 'The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation rest upon the one who claims under it.' *Ibid.*; *Bruno v. United States*, [308 U.S. 287, 294, 60 S.Ct. 198, 200, 84 L.Ed. 257 (1939)]; *Weiler v. United States*, 323 U.S. 606, 611 [, 65 S.Ct. 548, 551, 89 L.Ed. 495 (1945)]." *Kotteakos v. United States*, 328 U.S. 750, 760–761, 66 S.Ct. 1239, 1246, 90 L.Ed. 1557 (1946).

2. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.*, at 765, 66 S.Ct., at 1248.

the critical importance of the faculty of judgment in administering either standard, however, that difference is less significant than it might seem—a point well illustrated by the differing opinions expressed by THE CHIEF JUSTICE and by Justice KENNEDY in *Arizona v. Fulminante*, 499 U.S. ——, ——, ——, 111 S.Ct. 1246, ——, ——, 113 L.Ed.2d 302 (1991). While THE CHIEF JUSTICE considered the admission of the defendant's confession harmless error under *Chapman*, see 499 U.S., at ——-——, 111 S.Ct., at 1255 (dissenting opinion), Justice KENNEDY's cogent analysis demonstrated that the error could not reasonably have been viewed as harmless under a standard even more relaxed than the one we announce today. See *id.*, at ——-——, 111 S.Ct., at 1266–1267 (opinion concurring in judgment). In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied.

Although our adoption of *Kotteakos* does impose a new standard in this context, it is a standard that will always require "the discrimination ... of judgment transcending confinement by formula or precise rule. *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 240 [, 60 S.Ct. 811, 852, 84 L.Ed. 1129 (1940)]."[3] 328 U.S., at 761, 66 S.Ct., at 1246. In my own judgment, for the reasons explained by THE CHIEF JUSTICE, the *Doyle* error that took place in respondent's trial did not have a substantial and injurious effect or influence in determining the jury's verdict. Accordingly, I concur in the Court's opinion and judgment.

Justice WHITE, with whom Justice BLACKMUN joins, and with whom Justice SOUTER joins in part, dissenting.

Assuming that petitioner's conviction was in fact tainted by a constitutional violation that, while not harmless beyond a reasonable doubt, did not have "substantial and injurious effect or influence in determining the jury's verdict," *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946), it is undisputed that he would be entitled to reversal in the state courts on appeal or in this Court on certiorari review. If, however, the state courts erroneously concluded that no violation had occurred or (as is the case here) that it was harmless beyond a reasonable doubt, and supposing further that certiorari was either not sought or not granted, the majority would foreclose relief on federal habeas review. As a result of today's decision, in short, the fate of one in state custody turns on whether the state courts properly applied the federal Constitution as then interpreted by decisions of this Court, and on whether we choose to review his claim on certiorari. Because neither the federal habeas corpus statute nor our own precedents can support such illogically disparate treatment, I dissent.

I

A

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), established the federal nature of the harmless-error standard to be applied when constitutional rights are at stake. Such rights, we stated, are "rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the 'independent' federal courts would be the 'guardians of those rights.'" *Id.*, at 21, 87 S.Ct., at 826 (footnote omitted). Thus,

"[w]hether a conviction for crime should stand when a State has failed to accord

3. Justice Rutledge continued: "That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another." *Id.*, at 761, 66 S.Ct., at 1246.

federal constitutionally guaranteed rights is *every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.* With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Ibid.* (emphasis added).

Chapman, it is true, never expressly identified the source of this harmless-error standard. But, whether the standard be characterized as a "necessary rule" of federal law, *ibid.*, or criticized as a quasi-constitutional doctrine, see *id.*, at 46, 51, 87 S.Ct., at 839, 841 (Harlan, J., dissenting), the Court clearly viewed it as essential to the safeguard of federal constitutional rights. Otherwise, there would have been no justification for imposing the rule on state courts. Compare *id.*, at 48–51, 87 S.Ct., at 840–841 (Harlan, J., dissenting). As far as I can tell, the majority does not question *Chapman*'s vitality on direct review and, therefore, the federal and constitutional underpinnings on which it rests.

That being so, the majority's conclusion is untenable. Under *Chapman*, federal law requires reversal of a state conviction 646 involving a constitutional violation that is not harmless beyond a reasonable doubt. A defendant whose conviction has been upheld despite the occurrence of such a violation certainly is "in custody in violation of the Constitution or laws ... of the United States," 28 U.S.C. § 2254(a), and therefore is entitled to habeas relief. Although we have never explicitly held that this was the case, our practice before this day plainly supports this view, as the majority itself acknowledges. See, *e.g.*, *Rose v. Clark*, 478 U.S. 570, 584, 106 S.Ct. 3101, 3109, 92 L.Ed.2d 460 (1986); see also *ante*, at 1718.

B

The Court justifies its decision by asserting that "collateral review is different than direct review," *ante*, at 1719, and that "we have applied different standards on habeas than would be applied on direct review with respect to matters other than harmless-error analysis." *Id.*, at 1720. All told, however, it can only uncover a single example of a constitutional violation that would entitle a state prisoner to relief on direct but not on collateral review. Thus, federal habeas review is not available to a defendant claiming that the conviction rests on evidence seized in violation of the Fourth Amendment, even though such claims remain cognizable in state courts. *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). I have elsewhere stated my reasons for disagreeing with that holding, *id.*, at 536–537, 96 S.Ct., at 3072 (WHITE, J., dissenting), but today's decision cannot be supported even under *Stone*'s own terms.

Stone was premised on the view that the exclusionary rule is not a "personal constitutional right," *id.*, at 486, 96 S.Ct., at 3048, and that it "does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel." *Kimmelman v. Morrison*, 477 U.S. 365, 392, 106 S.Ct. 2574, 2592, 91 L.Ed.2d 305 (1986) (Powell, J., concurring in judgment). In other words, one whose conviction rests on evidence obtained in a search or seizure that violated the Fourth Amendment is deemed not to be unconstitutionally 647 detained. It is no surprise, then, that the Court of Appeals in this case rested its decision on an analogy between the rights guaranteed in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and those at issue in *Stone*. See 944 F.2d 1363, 1371–1372 (CA7 1991). *Doyle*, it concluded, "is ... a prophylactic rule designed to protect another prophylactic rule from erosion or misuse." 944 F.2d, at 1370.

But the Court clearly and, in my view, properly rejects that view. Indeed, it repeatedly emphasizes that *Doyle* "is rooted in fundamental fairness and due process

concerns," that "due process is violated whenever the prosecution uses for impeachment purposes a defendant's post-*Miranda* silence," and that it "does not bear the hallmarks of a prophylactic rule." *Ante*, at 1717. Because the Court likewise leaves undisturbed the notion that *Chapman*'s harmless-error standard is required to protect constitutional rights, see *supra* at 1714, its conclusion that a *Doyle* violation that fails to meet that standard will not trigger federal habeas relief is inexplicable.

II

The majority's decision to adopt this novel approach is far from inconsequential. Under *Chapman*, the state must prove beyond a reasonable doubt that the constitutional error "did not contribute to the verdict obtained." *Chapman*, *supra*, 386 U.S., at 24, 87 S.Ct. at 828. In contrast, the Court now invokes *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)—a case involving a nonconstitutional error of trial procedure—to impose on the defendant the burden of establishing that the error "resulted in 'actual prejudice.'" *Ante*, at 1722. Moreover, although the Court of Appeals limited its holding to *Doyle* and other so-called "prophylactic" rules, 944 F.2d, at 1375, and although the parties' arguments were similarly focused, see Brief for Respondent 36–37; Brief for United States as *Amicus Curiae* 16, 19, n. 11, the Court extends its holding to all "constitutional error[s] of the trial type." *Ante*, at 1722. Given that all such "trial errors" are now subject to harmless-error analysis, see *Arizona v. Fulminante*, 499 U.S. ——, ——, 111 S.Ct. 1246, ——, 113 L.Ed.2d 302 (1991), and that "most constitutional errors" are of this variety, *id.*, at ——, 111 S.Ct., at ——, the Court effectively has ousted *Chapman* from habeas review of state convictions.* In other words, a state court determination that a constitutional error—even one as fundamental as the admission of a coerced confession, see *Fulminante*, *supra*, at ——, 111 S.Ct., at ——is harmless beyond a reasonable doubt has in effect become unreviewable by lower federal courts by way of habeas corpus.

I believe this result to be at odds with the role Congress has ascribed to habeas review which is, at least in part, to deter both prosecutors and courts from disregarding their constitutional responsibilities. "[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Desist v. United States*, 394 U.S. 244, 262–263, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting); see also *Teague v. Lane*, 489 U.S. 288, 306, 109 S.Ct. 1060, 1072, 103 L.Ed.2d 334 (1989) (plurality opinion). In response, the majority characterizes review of the *Chapman* determination by a federal habeas court as "scarcely ... logical," *ante*, at 1721, and, in any event, sees no evidence that deterrence is needed. *Ibid.* Yet the logic of such practice is not ours to assess for, as Justice Frankfurter explained,

> "Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution.... But the wisdom of such a modification in the law is for Congress to consider...." *Brown v. Allen*, 344 U.S. 443, 499–500, 73 S.Ct. 397, 442–443, 97 L.Ed. 469 (1953) (opinion of Frankfurter, J.).
>
> "[T]he prior State determination of a claim under the United States Constitu-

* As I explained in *Fulminante*, I have serious doubt regarding the effort to classify in systematic fashion constitutional violations as either "trial errors"—that are subject to harmlessness analysis—or "structural defects"—that are not. See 499 U.S., at ——, 111 S.Ct., at —— (WHITE, J., dissenting).

tion cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress ... provided it should not have." *Id.*, at 500, 73 S.Ct., at 443.

See also *Reed v. Ross*, 468 U.S. 1, 10, 104 S.Ct. 2901, 2907, 82 L.Ed.2d 1 (1984). As for the "empirical evidence" the majority apparently seeks, I cannot understand its import. Either state courts are faithful to federal law, in which case there is no cost in applying the *Chapman* as opposed to the *Kotteakos* standard on collateral review; or they are not, and it is precisely the role of habeas corpus to rectify that situation.

Ultimately, the central question is whether States may detain someone whose conviction was tarnished by a constitutional violation that is not harmless beyond a reasonable doubt. *Chapman* dictates that they may not; the majority suggests that, so long as direct review has not corrected this error in time, they may. If state courts remain obliged to apply *Chapman*, and in light of the infrequency with which we grant certiorari, I fail to see how this decision can be reconciled with Congress' intent.

III

Our habeas jurisprudence is taking on the appearance of a confused patchwork in which different constitutional rights are treated according to their status, and in which the same constitutional right is treated differently depending on whether its vindication is sought on direct or collateral review. I believe this picture bears scant resemblance either to Congress' design or to our own precedents. The Court of Appeals having yet to apply *Chapman* to the facts of this case, I would remand to that court for determination of whether the *Doyle* violation was harmless beyond a reasonable doubt. I dissent.

Justice BLACKMUN, dissenting.

I agree that "today's decision cannot be supported even under *Stone*'s own terms," *ante*, at 1726 (WHITE, J., dissenting). Therefore, I join Justice WHITE's dissent in its entirety.

Justice O'CONNOR, dissenting.

I have no dispute with the Court's observation that "collateral review is different from direct review." *Ante*, at 1719. Just as the federal courts may decline to adjudicate certain issues of federal law on habeas because of prudential concerns, see *Withrow v. Williams*, — U.S. —, —, 113 S.Ct. 1745, 1750, — L.Ed.2d — (1993); *id.*, at —, 113 S.Ct., at 1757 (O'CONNOR, J., concurring in part and dissenting in part), so too may they resolve specific claims on habeas using different and more lenient standards than those applicable on direct review, see, *e.g.*, *Teague v. Lane*, 489 U.S. 288, 299–310, 109 S.Ct. 1060, 1068–1075, 103 L.Ed.2d 334 (1989) (habeas claims adjudicated under the law prevailing at time conviction became final and not on the basis of intervening changes of law). But decisions concerning the Great Writ "warrant restraint," *Withrow*, — U.S., at —, 113 S.Ct., at 1758 (O'CONNOR, J., concurring in part and dissenting in part), for we ought not take lightly alteration of that " 'fundamental safeguard against unlawful custody,' " *id.*, at —, 113 S.Ct., at 1756 (quoting *Fay v. Noia*, 372 U.S. 391, 449, 83 S.Ct. 822, 854, 9 L.Ed.2d 837 (1963) (Harlan, J., dissenting)).

In my view, restraint should control our decision today. The issue before us is not whether we should remove from the cognizance of the federal courts on habeas a discrete prophylactic rule unrelated to the truthfinding function of trial, as was the case in *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067, (1976), and more recently in *Withrow v. Williams*, *supra*. Rather, we are asked to alter a standard that not only finds application in virtually every case of error but that also may be critical to our faith in the reliability of

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the criminal process. Because I am not convinced that the principles governing the exercise of our habeas powers—federalism, finality, and fairness—counsel against applying *Chapman*'s harmless-error standard on collateral review, I would adhere to our former practice of applying it to cases on habeas and direct review alike. See *ante*, at 1717–1718. I therefore respectfully dissent.

The Court begins its analysis with the nature of the constitutional violation asserted, *ante*, at 1716–1718, and appropriately so. We long have recognized that the exercise of the federal courts' habeas powers is governed by equitable principles. *Fay v. Noia*, *supra*, 372 U.S., at 438, 83 S.Ct., at 848; *Withrow*, *supra*, at ——, ——, 113 S.Ct., at 1757–1758 (O'CONNOR, J., concurring in part and dissenting in part). And the nature of the right at issue is an important equitable consideration. When a prisoner asserts the violation of a core constitutional privilege critical to the reliability of the criminal process, he has a strong claim that fairness favors review; but if the infringement concerns only a prophylactic rule, divorced from the criminal trial's truthfinding function, the prisoner's claim to the equities rests on far shakier ground. Thus, in *Withrow v. Williams*, this Court declined to bar relitigation of *Miranda* claims on habeas because *Miranda* is connected to the Fifth Amendment and the Fifth Amendment, in turn, serves the interests of reliability. *Withrow*, *supra*, at ——, ——, 113 S.Ct., at 1753. I dissented because I believe that *Miranda* is a prophylactic rule that actually impedes the truthseeking function of criminal trials. — U.S., at ——, ——, ——, 113 S.Ct., at 1750, 1751–1754. See also *Stone v. Powell*, 428 U.S. 465, 486, 490, 96 S.Ct. 3037, 3048, 3050, 49 L.Ed.2d 1067 (1976) (precluding review of exclusionary rule violations in part because the rule is judicially fashioned and interferes with the truthfinding function of trial).

Petitioner in this case alleged a violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), an error the Court accurately characterizes as constitutional trial error. *Ante*, at 1717. But the Court's holding today, it turns out, has nothing to do with *Doyle* error at all. Instead, the Court announces that the harmless-error standard of *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), which requires the prosecution to prove constitutional error harmless beyond a reasonable doubt, no longer applies to *any* trial error asserted on habeas, whether it is a *Doyle* error or not. In *Chapman*'s place, the Court substitutes the less rigorous standard of *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946). *Ante*, at 1722.

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A repudiation of the application of *Chapman* to all trial errors asserted on habeas should be justified, if at all, based on the nature of the *Chapman* rule itself. Yet, as Justice WHITE observes, *ante*, at 1726 (dissenting opinion), one searches the majority opinion in vain for a discussion of the basis for *Chapman*'s harmless-error standard. We are left to speculate whether *Chapman* is the product of constitutional command, or a judicial construct that may overprotect constitutional rights. More important, the majority entirely fails to discuss the *effect* of the *Chapman* rule. If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side—the possibility that an error may have caused the conviction of an actually innocent person—is sufficient by itself to permit plenary review of the prisoner's federal claim. *Withrow*, *supra*, at ——, 113 S.Ct., at 1757 (O'CONNOR, J., concurring in part and dissenting in part) (citing cases). Whatever the source of the *Chapman* standard, the equities may favor its application on habeas if it substantially promotes the central goal of the criminal justice system—accurate determinations of guilt and innocence. See *Withrow*, *supra*, at ——, ——, 113 S.Ct., at 1752–1753 (reasoning that, although *Miranda* may be a prophylactic rule, the fact

that it is not "divorced" from the truthfinding function of trial weighs in favor of its application on habeas); *Teague*, 489 U.S., at 313, 109 S.Ct., at 1076 (if absence of procedure seriously diminishes likelihood of accurate conviction, new rule requiring such procedure may be retroactively applied on habeas).

In my view, the harmless-error standard often will be inextricably intertwined with the interest of reliability. By now it goes without saying that harmless-error review is of almost universal application; there are few errors that may not be forgiven as harmless. *Arizona v. Fulminante*, 499 U.S. ——, ——, 111 S.Ct. 1246, 1252, 113 L.Ed.2d 302 (1991). For example, we have recognized that a defendant's right to confront the witnesses against him is central to the truthfinding function of the criminal trial. See, *e.g.*, *Maryland v. Craig*, 497 U.S. 836, 845–847, 110 S.Ct. 3157, 3163–3164, 111 L.Ed.2d 666 (1990); *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597 (1980); *Mattox v. United States*, 156 U.S. 237, 242–243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895); see also 3 W. Blackstone, Commentaries 373–374 (1768). But Confrontation Clause violations are subject to harmless-error review nonetheless. See *Coy v. Iowa*, 487 U.S. 1012, 1021–1022, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988). When such an error is detected, the harmless-error standard is crucial to our faith in the accuracy of the outcome: The absence of full adversary testing, for example, cannot help but erode our confidence in a verdict; a jury easily may be misled by such an omission. Proof of harmlessness beyond a reasonable doubt, however, sufficiently restores confidence in the verdict's reliability that the conviction may stand despite the potentially accuracy impairing error. Such proof demonstrates that, even though the error had the *potential* to induce the jury to err, in fact there is no reasonable possibility that it did. Rather, we are confident beyond a reasonable doubt that the error had no influence on the jury's judgment at all. Cf. *In re Winship*, 397 U.S. 358, 363–364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) (proof of guilt beyond a reasonable doubt indispensable to community's respect and confidence in criminal process).

At least where errors bearing on accuracy are at issue, I am not persuaded that the *Kotteakos* standard offers an adequate assurance of reliability. Under the Court's holding today, federal courts on habeas are barred from offering relief unless the error " 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Ante*, at 1722 (quoting *Kotteakos*, *supra*, 328 U.S., at 776, 66 S.Ct. at 1253). By tolerating a greater probability that an error with the potential to undermine verdict accuracy was harmful, the Court increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial. Of course, the Constitution does not require that every conceivable precaution in favor of reliability be taken; and certainly 28 U.S.C. § 2254 does not impose such an obligation on its own. Indeed, I agree with the Court that habeas relief under § 2254 is reserved for those prisoners "whom society has grievously wronged." *Ante*, at 1721. But prisoners who may have been convicted mistakenly because of constitutional trial error *have* suffered a grievous wrong and ought not be required to bear the greater risk of uncertainty the Court now imposes upon them. Instead, where constitutional error may have affected the accuracy of the verdict, on habeas we should insist on such proof as will restore our faith in the verdict's accuracy to a reasonable certainty. Adherence to the standard enunciated in *Chapman* requires no more; and the equities require no less.

To be sure, the harmless-error inquiry will not always bear on reliability. If the trial error being reviewed for harmlessness is not itself related to the interest of accuracy, neither is the harmless-error standard. Accordingly, in theory it would be neither illogical nor grudging to reserve

Chapman for errors related to the accuracy of the verdict, applying *Kotteakos'* more lenient rule whenever the error is of a type that does not impair confidence in the trial's result. But the Court draws no such distinction. On the contrary, it holds *Kotteakos* applicable to *all* trial errors, whether related to reliability or not. The Court does offer a glimmer of hope by reserving in a footnote the possibility of an exception: *Chapman* may remain applicable, it suggests, in some "unusual" cases. But the Court's description of those cases suggests that its potential exception would be both exceedingly narrow and unrelated to reliability concerns. See *ante*, at 1722, n. 9 (reserving the "possibility that in an unusual case, a deliberate and especially egregious error of the trial type" or error "combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even it did not substantially influence the jury's verdict").

But even if the Court's holding were limited to errors divorced from reliability concerns, the decision nevertheless would be unwise from the standpoint of judicial administration. Like Justice WHITE, I do not believe we should turn our habeas jurisprudence into a "patchwork" of rules and exceptions without strong justification. *Ante*, at 1728 (dissenting opinion). The interest of efficiency, always relevant to the scope of habeas relief, see, *e.g.*, *Stone*, 428 U.S., at 491, n. 31, 96 S.Ct., at 3033, n. 31; *Withrow*, — U.S., at ———, 113 S.Ct., at 1753–1755; *id.*, at ———, 113 S.Ct., at 1761–1764 (O'CONNOR, J., dissenting), favors simplification of legal inquiries, not their multiplication. A rule requiring the courts to distinguish between errors that affect accuracy and those that do not, however, would open up a whole new frontier for litigation and decision. In each case, the litigants would brief and federal judges would be required to decide whether the particular error asserted relates to accuracy. Given the number of constitutional rules we have recognized and the virtually limitless ways in which they might be transgressed, I cannot imagine that the benefits brought by such litigation could outweigh the costs it would impose.

In fact, even on its own terms the Court's decision buys the federal courts a lot of trouble. From here on out, prisoners undoubtedly will litigate—and judges will be forced to decide—whether each error somehow might be wedged into the narrow potential exception the Court mentions in a footnote today. Moreover, since the Court only mentions the *possibility* of an exception, all concerned must also address whether the exception exists at all. I see little justification for imposing these novel and potentially difficult questions on our already overburdened justice system.

Nor does the majority demonstrate that the *Kotteakos* standard will ease the burden of conducting harmless-error review in those cases to which it does apply. Indeed, as Justice STEVENS demonstrates in his concurrence, *Kotteakos* is unlikely to lighten the load of the federal judiciary at all. The courts still must review the entire record in search of conceivable ways the error may have influenced the jury; they still must conduct their review *de novo;* and they still must decide whether they have sufficient confidence that the verdict would have remained unchanged even if the error had not occurred. See *ante*, at 1724. The only thing the Court alters today is the degree of confidence that suffices. But *Kotteakos'* threshold is no more precise than *Chapman's*; each requires an exercise of judicial judgment that cannot be captured by the naked words of verbal formulae. *Kotteakos*, it is true, is somewhat more lenient; it will permit more errors to pass uncorrected. But that simply reduces the number of cases in which relief will be granted. It does not decrease the burden of identifying those cases that warrant relief.

Finally, the majority considers the costs of habeas review generally. *Ante*, at 1721–1722. Once again, I agree that those

costs—the effect on finality, the infringement on state sovereignty, and the social cost of requiring retrial, sometimes years after trial and at a time when a new trial has become difficult or impossible—are appropriate considerations. See *Withrow*, —— U.S., at ——-——, 113 S.Ct., at 1759–1760 (O'CONNOR, J., concurring in part and dissenting in part); see also *id.*, at ——, ——, 113 S.Ct., at 1750, 1754–1755; *Stone, supra*, 428 U.S., at 489–491, 96 S.Ct., at 3050–3051. But the Court does not explain how those costs set the harmless-error inquiry apart from any other question presented on habeas; such costs are inevitable *whenever* relief is awarded. Unless we are to accept the proposition that denying relief whenever possible is an unalloyed good, the costs the Court identifies cannot by themselves justify the lowering of standards announced today. The majority, of course, does not contend otherwise; instead, it adheres to our traditional approach of distinguishing between those claims that are worthy of habeas relief and those that, for prudential and equitable reasons, are not. Nonetheless, it seems to me that the Court's decision cuts too broadly and deeply to comport with the equitable and remedial nature of the habeas writ; it is neither justified nor justifiable from the standpoint of fairness or judicial efficiency. Because I would remand to the Court of Appeals for application of *Chapman*'s more demanding harmless-error standard, I respectfully dissent.

Justice SOUTER, dissenting.

I join in all but the footnote and Part III of Justice WHITE's dissent, subject only to the caveat that I do not mean to indicate an opinion on the merits of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

CSX TRANSPORTATION, INC., Petitioner,

v.

Lizzie Beatrice EASTERWOOD.

Lizzie Beatrice EASTERWOOD, Petitioner,

v.

CSX TRANSPORTATION, INC.

Nos. 91–790, 91–1206.

Argued Jan. 12, 1993.

Decided April 21, 1993.

Widow of truck driver who was killed when struck by train sued railroad. The United States District Court for the Northern District of Georgia, Robert L. Vining, Jr., J., 742 F.Supp. 676, entered summary judgment in favor of railroad, and widow appealed. The Court of Appeals, Johnson, Circuit Judge, 933 F.2d 1548, affirmed in part, reversed in part and remanded. On petition for writ of certiorari, the Supreme Court, Justice White, held that: (1) regulations adopted by the Secretary of Transportation under the Federal Railroad Safety Act did not preempt requirements imposed by state common law of negligence regarding railroad's duty to maintain warning devices at a railroad crossing, but (2) speed limits imposed by federal regulation on freight and passenger trains operating along specific types of track preempted any common-law claim that conductor, while operating train at speed within federal limits, was negligently proceeding too fast under circumstances, so as to be liable for motorist's death.

Affirmed.

Justice Thomas concurred in part and dissented in part and filed opinion, in which Justice Souter concurred.

APPENDIX E

leading information about lawful conduct. *Edenfield*, 507 U.S., at 767, 113 S.Ct. 1792. Had the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, see *Edge*, 509 U.S., at 428, 113 S.Ct. 2696, this might be a different case. But under current federal law, as applied to petitioners and the messages that they wish to convey, the broadcast prohibition in 18 U.S.C. § 1304 and 47 CFR § 73.1211 (1998) violates the First Amendment. The judgment of the Court of Appeals is therefore

Reversed.

Chief Justice REHNQUIST, concurring.

Title 18 U.S.C. § 1304 regulates broadcast advertising of lotteries and casino gambling. I agree with the Court that "[t]he operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies," *ante*, at 1933, that it violates the First Amendment. But, as the Court observes:

> "There surely are practical and non-speech-related forms of regulation—including a prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements—that could more directly and effectively alleviate some of the social costs of casino gambling." *Ante*, at 1934.

Were Congress to undertake substantive regulation of the gambling industry, rather than simply the manner in which it may broadcast advertisements, "exemptions and inconsistencies" such as those in § 1304 might well prove constitutionally tolerable. "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (citations omitted).

But when Congress regulates commercial speech, the *Central Hudson* test imposes a more demanding standard of review. I agree with the Court that that standard has not been met here and I join its opinion.

Justice THOMAS, concurring in the judgment.

I continue to adhere to my view that "[i]n cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," the *Central Hudson* test should not be applied because "such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial speech' than it can justify regulation of 'noncommercial' speech." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (concurring in part and concurring in the judgment). Accordingly, I concur only in the judgment.

527 U.S. 263

Tommy David STRICKLER, Petitioner,

v.

Fred W. GREENE, Warden.

No. 98–5864.

Argued March 3, 1999.

Decided June 17, 1999.

Following affirmance of capital murder conviction and death sentence, 241 Va. 482, 404 S.E.2d 227, and affirmance of denial of state habeas corpus petition, 249 Va. 120, 452 S.E.2d 648, state prisoner petitioned for habeas corpus. Writ was granted by the United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., Senior

District Judge. The Court of Appeals for the Fourth Circuit, 149 F.3d 1170, vacated in part and remanded, and certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) undisclosed documents impeaching eyewitness testimony as to circumstances of abduction of victim were favorable to petitioner for purposes of *Brady*; (2) petitioner reasonably relied on prosecution's open file policy and established cause for procedural default in raising *Brady* claim; but (3) petitioner could not show either materiality under *Brady* or prejudice that would excuse petitioner's procedural default.

Affirmed.

Justice Thomas joined in part.

Justice Souter, with whom Justice Kennedy joined in part, filed an opinion concurring in part and dissenting in part.

1. **Constitutional Law** ⇐268(5)
Criminal Law ⇐700(1, 4)

The due process duty of the prosecution under *Brady* to disclose evidence favorable to defendant is applicable even though there has been no request by defendant, and encompasses impeachment evidence as well as exculpatory evidence. U.S.C.A. Const. Amends. 5, 14.

2. **Criminal Law** ⇐700(2.1)

Evidence is "material" for purposes of *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

See publication Words and Phrases for other judicial constructions and definitions.

3. **Criminal Law** ⇐700(6, 7)

The *Brady* rule encompasses evidence known only to police investigators and not to the prosecutor, and thus the individual prosecutor has a duty to learn of any evidence favorable to the defense which is known to the others acting on the government's behalf in the case, including the police.

4. **Attorney General** ⇐6

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

5. **Criminal Law** ⇐700(2.1)

Strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

See publication Words and Phrases for other judicial constructions and definitions.

6. **Criminal Law** ⇐700(2.1)

There are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. U.S.C.A. Const.Amends. 5, 14.

7. **Criminal Law** ⇐700(4)

The contrast between the terrifying incident that a witness confidently described in her testimony at trial on charges of abduction and capital murder and her initial perception of that event "as a trivial episode of college kids carrying on" sufficed to establish the impeaching character of the undisclosed documents conveying that initial perception, so that they were favorable to the accused for purposes of *Brady*, even if they were inculpatory.

8. **Criminal Law** ⇐700(4)

Brady's disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness.

9. **Criminal Law** ⇐700(2.1)

If a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*. U.S.C.A. Const.Amends. 5, 14.

10. Habeas Corpus ⇐407

Habeas corpus petitioner established cause for procedural default in failing to raise *Brady* claim either in trial court or in state habeas proceeding, where exculpatory material was withheld by the prosecution, petitioner reasonably relied on prosecution's open file policy, and state confirmed petitioner's reliance by asserting during state habeas proceedings that petitioner had already received "everything known to the government."

11. Habeas Corpus ⇐407

Conduct attributable to the State that impedes trial counsel's access to the factual basis for making a claim is the type of factor that ordinarily establishes the existence of cause for a procedural default in making a claim later asserted in federal habeas corpus proceeding.

12. Habeas Corpus ⇐405.1

In a habeas corpus proceeding, the standard for cause for a procedural default should not vary depending on the timing of the default.

13. Habeas Corpus ⇐407

For purposes of establishing cause for procedural default in failing to raise *Brady* claim prior to federal habeas corpus proceeding, based on failure to disclose certain notes of detective's interview with witness and letter by witness to detective, petitioner reasonably relied on prosecution's open file policy despite knowledge that detective had interviewed witness and though the federal district court entered an order allowing discovery of police files; knowledge of interviews did not establish knowledge that records pertaining to those interviews existed and had been suppressed, especially if some of them were in the prosecutor's open file, and fact that federal court granted discovery did not demonstrate that state court would have done so.

14. Habeas Corpus ⇐688

Under Virginia law, petitioner would not have been entitled to broad discovery of police files in state habeas proceedings without a showing of good cause. Va.Sup.Ct.Rules, Rule 4:1(b)(5)(3)(b).

15. Habeas Corpus ⇐688

Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review, nor should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support.

16. Habeas Corpus ⇐405.1

Proper respect for state procedures counsels against a requirement that, to avoid finding lack of cause for procedural default for federal habeas corpus purposes, all possible claims be raised in state collateral proceedings, even when no known facts support them; the presumption that prosecutors have fully discharged their official duties is inconsistent with the suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.

17. Criminal Law ⇐627.6(6)

Under Virginia law, except as modified by *Brady*, defendant would not have been entitled to discovery of police files. Va.Sup.Ct.Rules, Rule 3A:11.

18. Criminal Law ⇐700(2.1)

Under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.

19. Habeas Corpus ⇐409

In order to establish prejudice excusing procedural default in failing to raise *Brady* claim in state court, petitioner had to convince the Supreme Court that there was a reasonable probability, and not mere possibility, that the result of the trial would have been different if the suppressed documents had been disclosed to the defense, and it was not enough that testimony of witness about whom impeaching evidence was withheld made petitioner's conviction more likely than if she had not testified, and that discrediting her testimony might have changed the outcome of the trial; the question was not whether the petitioner would more likely than not have received a different verdict

with the suppressed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

20. Criminal Law ⇐700(2.1)

The materiality inquiry under *Brady* is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions; rather, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

21. Criminal Law ⇐700(4)
Habeas Corpus ⇐409

Habeas petitioner could not show either materiality under *Brady* in failure to disclose in murder prosecution evidence that would have impeached testimony of eyewitness as to circumstances of abduction of victim, or prejudice that would excuse petitioner's procedural default in failing to raise the *Brady* claim earlier, where the record provided strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death even if the testimony of that witness had been either severely impeached or excluded entirely, and her testimony did not relate to defendant's eligibility for the death sentence and was not relied upon by the prosecution at all during its closing argument at the penalty phase.

22. Homicide ⇐30(1)

Under Virginia law, defendant's guilt of capital murder did not depend on proof that he was the dominant partner in killing the victim; proof that he was an equal participant with another was sufficient.

Syllabus *

+263 The Commonwealth of Virginia charged petitioner with capital murder and related crimes. Because an open file policy gave petitioner access to all of the evidence in the prosecutor's files, petitioner's counsel did not file a pretrial motion for discovery of possible exculpatory evidence. At the trial, Anne Stoltzfus gave detailed eyewitness testimony about the crimes and petitioner's role as one of the perpetrators. The prosecutor failed to disclose exculpatory materials in the police files, consisting of notes taken by a detective during interviews with Stoltzfus, and letters written by Stoltzfus to the detective, that cast serious doubt on significant portions of her testimony. The jury found petitioner guilty, and he was sentenced to death. The Virginia Supreme Court affirmed. In subsequent state habeas corpus proceedings, petitioner advanced an ineffective assistance of counsel claim based, in part, on trial counsel's failure to file a motion under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, for disclosure of all exculpatory evidence known to the prosecution or in its possession. In response, the Commonwealth asserted that such a motion was unnecessary because of the prosecutor's open file policy. The trial court denied relief. The Virginia Supreme Court affirmed. Petitioner then filed a federal habeas petition and was granted access to the exculpatory Stoltzfus materials for the first time. The District Court vacated petitioner's capital murder conviction and death sentence on the grounds that the Commonwealth had failed to disclose those materials and that petitioner had not, in consequence, received a fair trial. The Fourth Circuit reversed because petitioner had procedurally defaulted his *Brady* claim by not raising it at his trial or in the state collateral proceedings. In addition, the Fourth Circuit concluded that the claim was, in any event, without merit.

Held: Although petitioner has demonstrated cause for failing to raise a *Brady* claim, Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to petitioner. Pp. 1947–1955.

(a) There are three essential components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. The record in this case unquestionably establishes two of those components. The contrast between (a) the terrifying incident that Stoltzfus confidently described in her testimony and (b) her initial statement to the detective that the incident seemed a trivial episode suffices to establish the impeaching character of the undisclosed documents. Moreover, with respect to some of those documents, there is no dispute that they were known to the Commonwealth but not disclosed to trial counsel. It is the third component—whether petitioner has established the necessary prejudice—that is the most difficult element of the claimed *Brady* violation here. Because petitioner acknowledges that his *Brady* claim is procedurally defaulted, this Court must first decide whether that default is excused by an adequate showing of cause and prejudice. In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself. The suppression of the Stoltzfus documents constitutes one of the causes for the failure to assert a *Brady* claim in the state courts, and unless those documents were "material" for *Brady* purposes, see 373 U.S., at 87, 83 S.Ct. 1194, their suppression did not give rise to sufficient prejudice to overcome the procedural default. Pp. 1947–1949.

(b) Petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government. See *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, and *Amadeo v. Zant*, 486 U.S. 214, 222, 108 S.Ct. 1771, 100 L.Ed.2d 249. *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457, and *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517, distinguished. This Court need not decide whether any one or two of the foregoing factors would be sufficient to constitute cause, since the combination of all three surely suffices. Pp. 1949–1952.

(c) However, in order to obtain relief, petitioner must convince this Court that there is a reasonable probability that his conviction or sentence would have been different had the suppressed documents been disclosed to the defense. The adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the suppressed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490. Here, other evidence in the the record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached or her testimony excluded entirely. Notwithstanding the obvious significance of that testimony, therefore, petitioner cannot show prejudice sufficient to excuse his procedural default. Pp. 1952–1955.

149 F.3d 1170, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, GINSBURG, and BREYER, JJ., joined in full, in which KENNEDY and SOUTER, JJ., joined as to Part III, and in which THOMAS, J., joined as to Parts I and IV. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which KENNEDY, J., joined as to Part II.

Miguel A. Estrada, Washington, DC, for petitioner.

Pamela A. Rumpz, for respondent.

For U.S. Supreme Court briefs, see:

1998 WL 880835 (Pet.Brief)

1999 WL 24931 (Resp.Brief)

1999 WL 86495 (Reply.Brief)

Justice STEVENS delivered the opinion of the Court.

The District Court for the Eastern District of Virginia granted petitioner's application for a writ of habeas corpus and vacated his capital murder conviction and death sentence on the grounds that the Commonwealth had failed to disclose important exculpatory evidence and that petitioner had not, in consequence, received a fair trial. The Court of Appeals for the Fourth Circuit reversed because petitioner had not raised his constitutional claim at his trial or in state collateral proceedings. In addition, the Fourth Circuit concluded that petitioner's claim was, "in any event, without merit." App. 418, n. 8.[1] Finding the legal question presented by this case considerably more difficult than the Fourth Circuit, we granted certiorari, 525 U.S. ——, 119 S.Ct. 27, 141 L.Ed.2d 787 (1998), to consider (1) whether the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny; (2) whether there was an acceptable "cause" for petitioner's failure to raise this claim in state court; and (3), if so, whether he suffered prejudice sufficient to excuse his procedural default.

I

In the early evening of January 5, 1990, Leanne Whitlock, an African-American sophomore at James Madison University, was abducted from a local shopping center and robbed and murdered. In separate trials, both petitioner and Ronald Henderson were convicted of all three offenses. Henderson was convicted of first-degree murder, a noncapital offense, whereas petitioner was convicted of capital murder and sentenced to death.[2]

At both trials, a woman named Anne Stoltzfus testified in vivid detail about Whitlock's abduction. The exculpatory material that petitioner claims should have been disclosed before trial includes documents prepared by Stoltzfus, and notes of interviews with her, that impeach significant portions of her testimony. We begin, however, by noting that, even without the Stoltzfus testimony, the evidence in the record was sufficient to establish petitioner's guilt on the murder charge. Whether petitioner would have been convicted of capital murder and received the death sentence if she had not testified, or if she had been sufficiently impeached, is less clear. To put the question in context, we review the trial testimony at some length.

The Testimony at Trial

At about 4:30 p.m. on January 5, 1990, Whitlock borrowed a 1986 blue Mercury Lynx from her boyfriend, John Dean, who worked in the Valley Shopping Mall in Harrisonburg, Virginia. At about 6:30 or 6:45 p.m., she left her apartment, intending to return the car to Dean at the mall. She did not return the car and was not again seen alive by any of her friends or family.

Petitioner's mother testified that she had driven petitioner and Henderson to Harrisonburg on January 5. She also testified that petitioner always carried a hunting knife that had belonged to his father. Two witnesses, a friend of Henderson's and a security guard, saw petitioner and Henderson at the mall that afternoon. The security guard was informed around 3:30 p.m. that two men, one of whom she identified at trial as petitioner, were attempting to steal a car in the parking lot. She had them under observation during the remainder of the afternoon but lost sight of them at about 6:45.

At approximately 7:30 p.m., a witness named Kurt Massie saw the blue Lynx at a location in Augusta County about 25 miles from Harrisonburg and a short distance from the cornfield where Whitlock's body was later found. Massie identified petitioner as the driver of the vehicle; he also saw a white woman in the front seat and another man in the back. Massie noticed that the car was muddy, and that it turned off Route 340 onto a dirt road.

1. The opinion of the Court of Appeals is unreported. The judgment order is reported, *Strickler v. Pruett*, 149 F.3d 1170, 1998 WL 340420 (C.A.4 1998). The opinion of the District Court is also unreported.

2. Petitioner was tried in May 1990. Henderson fled the State and was later apprehended in Oregon. He was tried in March 1991.

At about 8 p.m., another witness saw the Lynx at Buddy's Market, with two men sitting in the front seat. The witness did not see anyone else in the car. At approximately 9 p.m., petitioner and Henderson arrived at Dice's Inn, a bar in Staunton, Virginia, where they stayed for about four or five hours. They danced with several women, including four prosecution witnesses: Donna Kay Tudor, Nancy Simmons, Debra Sievers, and Carolyn Brown. While there, Henderson gave Nancy Simmons a watch that had belonged to Whitlock. Petitioner spent most of his time with Tudor, who was later arrested for grand larceny based on her possession of the blue Lynx.

These four women all testified that Tudor had arrived at Dice's at about 8 p.m. Three of them noticed nothing unusual about petitioner's appearance, but Tudor saw some blood on his jeans and a cut on his knuckle. Tudor also testified that she, Henderson, and petitioner left Dice's together after it closed to search for marijuana. Henderson was driving the blue Lynx, and petitioner and Tudor rode in back. Tudor related that petitioner was leaning toward Henderson and talking with him; she overheard a crude conversation that could reasonably be interpreted as describing the assault and murder of a black person with a "rock crusher." Tudor stated that petitioner made a statement that implied that he had killed someone, so they "wouldn't give him no more trouble." App. 99. Tudor testified that while she, petitioner, and Henderson were driving around, petitioner took out his knife and threatened to stab Henderson because he was driving recklessly. Petitioner then began driving.

At about 4:30 or 5 a.m. on January 6, petitioner drove Henderson to Kenneth Workman's apartment in Timberville.[3] Henderson went inside to get something, and petitioner and Tudor drove off without waiting for him. Workman testified that Henderson had blood on his pants and stated he had killed a black person.

Petitioner and Tudor then drove to a motel in Blue Ridge. A day or two later they went to Virginia Beach, where they spent the rest of the week. Petitioner gave Tudor pearl earrings that Whitlock had been wearing when she was last seen. Tudor saw Whitlock's driver's license and bank card in the glove compartment of the car. Tudor testified that petitioner unsuccessfully attempted to use Whitlock's bank card when they were in Virginia Beach.

When petitioner and Tudor returned to Augusta County, they abandoned the blue Lynx. On January 11, the police identified the car as Dean's, and found petitioner's and Tudor's fingerprints on both the inside and the outside of the car. They also found shoe impressions that matched the soles of shoes belonging to petitioner. Inside the car, they retrieved a jacket that contained identification papers belonging to Henderson.

The police also recovered a bag at petitioner's mother's house that Tudor testified she and petitioner had left when they returned from Virginia Beach. The bag contained, among other items, three identification cards belonging to Whitlock and a black "tank top" shirt that was later found to have human blood and semen stains on it. Tr. 707.

On January 13, a farmer called the police to advise them that he had found Henderson's wallet; a search of the area led to the discovery of Whitlock's frozen, nude, and battered body. A 69-pound rock, spotted with blood, lay nearby. Forensic evidence indicated that Whitlock's death was caused by "multiple blunt force injuries to the head." App. 109. The location of the rock and the human blood on the rock suggested that it had been used to inflict these injuries. Based on the contents of Whitlock's stomach, the medical examiner determined that she died fewer than six hours after she had last eaten.[4]

A number of Caucasian hair samples were found at the scene, three of which were probably petitioner's. Given the weight of the rock, the prosecution argued that one of

3. Workman was called as a defense witness.

4. Whitlock's roommate testified that Whitlock had dinner at 6 p.m. on January 5, 1990, just before she left for the mall to return Dean's car.

the killers must have held the victim down while the other struck her with the murder weapon.

Donna Tudor's estranged husband, Jay Tudor, was called by the defense and testified that in March she had told him that she was present at the murder scene and that petitioner did not participate in the murder. Jay Tudor's testimony was inconsistent in several respects with that of other witnesses. For example, he testified that several days elapsed between the time that petitioner, Henderson, and Donna Tudor picked up Whitlock and the time of Whitlock's murder.

Anne Stoltzfus' Testimony

Anne Stoltzfus testified that on two occasions on January 5 she saw petitioner, Henderson, and a blonde girl inside the Harrisonburg mall, and that she later witnessed their abduction of Whitlock in the parking lot. She did not call the police, but a week and a half after the incident she discussed it with classmates at James Madison University, where both she and Whitlock were students. One of them called the police. The next night a detective visited her, and the following morning she went to the police station and told her story to Detective Claytor, a member of the Harrisonburg City Police Department. Detective Claytor showed her photographs of possible suspects, and she identified petitioner and Henderson "with absolute certainty" but stated that she had a slight reservation about her identification of the blonde woman. *Id.*, at 56.

At trial, Stoltzfus testified that, at about 6 p.m. on January 5, she and her 14-year-old daughter were in the Music Land store in the mall looking for a compact disc. While she was waiting for assistance from a clerk, petitioner, whom she described as "Mountain Man," and the blonde girl entered.[5] Because petitioner was "revved up" and "very impatient," she was frightened and backed up, bumping into Henderson (whom she called "Shy Guy"), and thought she felt something hard in the pocket of his coat. *Id.*, at 36–37.

Stoltzfus left the store, intending to return later. At about 6:45, while heading back toward Music Land, she again encountered the threesome: "Shy Guy" walking by himself, followed by the girl, and then "Mountain Man" yelling "Donna, Donna, Donna." The girl bumped into Stoltzfus and then asked for directions to the bus stop.[6] The three then left.

At first Stoltzfus tried to follow them because of her concern about petitioner's behavior, but she "lost him" and then headed back to Music Land. The clerk had not returned, so she and her daughter went to their car. While driving to another store, they saw a shiny dark blue car. The driver was "beautiful," "well dressed and she was happy, she was singing...." *Id.*, at 41. When the blue car was stopped behind a minivan at a stop sign, Stoltzfus saw petitioner for the third time.

She testified:

"'Mountain Man' came tearing out of the Mall entrance door and went up to the driver of the van and ... was just really mad and ran back and banged on back of the backside of the van and then went back to the Mall entrance wall where 'Shy Guy' and 'Blonde Girl' was standing ... then we left [and before the van and a white-pickup truck could turn] 'Mountain Man' came out again...." *Id.*, at 42–43.

After first going to the passenger side of the pickup truck, petitioner came back to the black girl's car, "pounded on" the passenger

5. She testified to their appearances in great detail. She stated that petitioner had "a kind of multi layer look." He wore a grey t-shirt with a Harley Davidson insignia on it. The prosecutor showed Stoltzfus the shirt, stained with blood and semen, that the police had discovered at petitioner's mother's house. He asked if it were the same shirt she saw petitioner wearing at the mall. She replied, "That could have been it." App. 37, 39. Henderson "had either a white or light colored shirt, probably a short sleeve knit shirt and his pants were neat. They weren't just old blue jeans. They may have been new blue jeans or it may have just been more dressy slacks of some sort." *Id.*, at 37. The woman "had blonde hair, it was kind of in a shaggy cut down the back. She had blue eyes, she had a real sweet smile, kind of a small mouth. Just a touch of freckles on her face." *Id.*, at 60.

6. Stoltzfus stated that the girl caught a button in Stoltzfus' "open weave sweater, which is why I remember her attire." *Id.*, at 39.

window, shook the car, yanked the door open and jumped in. When he motioned for "Blonde Girl" and "Shy Guy" to get in, the driver stepped on the gas and "just laid on the horn" but she could not go because there were people walking in front of the car. The horn "blew a long time" and petitioner

> "started hitting her ... on the left shoulder, her right shoulder and then it looked like to me that he started hitting her on the head and I was, I just became concerned and upset. So I beeped, honked my horn and then she stopped honking the horn and he stopped hitting her and opened the door again and the 'Blonde Girl' got in the back and 'Shy Guy' followed and got behind him." *Id.*, at 44–45.

Stoltzfus pulled her car up parallel to the blue car, got out for a moment, got back in, and leaned over to ask repeatedly if the other driver was "O.K." The driver looked "frozen" and mouthed an inaudible response. Stoltzfus started to drive away and then realized "the only word that it could possibly be, was help." *Id.*, at 47. The blue car then drove slowly around her, went over the curb with its horn honking, and headed out of the mall. Stoltzfus briefly followed, told her daughter to write the license number on a "3x4 [inch] index card,"[7] and then left for home because she had an empty gas tank and "three kids at home waiting for supper." *Id.*, at 48–49.

At trial Stoltzfus identified Whitlock from a picture as the driver of the car and pointed to petitioner as "Mountain Man." When asked if pretrial publicity about the murder had influenced her identification, Stoltzfus replied "absolutely not." She explained:

> "[F]irst of all, I have an exceptionally good memory. I had very close contact with [petitioner] and he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification." *Id.*, at 58.

The Commonwealth did not produce any other witnesses to the abduction. Stoltzfus' daughter did not testify.

The Stoltzfus Documents

The materials that provide the basis of petitioner's *Brady* claim consist of notes taken by Detective Claytor during his interviews with Stoltzfus, and letters written by Stoltzfus to Claytor. They cast serious doubt on Stoltzfus' confident assertion of her "exceptionally good memory." Because the content of the documents is critical to petitioner's procedural and substantive claims, we summarize their content.

Exhibit 1[8] is a handwritten note prepared by Detective Claytor after his first interview with Stoltzfus on January 19, 1990, just two weeks after the crime. The note indicates that she could not identify the black female victim. The only person Stoltzfus apparently could identify at this time was the white female. *Id.*, at 306.

Exhibit 2 is a document prepared by Detective Claytor some time after February 1. It contains a summary of his interviews with Stoltzfus conducted on January 19 and January 20, 1990.[9] At that time "she was not sure whether she could identify the white males but felt sure she could identify the white female."

Exhibit 3 is entitled "Observations" and includes a summary of the abduction.

Exhibit 4 is a letter written by Stoltzfus to Claytor three days after their first interview "to clarify some of my confusion for you." The letter states that she had not remembered being at the mall, but that her daughter had helped jog her memory. Her description of the abduction includes the

7. "I said to my fourteen[-year-]old daughter, write down the license number, you know, it was West Virginia, NKA 243 and I said help me to remember, 'No Kids Alone 243,' and I said remember, 243 is my age." *Id.*, at 48.

8. These materials were originally attached to an affidavit submitted with petitioner's motion for summary judgment on his federal petition for habeas corpus. Because both the District Court and the Court of Appeals referred to the documents by their exhibit numbers, we have done the same.

9. As the District Court pointed out, however, it omits reference to the fact that Stoltzfus originally said that she could not identify the victim—a fact recorded in his handwritten notes. *Id.*, at 387.

comment: "I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off.... Then the guy I saw came running up to the black girl's window.? Were those 2 memories the same person?" *Id.*, at 316. In a postscript she noted that her daughter "doesn't remember seeing the 3 people get into the black girl's car...." *Ibid.*

Exhibit 5 is a note to Claytor captioned "My Impressions of 'The Car,'" which contains three paragraphs describing the size of the car and comparing it with Stoltzfus' Volkswagen Rabbit, but not mentioning the license plate number that she vividly recalled at the trial. *Id.*, at 317–318.

Exhibit 6 is a brief note from Stoltzfus to Claytor dated January 25, 1990, stating that after spending several hours with John Dean, Whitlock's boyfriend, "looking at current photos," she had identified Whitlock "beyond a shadow of a doubt." [10] *Id.*, at 318. The District Court noted that by the time of trial her identification had been expanded to include a description of her clothing and her appearance as a college kid who was "singing" and "happy." *Id.*, at 387–388.

Exhibit 7 is a letter from Stoltzfus to Detective Claytor, dated January 16, 1990, in which she thanks him for his "patience with my sometimes muddled memories." She states that if the student at school had not called the police, "I never would have made any of the associations that you helped me make." *Id.*, at 321.

In Exhibit 8, which is undated and summarizes the events described in her trial testimony, Stoltzfus commented:

> "So where is the 3x4 card?... It would have been very nice if I could have remembered all this at the time and had simply gone to the police with the information. But I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at JMU.... Monday, January 15th. I was cleaning out my car and found the 3x4 card. I tore it into little pieces and put it in the bottom of a trash bag." *Id.*, at 326.

There is a dispute between the parties over whether petitioner's counsel saw Exhibits 2, 7, and 8 before trial. The prosecuting attorney conceded that he himself never saw Exhibits 1, 3, 4, 5, and 6 until long after petitioner's trial, and they were not in the file he made available to petitioner.[11] For purposes of this case, therefore, we assume that petitioner proceeded to trial without having seen Exhibits 1, 3, 4, 5, and 6.[12]

State Proceedings

Petitioner was tried in Augusta County, where Whitlock's body was found, on charges of capital murder, robbery, and abduction. Because the prosecutor maintained an open file policy, which gave petitioner's counsel access to all of the evidence in the Augusta County prosecutor's files,[13] petitioner's coun-

10. Stoltzfus' trial testimony made no mention of her meeting with Dean.

11. The prosecutor recalled that Exhibits 2, 7, and 8 had been in his open file, *id.*, at 365–368, but the lawyer who represented Henderson at his trial swore that they were not in the file, *id.*, at 330; the recollection of petitioner's trial counsel was somewhat equivocal. Lead defense counsel was sure he had not seen the documents, *ibid.*, while petitioner's other lawyer signed an affidavit to the effect that he does "remember the information contained in [the documents]" but "cannot recall if I have seen these specific documents," *id.*, at 371.

12. Although the parties have not advanced an explanation for the non-disclosure of the documents, perhaps it was an inadvertent consequence of the fact that Harrisonburg is in Rockingham County and the trial was conducted by the Augusta County prosecutor. We note, however, that the prosecutor is responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Thus, the Commonwealth, through its prosecutor, is charged with knowledge of the Stoltzfus materials for purposes of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

13. In the federal habeas proceedings, the prosecutor gave the following sworn answer to an interrogatory requesting him to state what materials were disclosed by him to defense counsel pursuant to *Brady*: "I disclosed my entire prosecution file to Strickler's defense counsel prior to Strickler's trial by allowing him to inspect my entire prosecution file including, but not limited to, all police reports in the file and all witness

sel did not file a pretrial motion for discovery of possible exculpatory evidence.[14] In closing argument, petitioner's lawyer effectively conceded that the evidence was sufficient to support the robbery and abduction charges, as well as the lesser offense of first-degree murder, but argued that the evidence was insufficient to prove that petitioner was guilty of capital murder. *Id.*, at 192–193.

The judge instructed the jury that petitioner could be found guilty of the capital charge if the evidence established beyond a reasonable doubt that he "jointly participated in the fatal beating" and "was an active and immediate participant in the act or acts that caused the victim's death." *Id.*, at 160–161. The jury found petitioner guilty of abduction, robbery, and capital murder. *Id.*, at 200–201. After listening to testimony and arguments presented during the sentencing phase, the jury made findings of "vileness" and "future dangerousness," and unanimously recommended the death sentence that the judge later imposed.

The Virginia Supreme Court affirmed the conviction and sentence. *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991). It held that the trial court had properly instructed the jury on the "joint perpetrator" theory of capital murder and that the evidence, viewed most favorably in support of the verdict, amply supported the prosecution's theory that both petitioner and Henderson were active participants in the actual killing.[15]

In December 1991, the Augusta County Circuit Court appointed new counsel to represent petitioner in state habeas corpus proceedings. State habeas counsel advanced an ineffective-assistance-of-counsel claim based, in part, on trial counsel's failure to file a motion under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), "to have the Commonwealth disclose to the defense all exculpatory evidence known to it—or in its possession." App. 205–206. In answer to that claim, the Commonwealth asserted that such a motion was unnecessary because the prosecutor had maintained an open file policy.[16] The Circuit Court dismissed the petition, and the State Supreme Court affirmed. *Strickler v. Murray*, 249 Va. 120, 452 S.E.2d 648 (1995).

Federal Habeas Corpus Proceedings

In March 1996, petitioner filed a federal habeas corpus petition in the Eastern Dis-

statements in the file." App. 368. Petitioner's trial counsel had shared the prosecutor's understanding of the "open file" policy. In an affidavit filed in the state habeas proceeding, they stated that they "thoroughly investigated" petitioner's case. "In this we were aided by the prosecutor's office, which gave us full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files.... As a result of this cooperation, they introduced nothing at trial of which we were previously unaware." *Id.*, at 223.

14. In its pleadings on state habeas, the Commonwealth explained: "From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed *all* the evidence the Commonwealth intended to present ... Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal [*Brady*] motion." *Id.*, at 212–213.

15. "The Commonwealth's theory of the case was that Strickler and Henderson had acted jointly to accomplish the actual killing. It contended at trial, and argues on appeal, that the physical evidence points to a violent struggle between the assailants and the victim, in which Strickler's hair had actually been torn out by the roots. Although Leanne had been beaten and kicked, none of her injuries would have been sufficient to immobilize her until her skull was crushed with the 69-pound rock. Because, the Commonwealth's argument goes, the rock had been dropped on her head at least twice, while she was on the ground, leaving two bloodstained depressions in the frozen earth, it would have been necessary that she be held down by one assailant while the other lifted the rock and dropped it on her head.

"The weight and dimensions of the 69-pound bloodstained rock, which was introduced in evidence as an exhibit, made it apparent that a single person could not have lifted it and dropped or thrown it while simultaneously holding the victim down. The bloodstains on Henderson's jacket as well as on Strickler's clothing further tended to corroborate the Commonwealth's theory that the two men had been in the immediate presence of the victim's body when the fatal blows were struck and, hence, had jointly participated in the killing." *Strickler*, 241 Va., at 494, 404 S.E.2d, at 235.

16. See n. 14, *supra*.

trict of Virginia. The District Court entered a sealed, *ex parte* order granting petitioner's counsel the right to examine and to copy all of the police and prosecution files in the case. District Court Record, Doc. No. 20. That order led to petitioner's counsel's first examination of the Stoltzfus materials, described above. *Supra*, at 1945–1947.

Based on the discovery of those exhibits, petitioner for the first time raised a direct claim that his conviction was invalid because the prosecution had failed to comply with the rule of *Brady v. Maryland*. The District Court granted the Commonwealth's motion to dismiss all claims except for petitioner's contention that the Commonwealth violated *Brady*, that he received ineffective assistance of counsel,[17] and that he was denied due process of law under the Fifth and Fourteenth Amendments. In its order denying the Commonwealth's motion to dismiss, the District Court found that petitioner had "demonstrated cause for his failure to raise this claim earlier [because] [d]efense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceeding." App. 287.

After reviewing the Stoltzfus materials, and making the assumption that the three disputed exhibits had been available to the defense, the District Court concluded that the failure to disclose the other five was sufficiently prejudicial to undermine confidence in the jury's verdict. *Id.*, at 396. It granted summary judgment to petitioner and granted the writ.

The Court of Appeals vacated in part and remanded. It held that petitioner's *Brady* claim was procedurally defaulted because the factual basis for the claim was available to him at the time he filed his state habeas petition. Given that he knew that Stoltzfus had been interviewed by Harrisonburg police officers, the court opined that "reasonably competent counsel would have sought discovery in state court" of the police files, and that in response to this "simple request, it is likely the state court would have ordered the production of the files." *Id.*, at 421. Therefore, the Court of Appeals reasoned, it could not address the *Brady* claim unless petitioner could demonstrate both cause and actual prejudice.

Under Fourth Circuit precedent a party "cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence." App. 423 (citing *Stockton v. Murray*, 41 F.3d 920, 925 (C.A.4 1994)). Having already decided that the claim was available to reasonably competent counsel, the Fourth Circuit stated that the basis for finding procedural default also foreclosed a finding of cause. Moreover, the Court of Appeals reasoned, petitioner could not fault his trial lawyers' failure to make a *Brady* claim because they reasonably relied on the prosecutor's open file policy. App. 423–424.[18]

As an alternative basis for decision, the Court of Appeals also held that petitioner could not establish prejudice because "the Stoltzfus materials would have provided little or no help . . . in either the guilt or sentencing phases of the trial." *Id.*, at 425. With respect to guilt, the court noted that Stoltzfus' testimony was not relevant to petitioner's argument that he was only guilty of first-degree murder rather than capital murder because Henderson, rather than he, actually killed Whitlock. With respect to sentencing, the court concluded that her testimony "was of no import" because the findings of future dangerousness and vileness rested on other evidence. Finally, the court noted that even if it could get beyond the procedural default, the *Brady* claim would fail on the merits because of the absence of prejudice. App. 425, n. 11. The Court of Appeals, therefore, reversed the District Court's judgment and remanded the case with instructions to dismiss the petition.

17. Petitioner later voluntarily dismissed this claim. App. 384.

18. For reasons we do not entirely understand, the Court of Appeals thus concluded that, while it was reasonable for trial counsel to rely on the open file policy, it was unreasonable for postconviction counsel to do so.

II

The first question that our order granting certiorari directed the parties to address is whether the State violated the *Brady* rule. We begin our analysis by identifying the essential components of a *Brady* violation.

[1–3] In *Brady* this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct. 1194. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*, at 682, 105 S.Ct. 3375; see also *Kyles v. Whitley*, 514 U.S. 419, 433–434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Id.*, at 438, 115 S.Ct. 1555. In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S., at 437, 115 S.Ct. 1555.

[4] These cases, together with earlier cases condemning the knowing use of perjured testimony,[19] illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

[5, 6] This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence[20]—that is, to any suppression of so-called "*Brady* material"—although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

[7, 8] Two of those components are unquestionably established by the record in this case. The contrast between (a) the terrifying incident that Stoltzfus confidently described in her testimony and (b) her initial perception of that event "as a trivial episode of college kids carrying on" that her daughter did not even notice, suffices to establish the impeaching character of the undisclosed documents.[21] Moreover, with respect to at

19. See, *e.g.*, *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935) *(per curiam)*; *Pyle v. Kansas*, 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Napue v. Illinois*, 360 U.S. 264, 269–270, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

20. Consider, for example, this comment in the dissenting opinion in *Kyles v. Whitley*: "It is petitioner's burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner's guilt." 514 U.S., at 460, 115 S.Ct. 1555 (SCALIA, J., dissenting).

21. We reject the Commonwealth's contention that these documents do not fall under *Brady* because they were "inculpatory." Brief for Respondent 41. Our cases make clear that *Brady's*

least five of those documents, there is no dispute about the fact that they were known to the State but not disclosed to trial counsel. It is the third component—whether petitioner has established the prejudice necessary to satisfy the "materiality" inquiry—that is the most difficult element of the claimed *Brady* violation in this case.

Because petitioner acknowledges that his *Brady* claim is procedurally defaulted, we must first decide whether that default is excused by an adequate showing of cause and prejudice. In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself. The suppression of the Stoltzfus documents constitutes one of the causes for the failure to assert a *Brady* claim in the state courts, and unless those documents were "material" for *Brady* purposes, their suppression did not give rise to sufficient prejudice to overcome the procedural default.

III

The Commonwealth expressly disavows any reliance on the fact that petitioner's *Brady* claim was not raised at trial. Brief for Respondent 17–18, n. 6. It states that it has consistently argued "that the claim is defaulted because it could have been raised on state habeas corpus through the exercise of due diligence, but was not." *Ibid.* Despite this concession, it is appropriate to begin the analysis of the "cause" issue by explaining why petitioner's reasons for failing to raise his *Brady* claim at trial are acceptable under this Court's cases.

[9–11] Three factors explain why trial counsel did not advance this claim: The documents were suppressed by the Commonwealth; the prosecutor maintained an open file policy;[22] and trial counsel were not aware of the factual basis for the claim. The first and second factors—*i.e.*, the non-disclosure and the open file policy—are both fairly characterized as conduct attributable to the State that impeded trial counsel's access to the factual basis for making a *Brady* claim.[23] As we explained in *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639 (1986), it is just such factors that ordinarily establish the existence of cause for a procedural default.[24]

[12] If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable. Indeed, in *Murray* we expressly noted that "the standard for cause should not vary depending on the timing of a procedural default." *Id.*, at 491, 106 S.Ct. 2639.

disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

22. While the precise dimensions of an "open file policy" may vary from jurisdiction to jurisdiction, in this case it is clear that the prosecutor's use of the term meant that his entire prosecution file was made available to the defense. App. 368; see also n. 13, *supra*.

23. We certainly do not criticize the prosecution's use of the open file policy. We recognize that this practice may increase the efficiency and the fairness of the criminal process. We merely note that, if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.

24. "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see *Reed v. Ross*, 468 U.S., at 16, 104 S.Ct. 2901, or that 'some interference by officials,' *Brown v. Allen*, 344 U.S. 443, 486, 73 S.Ct. 397, 97 L.Ed. 469 (1953), made compliance impracticable, would constitute cause under this standard." *Murray*, 477 U.S., at 488, 106 S.Ct. 2639; see also *Amadeo v. Zant*, 486 U.S. 214, 221–222, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

[13] The Commonwealth contends, however, that the prosecution's maintenance of an open file policy that did not include all it was purported to contain is irrelevant because the factual basis for the assertion of a *Brady* claim was available to state habeas counsel. It presses two factors to support this assertion. First, it argues that an examination of Stoltzfus' trial testimony,[25] as well as a letter published in a local newspaper,[26] made it clear that she had had several interviews with Detective Claytor. Second, the fact that the Federal District Court entered an order allowing discovery of the Harrisonburg police files indicates that diligent counsel could have obtained a similar order from the state court. We find neither factor persuasive.

Although it is true that petitioner's lawyers—both at trial and in post-trial proceedings—must have known that Stoltzfus had had multiple interviews with the police, it by no means follows that they would have known that records pertaining to those interviews, or that the notes that Stoltzfus sent to the detective, existed and had been suppressed.[27] Indeed, if the Commonwealth is correct that Exhibits 2, 7, and 8 were in the prosecutor's "open file," it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld. The prosecutor must have known about the newspaper articles and Stoltzfus' meetings with Claytor, yet he did not believe that his prosecution file was incomplete.

[14–17] Furthermore, the fact that the District Court entered a broad discovery order even before federal habeas counsel had advanced a *Brady* claim does not demonstrate that a state court also would have done so.[28] Indeed, as we understand Virginia law and the Commonwealth's position, petitioner would not have been entitled to such discovery in state habeas proceedings without a showing of good cause.[29] Even pursuant to the broader discovery provisions afforded at trial, petitioner would not have had access to these materials under Virginia law, except as modified by *Brady*.[30] Mere speculation that

25. Stoltzfus testified to meeting with Claytor at least three times. App. 55–56.

26. In her letter, which appeared on July 18, 1990 (after petitioner's trial) in the Harrisonburg Daily News-Record, Stoltzfus stated: "It never occurred to me that I was witnessing an abduction. In fact, if it hadn't been for the intelligent, persistent, professional work of Detective Daniel Claytor, I still wouldn't realize it. What sounded like a coherent story at the trial was the result of an incredible effort by the police to fit a zillion little puzzle pieces into one big picture." *Id.*, at 250. Stoltzfus also gave a pretrial interview to a reporter with the Roanoke Times that conflicted in some respects with her trial testimony, principally because she identified the blonde woman at the mall as Tudor. *Id.*, at 373.

27. The defense could not discover copies of these notes from Stoltzfus herself, because she refused to speak with defense counsel before trial. *Id.*, at 370.

28. The parties have been unable to provide, and the record does not illuminate, the factual basis on which the District Court entered the discovery order. It was granted *ex parte* and under seal and furnished broad access to any records relating to petitioner. District Court Record, Doc. No. 20. The Fourth Circuit has since found that federal district courts do not possess the authority to issue *ex parte* discovery orders in habeas proceedings. *In re Pruett*, 133 F.3d 275, 280 (C.A.4 1997). We express no opinion on the Fourth Circuit's decision on this question. However, we note that it is unlikely that petitioner would have been granted in state court the sweeping discovery that led to the Stoltzfus materials, since Virginia law limits discovery available during state habeas. Indeed, it is not even clear that he had a right to such discovery in federal court. See n. 29, *infra*.

29. Virginia law provides that "no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of the court, which may deny or limit discovery in any such proceeding." Va. Sup.Ct. Rule 4:1(b)(5)(3)(b); see also *Yeatts v. Murray*, 249 Va. 285, 289, 455 S.E.2d 18, 21 (1995). The Commonwealth acknowledges that petitioner was not entitled to discovery under Virginia law. Brief for Respondent 25.

30. See Va. Sup.Ct. R. 3A:11. This rule expressly excludes from defendants "the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except [for scientific reports of the accused or alleged victim]." The Virginia Supreme Court found that petitioner had been afforded all the discovery he was entitled to on direct review. "Limited discovery is permitted in criminal cases

some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review. Nor, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support. Proper respect for state procedures counsels against a requirement that all possible claims be raised in state collateral proceedings, even when no known facts support them. The presumption, well established by " 'tradition and experience,' " that prosecutors have fully " 'discharged their official duties,' " *United States v. Mezzanatto*, 513 U.S. 196, 210, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995), is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.

The Commonwealth's position on the "cause" issue is particularly weak in this case because the state habeas proceedings confirmed petitioner's justification for his failure to raise a *Brady* claim. As already noted, when he alleged that trial counsel had been incompetent because they had not advanced such a claim, the warden responded by pointing out that there was no need for counsel to do so because they "were voluntarily given full disclosure of everything known to the government." [31] Given that representation, petitioner had no basis for believing the Commonwealth had failed to comply with *Brady* at trial.[32]

The Commonwealth also argues that our decisions in *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996), and *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), preclude the conclusion that the cause for petitioner's default was adequate. In both of those cases, however, the petitioner was previously aware of the factual basis for his claim but failed to raise it earlier. See *Gray*, 518 U.S., at 161, 116 S.Ct. 2074; *McCleskey*, 499 U.S., at 498–499, 111 S.Ct. 1454. In the context of a *Brady* claim, a defendant cannot conduct the "reasonable and diligent investigation" mandated by *McCleskey* to preclude a finding of procedural default when the evidence is in the hands of the State.[33]

The controlling precedents on "cause" are *Murray v. Carrier*, 477 U.S., at 488, 106 S.Ct. 2639 and *Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). As we explained in the latter case:

> "If the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse

by the Rules of Court.... Strickler had the benefit of all the discovery to which he was entitled under the Rules. Those rights do not extend to general production of evidence, except in the limited areas prescribed by Rule 3A:11." *Strickler v. Commonwealth*, 241 Va. 482, 491, 404 S.E.2d 227, 233 (1991).

31. This statement is quoted in full at n. 14, *supra*. Respondent argues that this representation is not dispositive because it was made in the warden's motion to dismiss and therefore cannot excuse the failure to include a *Brady* claim in the petitioner's original state habeas pleading. We find the timing of the statement irrelevant, since the warden's response merely summarizes the State's "open file" policy, instituted by the prosecution at the inception of the case.

32. Furthermore, in its opposition to petitioner's motion during state habeas review for funds for an investigator, the Commonwealth argued: "Strickler's Petition contains 139 separate habeas claims. By requesting appointment of an investigator 'to procure the necessary factual basis to support certain of Petitioner's claims' (Motion, p. 1), Petitioner is implicitly conceding that he is not aware of factual support for the claims he has already made. Respondent agrees." App. 242.

In light of these assertions, we fail to see how the Commonwealth believes petitioner could have shown "good cause" sufficient to get discovery on a *Brady* claim in state habeas.

33. We do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them. Although *Gray* involved a procedurally defaulted *Brady* claim, in that case, the Court found that the petitioner had made "no attempt to demonstrate cause or prejudice for his default." *Gray*, 518 U.S., at 162, 116 S.Ct. 2074.

his procedural default under this Court's precedents." *Id.*, at 222, 108 S.Ct. 1771.[34]

[18] There is no suggestion that tactical considerations played any role in petitioner's failure to raise his *Brady* claim in state court. Moreover, under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Agurs*, 427 U.S., at 110, 96 S.Ct. 2392. 289

In summary, petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received "everything known to the government." [35] We need not decide in this case whether any one or two of these factors would be sufficient to constitute cause, since the combination of all three surely suffices.

IV

[19] The differing judgments of the District Court and the Court of Appeals attest to the difficulty of resolving the issue of prejudice. Unlike the Fourth Circuit, we do not believe that "the Stolzfus *[sic]* materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial." App. 425. Without a doubt, Stoltzfus' testimony was prejudicial in the sense that it made petitioner's conviction more likely than if she had not testified, and discrediting her testimony might have changed the outcome of the trial.

That, however, is not the standard that petitioner must satisfy in order to obtain relief. He must convince us that "there is a reasonable probability" that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. As we stressed in *Kyles:* "[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence 290 he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S., at 434, 115 S.Ct. 1555.

[20] The Court of Appeals' negative answer to that question rested on its conclusion that, without considering Stoltzfus' testimony, the record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty. The standard used by that court was incorrect. As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. *Id.*, at 434–435, 115 S.Ct. 1555. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435, 115 S.Ct. 1555.

The District Judge decided not to hold an evidentiary hearing to determine whether Exhibits 2, 7, and 8 had been disclosed to the defense, because he was satisfied that the "potentially devastating impeachment material" contained in the other five warranted the entry of summary judgment in petitioner's favor. App. 392. The District Court's

34. It is noteworthy that both of the reasons on which we relied in *McCleskey* to distinguish *Amadeo* also apply to this case: "This case differs from *Amadeo* in two crucial respects. First, there is no finding that the State concealed evidence. And second, even if the State intentionally concealed the 21-page document, the concealment would not establish cause here because, in light of McCleskey's knowledge of the information in the document, any initial concealment would not have prevented him from raising the claim in the first federal petition." 499 U.S., at 501–502, 111 S.Ct. 1454.

35. Since our opinion does not modify *Brady*, we reject the Commonwealth's contention that we announce a "new rule" today. See *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

conclusion that the admittedly undisclosed documents were sufficiently important to establish a violation of the *Brady* rule was supported by the prosecutor's closing argument. That argument relied on Stoltzfus' testimony to demonstrate petitioner's violent propensities and to establish that he was the instigator and leader in Whitlock's abduction and, by inference, her murder. The prosecutor emphasized the importance of Stoltzfus' testimony in proving the abduction:

> "[W]e are lucky enough to have an eyewitness who saw [what] happened out there in that parking lot. [In a] lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Mrs. Stoltzfus was there, she saw [what] happened." App. 169.

Given the record evidence involving Henderson,[36] the District Court concluded that, without Stoltzfus' testimony, the jury might have been persuaded that Henderson, rather than petitioner, was the ringleader. He reasoned that a "reasonable probability of conviction" of first-degree, rather than capital, murder sufficed to establish the materiality of the undisclosed Stoltzfus materials and, thus, a *Brady* violation. App. 396.

The District Court was surely correct that there is a reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result, either at the guilt or sentencing phases. Petitioner did, for example, introduce substantial mitigating evidence about abuse he had suffered as a child at the hands of his stepfather.[37] As the District Court recognized, however, petitioner's burden is to establish a reasonable *probability* of a different result. *Kyles*, 514 U.S., at 434, 115 S.Ct. 1555.

[21] Even if Stoltzfus and her testimony had been entirely discredited, the jury might still have concluded that petitioner was the leader of the criminal enterprise because he was the one seen driving the car by Kurt Massie near the location of the murder and the one who kept the car for the following week.[38] In addition, Tudor testified that petitioner threatened Henderson with a knife later in the evening.

[22] More importantly, however, petitioner's guilt of capital murder did not depend on proof that he was the dominant partner: Proof that he was an equal participant with Henderson was sufficient under the judge's instructions.[39] Accordingly, the strong evi-

36. The District Court summarized the evidence against Henderson. "Henderson's clothes had blood on them that night. Henderson had property belonging to Whitlock and gave her watch to a woman, Simmons, while at a restaurant known as Dice's Inn. Tr. 541. Henderson left Dice's Inn driving Whitlock's car. Henderson's wallet was found in the vicinity of Whitlock's body and was possibly lost during his struggle with her. Significantly, Henderson confessed to a friend on the night of the murder that he had just killed an unidentified black person and that friend observed blood on Henderson's jeans." App. 395.

37. At sentencing, the trial court discussed the mitigation evidence: "On the charge of capital murder ... it is difficult ... to sit here and listen to the testimony of [petitioner's mother] and Mr. Strickler's two sisters and not feel a great, great deal of sympathy for, for any person who has a childhood and a life like Mr. Strickler has had. He was in no way responsible for the circumstances of his birth. He was brutalized from the minute he's, almost from the minute he was born and certainly with his ... limitations and his ability with which he was born, it would have been extremely difficult for him to, to help himself. And difficult, when you look at a case like that to feel but anything but sympathy for him." Sentencing Hearing, 20 Record 57–58.

38. As the trial court stated at petitioner's sentencing hearing: "The facts in this case which support this jury verdict are one that Mr. Strickler was ... in control of this situation. He was in control at the shopping center in Harrisonburg. He was in control when the car went into the field up here on the 340 north of Waynesboro. He was in control thereafter, he ended up with the car. There is no question who ... was in control of this entire situation." *Id.*, at 22.

39. The judge gave the following instruction at petitioner's trial: "You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death." *Strickler v. Commonwealth*, 241 Va., at 493–494, 404 S.E.2d, at 234–235. The Virginia Supreme Court affirmed the propriety of this instruction on petitioner's direct appeal. *Id.*, at 495, 404 S.E.2d, at 235.

dence that Henderson was a killer is entirely consistent with the conclusion that petitioner was also an actual participant in the killing.[40]

Furthermore, there was considerable forensic and other physical evidence linking petitioner to the crime.[41] The weight and size of the rock,[42] and the character of the fatal injuries to the victim,[43] are powerful evidence supporting the conclusion that two people acted jointly to commit a brutal murder.

We recognize the importance of eyewitness testimony; Stoltzfus provided the only disinterested, narrative account of what transpired on January 5, 1990. However, Stoltzfus' vivid description of the events at the mall was not the only evidence that the jury had before it. Two other eyewitnesses, the security guard and Henderson's friend, placed petitioner and Henderson at the Harrisonburg Valley Shopping Mall on the afternoon of Whitlock's murder. One eyewitness later saw petitioner driving Dean's car near the scene of the murder.

The record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached. The jury was instructed on two predicates for capital murder: robbery with a deadly weapon and abduction with intent to defile.[44] On state habeas, the Virginia Supreme Court rejected as procedurally barred petitioner's challenge to this jury instruction on the ground that "abduction with intent to defile" was not a predicate for capital murder for a victim over the age of 12.[45] That issue is not before us. Even assuming, however, that this predicate was erroneous, armed robbery still would have supported the capital murder conviction.

40. It is also consistent with the fact that Henderson was convicted of first-degree murder but acquitted of capital murder after his jury, unlike petitioner's, was instructed that they could convict him of capital murder only if they found that he had "'inflict[ed] the fatal blows.'" Henderson's jury was instructed, "'One who is present aiding and abetting the actual killing, but who does not inflict the fatal blows that cause death is a principle [sic] in the second degree, and may not be found guilty of capital murder. Before you can find the defendant guilty of capital murder, the evidence must establish beyond a reasonable doubt that the defendant was an active and immediate participant in the acts that caused the death.'" 2 App. in No. 97-29(CA4), p. 777.

Henderson's trial took place before the Virginia Supreme Court affirmed the trial instruction, and the "joint perpetrator" theory it embodied, given at petitioner's trial. *Strickler v. Commonwealth*, 241 Va., at 494, 404 S.E.2d, at 235. Petitioner's trial judge rejected one of petitioner's proffered instructions, which would have required the Commonwealth to prove that "the defendant was the person who actually delivered the blow that killed Leanne Whitlock." *Ibid.* Petitioner's trial judge recused himself from presiding over Henderson's trial, indicating that he had already formed his own opinion about what had happened the night of Whitlock's murder. 21 Record 2.

41. For example, the police recovered hairs on a bra and shirt found with Whitlock's body that "were microscopically alike in all identifiable characteristics" to petitioner's hair. App. 135. The shirt recovered from the car at Strickler's mother's house had human blood on it. Petitioner's fingerprints were found on the outside and inside of the car taken from Whitlock. *Id.*, at 128–129. Tudor testified that petitioner's pants had blood on them, and he had a cut on his knuckle. *Id.*, at 95.

42. The trial judge thought the shape of the rock so significant to the jury's conclusion that he instructed the lawyers to have "detailed, high quality photographs taken of [the rock] . . . and I want it put in the record of the case." Sentencing Hearing, 20 Record 53.

43. The Deputy Chief Medical Examiner, who performed the autopsy, testified that the object that produced the fractures in Whitlock's skull caused "severe lacerations to the brain," and any two of the four fractures would have been fatal. App. 112.

44. The trial court instructed the jury that, to convict petitioner of capital murder, it must find beyond a reasonable doubt that (1) "the defendant killed Leanne Whitlock;" (2) "the killing was willful, deliberate and premeditated"; and (3) "the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with intent to extort money or a pecuniary benefit or with the intent to defile or was of a person during the commission of, or subsequent to, rape." *Strickler v. Murray*, 249 Va. 120, 124–125, 452 S.E.2d 648, 650 (1995).

45. In its motion to dismiss petitioner's state habeas petition, the Commonwealth conceded that the instruction on intent to defile was erroneously given in this case as a predicate for capital murder. App. 218.

Petitioner argues that the prosecution's evidence on armed robbery "flowed almost entirely from inferences from Stoltzfus' testimony," and especially from her statement that Henderson had a "hard object" under his coat at the mall. Brief for Petitioner 35. That argument, however, ignores the fact that petitioner's mother and Tudor provided direct evidence that petitioner had a knife with him on the day of the crime. In addition, the prosecution contended in its closing argument that the rock—not the knife—was the murder weapon.[46] The prosecution did advance the theory that petitioner had a knife when he got in the car with Whitlock, but it did not specifically argue that petitioner used the knife during the robbery.[47]

Petitioner also maintains that he suffered prejudice from the failure to disclose the Stoltzfus documents because her testimony impacted on the jury's decision to impose the death penalty. Her testimony, however, did not relate to his eligibility for the death sentence and was not relied upon by the prosecution at all during its closing argument at the penalty phase.[48] With respect to the jury's discretionary decision to impose the death penalty, it is true that Stoltzfus described petitioner as a violent, aggressive person, but that portrayal surely was not as damaging as either the evidence that he spent the evening of the murder dancing and drinking at Dice's or the powerful message conveyed by the 69-pound rock that was part of the record before the jury. Notwithstanding the obvious significance of Stoltzfus' testimony, petitioner has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely.

Petitioner has satisfied two of the three components of a constitutional violation under *Brady:* exculpatory evidence and nondisclosure of this evidence by the prosecution. Petitioner has also demonstrated cause for failing to raise this claim during trial or on state postconviction review. However, petitioner has not shown that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed. He therefore cannot show materiality under *Brady* or prejudice from his failure to raise the claim earlier. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice SOUTER, with whom Justice KENNEDY joins as to Part II, concurring in part and dissenting in part.

I look at this case much as the Court does, starting with its view in Part III (which I join) that Strickler has shown cause to excuse the procedural default of his *Brady* claim. Like the Court, I think it clear that the materials withheld were exculpatory as devastating ammunition for impeaching Stoltzfus.[1] See *ante,* at 1948–1949. Even on

46. In his closing argument, the prosecutor stated that there was "really no doubt about where it happened and what the murder weapon was. It was not a gun, it wasn't a knife. It was this thing here, it is to[o] big to be called a rock and to[o] small to be called a boulder." *Id.,* at 167.

47. The instructions given to the jury defined a deadly weapon as "any object or instrument that is likely to cause death or great bodily injury because of the manner and under the circumstance in which it is used." *Id.,* at 160.

48. The jury recommended death after finding the predicates of "future dangerousness" and "vileness." Neither of these predicates depended on Stoltzfus' testimony. The trial court instructed the jury, "Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives. One, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing, continuing serious threat to society or two, that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman and that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." Tr. 899–900.

1. The Court notes that the District Court did not resolve whether all eight of the Stoltzfus documents had been withheld, as Strickler claimed, or only five. For purposes of its decision granting summary judgment for Strickler, the District Court assumed that only five had not been disclosed. See *ante,* at 1952–1953, 1946–1947. The Court of Appeals also left the dispute unresolved, see App. 418, n. 8, though granting summary judgment for respondent based on a lack of prejudice would presumably have required that

the question of prejudice or materiality,[2] over which I ultimately part company with the majority, I am persuaded that Strickler has failed to establish a reasonable probability that, had the materials withheld been disclosed, he would not have been found guilty of capital murder. See *ante*, at 1953–1955. As the Court says, however, the prejudice enquiry does not stop at the conviction but goes to each step of the sentencing process: the jury's consideration of aggravating, death-qualifying facts, the jury's discretionary recommendation of a death sentence if it finds the requisite aggravating factors, and the judge's discretionary decision to follow the jury's recommendation. See *ante*, at 1954–1955. It is with respect to the penultimate step in determining the sentence that I think Strickler has carried his burden. I believe there is a reasonable probability (which I take to mean a significant possibility) that disclosure of the Stoltzfus materials would have led the jury to recommend life, not death, and I respectfully dissent.

I

Before I get to the analysis of prejudice I should say something about the standard for identifying it, and about the unfortunate phrasing of the shorthand version in which the standard is customarily couched. The Court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a "reasonable probability" of a different outcome if the evidence withheld had been disclosed. The Court rightly cautions that the standard intended by these words does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached. See *ante*, at 1952–1953; *Kyles v. Whitley*, 514 U.S. 419, 434–435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Instead, the Court restates the question (as I have done elsewhere) as whether "'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence'" in the outcome. *Ante*, at 1952–1953 (quoting *Kyles*, *supra*, at 435, 115 S.Ct. 1555).

Despite our repeated explanation of the shorthand formulation in these words, the continued use of the term "probability" raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, "more likely than not." While any short phrases for what the cases are getting at will be "inevitably imprecise," *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), I think "significant possibility" would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence.

To see that this is so, we need to recall *Brady's* evolution since the appearance of the rule as originally stated, that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* itself did not explain what it meant by "material" (perhaps assuming the term would be given its usual meaning in the law of evidence, see *United States v. Bagley*, 473 U.S. 667, 703, n. 5, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (Marshall, J., dissenting)). We first essayed a partial definition in *United States v. Agurs*,

court to assume that all eight documents had been withheld. Because this Court affirms the grant of summary judgment for respondent based on lack of prejudice and because it relies on at least one of the disputed documents in its analysis, see *ante*, at 1948–1949, I understand it to have assumed that none of the eight documents was disclosed. I proceed based on that assumption as well. If one thought the difference between five and eight documents withheld would affect the determination of prejudice, a remand to resolve that factual question would be necessary.

2. In keeping with suggestions in a number of our opinions, see *Schlup v. Delo*, 513 U.S. 298, 327, n. 45, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Sawyer v. Whitley*, 505 U.S. 333, 345, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), the Court treats the prejudice enquiry as synonymous with the materiality determination under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See *ante*, at 1948–1949, 1952–1953, 1955. I follow the Court's lead.

supra, where we identified three situations arguably within the ambit of *Brady* and said that in the first, involving knowing use of perjured testimony, reversal was required if there was "any reasonable likelihood" that the false testimony had affected the verdict. *Agurs*, *supra*, at 103, 96 S.Ct. 2392 (citing *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), in turn quoting *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). We have treated "reasonable likelihood" as synonymous with "reasonable possibility" and thus have equated materiality in the perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt. *Bagley*, *supra*, at 678–680, and n. 9, 105 S.Ct. 3375 (opinion of Blackmun, J.). See also *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (defining harmless-beyond-a-reasonable-doubt standard as no "'reasonable possibility' that trial error contributed to the verdict"); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (same). In *Agurs*, we thought a less demanding standard appropriate when the prosecution fails to turn over materials in the absence of a specific request. Although we refrained from attaching a label to that standard, we explained it as falling between the more-likely-than-not level and yet another criterion, whether the reviewing court's "'conviction [was] sure that the error did not influence the jury, or had but very slight effect.'" 427 U.S., at 112, 96 S.Ct. 2392 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Finally, in *United States v. Bagley*, *supra*, we embraced "reasonable probability" as the appropriate standard to judge the materiality of information withheld by the prosecution whether or not the defense had asked first. *Bagley* took that phrase from *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where it had been used for the level of prejudice needed to make out a claim of constitutionally ineffective assistance of counsel. *Strickland* in turn cited two cases for its formulation, *Agurs* (which did not contain the expression "reasonable probability") and *United States v. Valenzuela–Bernal*, 458 U.S. 858, 873–874, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) (which held that sanctions against the Government for deportation of a potential defense witness were appropriate only if there was a "reasonable likelihood" that the lost testimony "could have affected the judgment of the trier of fact").

The circuitous path by which the Court came to adopt "reasonable probability" of a different result as the rule of *Brady* materiality suggests several things. First, while "reasonable possibility" or "reasonable likelihood," the *Kotteakos* standard, and "reasonable probability" express distinct levels of confidence concerning the hypothetical effects of errors on decisionmakers' reasoning, the differences among the standards are slight. Second, the gap between all three of those formulations and "more likely than not" is greater than any differences among them. Third, because of that larger gap, it is misleading in *Brady* cases to use the term "probability," which is naturally read as the cognate of "probably" and thus confused with "more likely than not," see *Morris v. Mathews*, 475 U.S. 237, 247, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) (apparently treating "reasonable probability" as synonymous with "probably"); *id.*, at 254, n. 3, 106 S.Ct. 1032 (Blackmun, J., concurring in judgment) (cautioning against confusing "reasonable probability" with more likely than not). We would be better off speaking of a "significant possibility" of a different result to characterize the *Brady* materiality standard. Even then, given the soft edges of all these phrases,[3] the

3. Each of these phrases or standards has been used in a number of contexts. This Court has used "reasonable possibility," for example, in defining the level of threat of injury to competition needed to make out a claim under the Robinson-Patman Act, see, *e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993); the standard for judging whether a grand jury subpoena should be quashed under Federal Rule of Criminal Procedure 17(c), see *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991); and the debtor's burden in establishing that certain collateral is necessary to reorganization and thus exempt from the Bankruptcy Code's automatic stay provision, see *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484

touchstone of the enquiry [301] must remain whether the evidentiary suppression "undermines our confidence" that the factfinder would have reached the same result.

II

Even keeping in mind these caveats about the appropriate level of materiality, applying the standard to the facts of this case does not give the Court easy answers, as the Court candidly acknowledges. See *ante*, at 1952. Indeed, the Court concedes that discrediting Stoltzfus's testimony "might have changed the outcome of the trial," *ante*, at 1952–1953, and that the District Court was "surely correct" to find a "reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result, either at the guilt or sentencing phases," *ante*, at 1953.

In the end, however, the Court finds the undisclosed evidence inadequate to undermine confidence in the jury's sentencing [302] recommendation, whereas I find it sufficient to do that. Since we apply the same standard to the same record, our differing conclusions largely reflect different assessments of the significance the jurors probably ascribed to the Stoltzfus testimony. My assessment turns on two points. First, I believe that in making the ultimate judgment about what should be done to one of several participants in a crime this appalling the jurors would very likely have given weight to the degree of initiative and leadership exercised by that particular defendant. Second, I believe that no other testimony comes close to the prominence and force of Stoltzfus's account in showing Strickler as the unquestionably dominant member of the trio involved in Whitlock's abduction and the aggressive and moving figure behind her murder.

Although Stoltzfus was not the prosecution's first witness, she was the first to describe Strickler in any detail, thus providing the frame for the remainder of the story the prosecution presented to the jury. From the start of Stoltzfus's testimony, Strickler was "Mountain Man" and his male companion "Shy Guy," labels whose repetition more than a dozen times (by the prosecutor as well as by Stoltzfus) must have left the jurors with a clear sense of the relative roles that Strickler and Henderson played in the crimes that followed Stoltzfus's observation. According to her, when she first saw Strickler she "just sort of instinctively backed up because I was frightened." App. 36. Unlike retiring "Shy Guy," Strickler was "revved up." *Id.*, at 39, 60. Even in describing her first encounter with Strickler inside the mall, Stoltzfus spoke of him as domineering, a "very impatient" character yelling at his female companion, "Blonde Girl," to join him. *Id.*, at 36, 38–39.

U.S. 365, 375–376, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). We have adopted the standard established in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), for determining the harmlessness of nonconstitutional errors on direct review as the criterion for the harmlessness enquiry concerning constitutional errors on collateral review. See *Brecht v. Abrahamson*, 507 U.S. 619, 637–638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). We have used "reasonable probability" to define the plaintiff's burden in making out a claim under § 7 of the Clayton Act, see, *e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *FTC v. Morton Salt Co.*, 334 U.S. 37, 55–61, 68 S.Ct. 822, 92 L.Ed. 1196 (1948) (Jackson, J., dissenting in part) (contrasting "reasonable possibility" and "reasonable probability" and arguing for latter as appropriate standard under Robinson-Patman Act); the standard for granting certiorari, vacating, and remanding in light of intervening developments, see, *e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) *(per curiam)*; and the standard for exempting organizations from otherwise valid disclosure requirements in light of threats or harassment resulting from the disclosure, see, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 74, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)*. We have recently used "significant possibility" in explaining the circumstances under which nominal compensation is an appropriate award in a suit under the Longshore and Harbor Workers' Compensation Act, see *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 123, 117 S.Ct. 1953, 138 L.Ed.2d 327 (1997), but we most commonly use that term in defining one of the requirements for the granting of a stay pending certiorari. The three-part test requires a "reasonable probability" that the Court will grant certiorari or note probable jurisdiction, a "significant possibility" that the Court will reverse the decision below, and a likelihood of irreparable injury absent a stay. See, *e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 895, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 114 S.Ct. 1036, 127 L.Ed.2d 530 (1994) (REHNQUIST, C.J., in chambers).

After describing in detail how "Mountain Man" and "Blonde Girl" were dressed, Stoltzfus said that "'Mountain Man' came tearing out of the Mall entrance door and went up to the driver of [a] van and ... was just really mad and ran back and banged on back of the backside of the van" while "Shy Guy" and "Blonde Girl" hung back. *Id.*, at 43. "Mountain Man" approached a pickup truck, then "pounded on" the front passenger side window of Whitlock's car, "shook and shook the car door," "banging and banging on the window" while Whitlock checked to see if the door was locked. *Ibid.* Finally, "he just really shook it hard and you could tell he was mad. Shook it really hard and the door opened and he jumped in ... and faced her." *Id.*, at 43–44. While Whitlock tried to push him away, "Mountain Man" "motioned for 'Blonde Girl' and 'Shy Guy' to come" and the girl did as she was bidden. She "started to jump into the car," but "jumped back" when Whitlock stepped on the gas. *Id.*, at 44. Then "Mountain Man" started "hitting [Whitlock] on the left shoulder, her right shoulder and then ... the head," finally "open[ing] the door again" so "the 'Blonde Girl' got in the back and 'Shy Guy' followed and got behind him." *Id.*, at 45. "Shy Guy" passed "Mountain Man" his tan coat, which "Mountain Man" "fiddled with" for "what seemed like a long time," then "sat back up and ... faced" Whitlock while "the other two in the back seat sat back and relaxed." *Ibid.* Stoltzfus then claimed that she got out of her car and went over to Whitlock's, whereupon unassertive "Shy Guy" "instinctively jumped, you know, laid over on the seat to hide from me." *Id.*, at 46. Stoltzfus pulled up next to Whitlock's car and repeatedly asked, "[A]re you O.K.[?]," but Whitlock responded only with eye contact; "she didn't smile, there was no expression," and "[j]ust very serious, looked down to her right," suggesting Strickler was holding a weapon on her. *Id.*, at 46, 47. Finally, Whitlock mouthed something, which Stoltzfus demonstrated for the jury and then explained she realized must have been the word, "help." *Id.*, at 47.

Without rejecting the very notion that jurors with discretion in sentencing would be influenced by the relative dominance of one accomplice among others in a shocking crime, I could not regard Stoltzfus's colorful testimony as anything but significant on the matter of sentence. It was Stoltzfus alone who described Strickler as the initiator of the abduction, as the one who broke into Whitlock's car, who beckoned his companions to follow him, and who violently subdued the victim while "Shy Guy" sat in the back seat. The bare content of this testimony, important enough, was enhanced by one of the inherent hallmarks of reliability, as Stoltzfus confidently recalled detail after detail. The withheld documents would have shown, however, that many of the details Stoltzfus confidently mentioned on the stand (such as Strickler's appearance, Whitlock's appearance, the hour of day when the episode occurred, and her daughter's alleged notation of the license plate number of Whitlock's car) had apparently escaped her memory in her initial interviews with the police. Her persuasive account did not come, indeed, until after her recollection had been aided by further conversations with the police and with the victim's boyfriend. I therefore have to assess the likely havoc that an informed cross-examiner could have wreaked upon Stoltzfus as adequate to raise a significant possibility of a different recommendation, as sufficient to undermine confidence that the death recommendation would have been the choice. All it would have taken, after all, was one juror to hold out against death to preclude the recommendation actually given.

The Court does not, of course, deny that evidence of dominant role would probably have been considered by the jury; the Court, instead, doubts that this consideration, and the evidence bearing on it, would have figured so prominently in a juror's mind as to be a fulcrum of confidence. I am not convinced by the Court's reasons.

The Court emphasizes the brutal manner of the killing and Strickler's want of remorse, as jury considerations diminishing the relative importance of Strickler's position as ringleader. See *ante*, at 1955. Without doubt the jurors considered these to be important factors, and without doubt they may have been treated as sufficient to warrant

death. But as the Court says, sufficiency of other evidence and the facts it supports is not the *Brady* standard; and the significance of both brutality and sangfroid must surely have been complemented by a certainty that without Strickler there would have been no abduction and no ensuing murder.

The Court concludes that Stoltzfus's testimony is unlikely to have had significant influence on the jury's sentencing recommendation because the prosecutor made no mention of her testimony in his closing statement at the sentencing proceeding. See *ante*, at 1954. But although the Court is entirely right that the prosecution gave no prominence to the Stoltzfus testimony at the sentencing stage, the State's closing actually did include two brief references to Strickler's behavior in "just grabbing a complete stranger and abducting her," 19 Record 919; see also *id.*, at 904, as relevant to the jury's determination of future dangerousness. And since Strickler's criminal record had no convictions involving actual violence, a point defense counsel stressed in his closing argument, see *id.*, at 913, the jurors may well have given weight to Stoltzfus's lively portrait of Strickler as the aggressive leader of the group, when they came to assess his future dangerousness.

What is more important, common experience, supported by at least one empirical study, see Bowers, Sandys, & Steiner, Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making, 83 Cornell L.Rev. 1476, 1486–1496 (1998), tells us that the evidence and arguments presented during the guilt phase of a capital trial will often have a significant effect on the jurors' choice of sentence. True, Stoltzfus's testimony directly discussed only the circumstances of Whitlock's abduction, but its impact on the jury was almost certainly broader, as the prosecutor recognized. After the jury rendered its verdict on guilt, for example, the defense moved for a judgment of acquittal on the capital murder charge based on insufficiency of the evidence. In the prosecutor's argument to the court he replied that

> "the evidence clearly shows that this man was the aggressor. He was the one that ran out. He was the one that grabbed Leanne Whitlock. When she struggled trying to get away from him ..., he was the one that started beating her there in the car. And finally subdued her enough to make her drive away from the mall, so you start with the principle that he is the aggressor." 20 Record 15.

Stoltzfus's testimony helped establish the "principle," as the prosecutor put it, that Strickler was "the aggressor," the dominant figure, in the whole sequence of criminal events, including the murder, not just in the abduction. If the defense could have called Stoltzfus's credibility into question, the jurors' belief that Strickler was the chief aggressor might have been undermined to the point that at least one of them would have hesitated to recommend death.

The Court suggests that the jury might have concluded that Strickler was the leader based on three other pieces of evidence: Kurt Massie's identification of Strickler as the driver of Whitlock's car on its way toward the field where she was killed; Donna Tudor's testimony that Strickler kept the car the following week; and Tudor's testimony that Strickler threatened Henderson with a knife later on the evening of the murder. But if we are going to look at other testimony we cannot stop here. The accuracy of both Massie's and Tudor's testimony was open to question,[4] and all of it was subject to some evidence that Henderson had taken a major role in the murder. The Court has quoted the District Court's summation of evidence against him, *ante*, at 1953, n. 36: Henderson's wallet was found near the body, his clothes were bloody, he presented a woman friend with the victim's watch at a post-

4. Massie's identification was open to some doubt because it occurred at night as one car passed another on a highway. Moreover, he testified that he first saw four people in the car, then only three, and that none of the occupants was black. App. 66–67, 70–73. Tudor, as defense counsel brought out on cross-examination, testified pursuant to a cooperation agreement with the government and admitted that the story she told on the stand was different from what she had told the defense investigator before trial. *Id.*, at 100–101, 103–104.

mortem celebration (which he left driving the victim's car), and he confessed to a friend that he had just killed an unidentified black person. Had this been the totality of the evidence, the jurors could well have had little certainty about who had been in charge. But they could have had no doubt about the leader if they believed Stoltzfus.

Ultimately, I cannot accept the Court's discount of Stoltzfus in the *Brady* sentencing calculus for the reason I have repeatedly emphasized, the undeniable narrative force of what she said. Against this, it does not matter so much that other witnesses could have placed Strickler at the shopping mall on the afternoon of the murder, *ante*, at 1954, or that the Stoltzfus testimony did not directly address the aggravating factors found, *ante*, at 1955. What is important is that her evidence presented a gripping story, see E. Loftus & J. Doyle, Eyewitness Testimony: Civil and Criminal 5 (3d ed. 1997) ("[R]esearch redoundingly proves that the story format is a powerful key to juror decision making"). Its message was that Strickler was the madly energetic leader of two morally apathetic accomplices, who were passive but for his direction. One cannot be reasonably confident that not a single juror would have had a different perspective after an impeachment that would have destroyed the credibility of that story. I would accordingly vacate the sentence and remand for reconsideration, and to that extent I respectfully dissent.

GRUPO MEXICANO de DESARROLLO, S.A., et al., Petitioners,

v.

ALLIANCE BOND FUND, INC., et al.

No. 98–231.

Argued March 31, 1999.

Decided June 17, 1999.

Investment funds, which had purchased unsecured notes issued by Mexican toll road operator, sued operator and guarantors, alleging that operator had defaulted on its obligation under the notes, and seeking damages and preliminary injunction restraining operator from assigning toll road notes issued by Mexican government. The United States District Court for the Southern District of New York, John S. Martin, Jr., J., granted preliminary injunction preventing operator from dissipating, transferring, conveying, or otherwise encumbering funds' right to receive or benefit from government-issued toll road notes. Operator and guarantors appealed. The Court of Appeals for the Second Circuit, McLaughlin, Circuit Judge, affirmed, 143 F.3d 688. Certiorari was granted. The Supreme Court, Justice Scalia, held that: (1) district court's postappeal conversion of preliminary injunction into permanent injunction, coupled with its entry of final judgment in favor of funds on their contract claim, did not render appeal concerning propriety of the preliminary injunction moot; (2) neither failure of operator and guarantors to appeal permanent injunction, nor fact that they lost the case on the merits, resulted in forfeiture of their claim that preliminary injunction was wrongful; (3) prior to entry of money judgment, district court lacked power to issue a preliminary injunction preventing operator from transferring assets in which no lien or equitable interest was claimed; and (4) any enlargement of district courts' equitable powers in this respect was properly left to Congress.

Reversed and remanded.

Justice Ginsburg filed dissenting opinion in which Justices Stevens, Souter, and Breyer joined.

1. Federal Courts ⇐462

Appeal from grant of a preliminary injunction generally becomes moot when trial court enters a permanent injunction, because the former merges into the latter.

2. Federal Courts ⇐462

District court's postappeal conversion of preliminary injunction into permanent in-

APPENDIX F

Donald Allen JONES, Petitioner,

v.

STATE of South Carolina, Respondent.

No. 24832.

Supreme Court of South Carolina.

Heard Oct. 3, 1995.

Decided Aug. 31, 1998.

Rehearing Denied Oct. 7, 1998.

Defendant was convicted in the Circuit Court, Lancaster County, George F. Coleman, J., of murder, armed robbery, first-degree criminal sexual conduct, housebreaking, grand larceny, and kidnapping, and was sentenced to death. Following affirmance, 288 S.C. 1, 340 S.E.2d 782. United States Supreme Court vacated judgment, and case was remanded for resentencing. Death sentence was again imposed, judgment was entered thereon by James M. Morris, J., and sentence was affirmed, 298 S.C. 118, 378 S.E.2d 594. Application for post-conviction relief was denied by Paul E. Short, Jr., J., and defendant petitioned for writ of certiorari. The Supreme Court, Toal, J., held that: (1) defendant was not prejudiced by his attorneys' alleged failure to thoroughly investigate and present at resentencing mitigating evidence regarding his mental impairments, and (2) inmate's passing references to defendant being on death row did not prejudice defendant on resentencing.

Affirmed.

Finney, C.J., issued dissenting opinion.

1. **Criminal Law ⇐641.13(7)**

Even if capital murder defendant's attorneys failed to thoroughly investigate and present at resentencing mitigating evidence regarding his mental impairments, he was not thereby prejudiced; extensive evidence was presented at resentencing hearing about defendant's family and social background and bizarre behavior through his teacher, mother, two aunts, and uncle, jurors were aware through clinical psychologist's testimony that defendant was mentally retarded and had brain damage, they were given several mitigating factors through which to consider defendant's mental condition, and they were also presented with overwhelming evidence of his guilt and callous and heinous way in which he calculated and executed murder. U.S.C.A. Const.Amend. 6.

2. **Criminal Law ⇐796**

The sentencing jury in a capital case should not be instructed to "weigh" the aggravating circumstances against the mitigating circumstances.

3. **Homicide ⇐343**

Inmate's passing references to capital murder defendant being on death row did not prejudice defendant on resentencing; jury may have construed such comments as meaning that defendant was under death sentence for previous crime, and defendant did not establish how such comments misled jury regarding its role in sentencing process or diminished its sense of responsibility.

John H. Blume and Teresa L. Norris, both of Center for Capital Litigation; and South Carolina Office of Appellate Defense, Columbia, for petitioner.

Attorney General Charles Molony Condon and Assistant Deputy Attorney General Donald J. Zelenka, Columbia, for respondent.

ON WRIT OF CERTIORARI

TOAL, Justice:

We granted a petition for writ of certiorari from Donald Allen Jones to review the question of the denial of his right to effective assistance of counsel. We affirm the circuit court's order of dismissal.

FACTUAL/PROCEDURAL BACKGROUND

In October 1983, Donald Allen Jones broke into the residence of Ned and Geraldine Plyler, while they were away. He stole some money from the house. When the Plylers returned, Jones attacked them, killing Mr. Plyler and then raping Mrs. Plyler.

Jones was arrested and tried. He was convicted of murder, armed robbery, criminal sexual conduct, housebreaking, grand larceny, and kidnapping, and was sentenced to death. His convictions and sentence were

affirmed by this Court in *State v. Jones*, 288 S.C. 1, 340 S.E.2d 782 (1985). The United States Supreme Court vacated this judgment in *Jones v. South Carolina*, 476 U.S. 1102, 106 S.Ct. 1943, 90 L.Ed.2d 353 (1986), in light of *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). The case was remanded for a new sentencing proceeding in which Jones would be allowed to present evidence of his future adaptability to life in prison. At the resentencing, Jones was again sentenced to death. On direct appeal from his resentencing, Jones argued, *inter alia*, the trial judge erred in refusing to submit as a statutory mitigating circumstance that the murder was committed while he was under the influence of mental or emotional disturbance. *See* S.C.Code Ann. § 16–3–20(C)(b)(2) (Supp.1996). This Court found there was no evidence presented which indicated, at the time of the murder, Jones was under the influence of mental or emotional disturbance and, therefore, concluded the trial judge properly refused to charge the statutory mitigating circumstance. *State v. Jones*, 298 S.C. 118, 378 S.E.2d 594 (1989), *cert. denied*, 494 U.S. 1060, 110 S.Ct. 1534, 108 L.Ed.2d 773 (1990).

In 1990, Jones filed an application for Post–Conviction Relief ("PCR"). After an evidentiary hearing, the circuit court issued an order of dismissal. Jones's Rule 59(e) motion to alter or amend the final order was denied. He then filed a petition for writ of certiorari, and this Court granted certiorari to review one question. This question is divided into two parts:

1. Was Jones denied the right to effective assistance of counsel at his resentencing proceeding as a result of trial counsel's failure to adequately investigate and present relevant mitigating evidence regarding his impoverishment, the neglect and abuse to which he was subjected, his severe mental illness, and his neurological impairment?

2. Was Jones denied the right to effective assistance of counsel as a result of trial counsel's introduction of evidence that Jones had previously been sentenced to death?

Law/Analysis

A. Mitigating Evidence: Social History and Mental Impairment

[1] Jones argues that he was denied the right to effective assistance of counsel during his resentencing proceeding because his attorneys failed to thoroughly investigate and present mitigating evidence regarding his mental impairments. Specifically, Jones argues resentencing counsel were ineffective because they failed to adequately investigate his social history, obtain his mental records, and provide this information to his one expert witness, Dr. Diane Follingstad. He further claims counsel were ineffective because they did not obtain the neurological testing specifically recommended by Dr. Follingstad. Jones maintains a complete picture of his mental condition would have established he was suffering from a mental or emotional disturbance at the time he committed the murder and, thereby, entitled him to a charge on the additional statutory mitigating circumstance. *See* S.C.Code Ann. § 16–3–20(C)(b)(2) (the murder was committed while the defendant was under the influence of mental or emotional disturbance).

Under the test for ineffective assistance of counsel enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the petitioner must establish that counsel's representation fell below an objective standard of reasonableness. Then he must show that the deficient performance prejudiced the defense. When a defendant challenges a death sentence, prejudice is established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069, 80 L.Ed.2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

[2] Even if we assume in the present case that counsel's representation fell below an objective standard of reasonableness,

Jones fails the prejudice prong of the *Strickland* test. We find that there is not a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case and the aggravating factors the jury found, as well as the mitigating factors that might have been presented if Jones had been provided effective assistance of counsel. *See Stafford v. Saffle*, 34 F.3d 1557, 1564 (10th Cir.1994), *cert. denied*, 514 U.S. 1099, 115 S.Ct. 1830, 131 L.Ed.2d 751 (1995). The bottom line is that we must determine whether or not Jones has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about Jones's mental condition. In making this determination, we must consider the totality of the evidence before the jury.[1] *See Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

In this case, the jury was presented with overwhelming evidence of Jones's guilt and of the aggravating circumstances surrounding the murder. During the resentencing proceeding, testimony revealed how Jones, a former employee of the Plylers, broke into their home on October 11, 1983. After entering onto the property, he stole some money from the home and, while there, shot the Plylers' three dogs. When the Plylers eventually returned, Jones was standing on the porch. He approached Mr. Plyler, demanded money, and then from a few feet away, shot him with a shotgun. Mr. Plyler took a few steps and slumped forward on his face. Jones demanded that Mrs. Plyler remove the money that was in her husband's pocket. When she failed, Jones removed the money himself. Despite Mrs. Plyler's plea that he not shoot again, Jones shot Mr. Plyler in the head two more times with a pistol.

He then grabbed Mrs. Plyler by the elbow, took her inside, and sexually assaulted her at gunpoint in various rooms in the house for approximately two hours. At one point, he informed her he had killed her dogs and threatened to kill her son. Jones left Mrs. Plyler blindfolded, gagged, and tied to a bed. She heard him start her pickup truck, then immediately turn it off. Jones returned to the house; he told Mrs. Plyler he was checking to see if she was attempting to escape. Jones then drove away in the truck. Mrs. Plyler testified she untied herself and escaped from her home. For twenty minutes she worked her way in the dark over a barbed wire fence and through a pasture, towards a neighbor's home. Mrs. Plyler saw Jones return in the pickup truck; he appeared to enter the Plylers' home. He then left the home and drove the pickup truck back and forth, apparently in search of Mrs. Plyler. At one point, Jones stopped the vehicle and turned off its lights within fifteen feet of where Mrs. Plyler was hiding. Eventually, Jones drove off, and Mrs. Plyler was able to reach a neighbor's home. She reported the events to police. Jones was soon thereaf-

1. It should be clarified that our approach in this case is not inconsistent with, nor does it abrogate, precedent that has held that a jury should not be instructed to "weigh" the aggravating circumstances against the mitigating circumstances. *See State v. Bellamy*, 293 S.C. 103, 359 S.E.2d 63 (1987), *overruled on other grounds* by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Our analysis here relates not to jury instructions, but to determining, for purposes of post-conviction relief, ineffective assistance of counsel in death penalty cases.

A review of case law reveals why juries are not instructed to weigh aggravating and mitigating circumstances. In *State v. Shaw*, 273 S.C. 194, 205, 255 S.E.2d 799, 804 (1979), *cert. denied*, 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329 (1980), we rejected the defendants' contention that the death penalty "statutory complex is constitutionally defective because it does not assign numerical values to the aggravating and mitigating circumstances so that the sentencing authority can determine when the mitigating circumstances outweigh the aggravating circumstances." Based on this reasoning, *State v. Plath*, 281 S.C. 1, 19, 313 S.E.2d 619, 629, *cert. denied*, 467 U.S. 1265, 104 S.Ct. 3560, 82 L.Ed.2d 862 (1984) declared that "Additional aggravating circumstances do not, under our statute, contribute to the actual selection of the death penalty because juries in this State are not instructed to 'weigh' circumstances of aggravation against circumstances of mitigation." Thus, the type of "weighing" we have disapproved of is that which requires a jury to determine life or death on the basis of the numerical weight of the aggravating and mitigating circumstances. The "weighing" that is permissible is the *considering* of any mitigating and aggravating circumstances. *See Bellamy*, 293 S.C. at 107, 359 S.E.2d at 65.

ter arrested. He was identified by Mrs. Plyler, who knew him prior to these incidents. Moreover, physical evidence linked him to the crime. His palm prints were found inside the Plylers' residence.

In mitigation, Jones presented six witnesses who were familiar with his background. These included a school teacher, four family members, and a psychologist. Jones's third grade teacher stated that Jones had difficulty retaining skills and that he was in special education classes. Jones's aunt also testified on his behalf about his childhood and stated that Donald smiled inappropriately, although his behavior generally was not unusual. In his later years, he would wear shorts in the winter and a coat during the summer. While in jail, he would respond to letters from family members by rewriting and returning the correspondence he had received.

Jones's mother testified to other unusual behavior by Jones. On two occasions, he engaged in "tearing [his mother's] house up." He would sometimes take a bath using big buckets. He would sit on the side of the bridge and "look like he was just in a deep wonder." He began doing these things after his sister's death. Another of Jones's aunts testified that he was a happy and obedient child. While in prison, Jones also answered her letters by sending the same letter back. Moreover, Jones's uncle testified on his behalf.

Thus, extensive evidence was presented at the resentencing hearing about Jones's family and social background through his teacher, mother, two aunts, and uncle. They highlighted the changes that occurred in him after the death of his sister and pointed out his unusual behavior.

In addition, counsel presented Dr. Diane Follingstad, a clinical psychologist, who had tested Jones. Dr. Follingstad had administered tests that screen for brain damage. She testified that Jones had "some mental deficiency." Further, she indicated that she had administered the Wechsler Adult Intelligence Scale ("WAIS") test on Jones. On the WAIS, he scored a 74 as to verbal I.Q., a 63 on the performance I.Q., achieving an overa I.Q. of 67, which is in the "mentally retarde range." She testified that with an I.Q. of 67 Jones "would have only one and a half per cent of the population lower than him." She also gave him the Bender Gestalt tes and Trails test, which screen for organi brain damage. On these tests, Jones score "within a brain damaged range," which sug gested "he does have some problem with th actual functioning of his brain." She furthe stated that Jones

> does act impulsively, that he doesn't thin things through, that he does have ver poor judgment, extremely poor judgment that he doesn't seem to have the ability t really be able to stop and consider a vari ety of options. He also doesn't have a lo of information about the world to use, an he also doesn't have many options to ge society's rewards in a more legitimate way ... but that he just—he doesn't see man options for himself.

She did not specifically diagnose Jones a being mentally ill at the time of the murder

Against the recommendation of defens counsel, Jones testified during resentencing He admitted planning to steal money fron the Plylers several days before he actuall committed the crimes. Jones explained h stole a shotgun and shells. He hid the shot gun before going to rob the Plylers. H testified he planned to have Mrs. Plyler writ a check and then hold her hostage until th bank opened. Once he cashed the check, h planned to kill Mrs. Plyler.

Jones stated that on the day of the crimes he shot the Plylers' dogs, broke a window o the side of their home where no one woul notice, and waited in the Plylers' home fo them to return. Since he only had a fe shotgun shells, Jones testified he loaded th shotgun with some of Mr. Plylers' own shell and test-fired the shotgun against a wall o the home. While waiting, Jones cut th ropes he used to bind Mrs. Plyler and locate Mr. Plyler's pistol.

Jones testified that when the Plylers re turned home, he did not ask Mr. Plyler t

2. These were nearly the same scores determined by Dr. James Evans, who testified for Jones at the PCR hearing.

give him his money, but immediately shot him with the shotgun. Jones admitted he knew Mr. Plyler was still alive, so Jones shot him twice with Mr. Plyler's own pistol. Jones acknowledged the Plylers, for whom he had worked, had been good to him, and he had nothing against them.

Based on the evidence presented in the resentencing phase, the jury considered five statutory aggravating circumstances: (1) robbery while armed with a deadly weapon; (2) larceny with the use of a deadly weapon; (3) housebreaking; (4) criminal sexual conduct in the first degree; and (5) kidnapping. Moreover, the following statutory mitigating circumstances were considered: (1) the defendant has no significant history of prior criminal conviction involving the use of violence against another person; (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (3) the age or mentality of the defendant at the time of the crime; and (4) other mitigating circumstance or circumstances otherwise authorized by law.

After deliberating, the jury found beyond a reasonable doubt the existence of all five aggravating circumstances listed above and recommended that Jones be sentenced to death for the murder of Ned Plyler. The resentencing judge then found as an affirmative fact that the evidence of the case warranted the imposition of the death penalty and that its imposition was not the result of prejudice, passion, or any other arbitrary factor.

At the PCR hearing, Jones presented the testimony of four experts. Patricia Feigley, a clinical social worker, testified about the importance of conducting a family and social history. Testifying at length about Jones's upbringing and poor physical and social environment, she indicated that he was mentally retarded and suffered from a speech defect. Dr. James Evans, a clinical psychologist, testified that he had tested Jones and had concluded that Jones had an I.Q. of 69, within the range of mental retardation. Jones had a poor memory and exhibited signs of neuropsychological dysfunction and organic brain dysfunction.

A neurologist Dr. Nancy Earl stated that Jones showed signs "consistent with the diagnosis of mental retardation and organic brain dysfunction or syndrome," and he had difficulty thinking in abstractions. Jones's language was within the range of normality, but his speech was not normal. He could understand and relate fairly well with concrete concepts, but had considerable difficulty with more abstract concepts.

The diagnostic impressions of Dr. Billy Royal, a psychiatrist, were that Jones suffered from mild mental retardation, organic mental syndrome, and psychotic disorder. Although Royal admitted that a 1983 neurological examination of Jones had not revealed organic brain damage, he stated that a neuropsychological test may have been necessary to detect it.

In summary, these experts testified that Jones was mentally retarded, had brain damage, and suffered from mental illness. The witnesses concluded Jones had each of these disorders at the time the crimes were committed. The experts maintained Dr. Follingstad did not have an adequate social history, complete mental records, and sufficient testing, such as a neurological examination, by which to evaluate Jones and, accordingly, she could not have diagnosed Jones as suffering from mental illness.

With regard to Jones's mental condition, even if counsel had fully explored the mitigating circumstance of his mental incapacity, all that would have occurred at the resentencing was that the jury would have heard a more elaborate version of Dr. Follingstad's testimony. Follingstad did discuss that Jones was in the range for organic brain damage, that he fell within the "mentally retarded range," and that his I.Q. ranked in the lowest one and one-half percent in the population. Mental retardation and organic brain dysfunction were the same ailments discovered by Drs. Earl, Evans, and Royal, the experts Jones presented at the PCR hearing. We find that additional evidence about Jones's mental impairment would not have revealed anything significantly different than that which the jury was presented.

At the sentencing hearing, the mentality of Jones was the focus of his mitigation case.

His counsel's strategy was not to portray Jones as being under active mental and emotional disturbance, but rather to emphasize his mental retardation, as evidenced by his upbringing.[3] This strategy obviously did not succeed. Just because it was unsuccessful does not mean that Jones can now recharacterize the evidence and claim that counsel did not adequately present mitigation evidence. The "new" evidence is the same as the "old" evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation.

Nevertheless, for purposes of the *Strickland* analysis, let us assume that if Jones's PCR experts had been presented at the resentencing hearing, Jones would have been entitled to an instruction on the additional mitigating circumstance found in section 16–3–20(C)(b)(2). Even if counsel's representation was not objectively reasonable, Jones has not met his burden of establishing prejudice under *Strickland*. From the testimony presented, the jurors were aware that Jones was mentally retarded, that he had brain damage, and that he often behaved in a bizarre manner. They were given several mitigating factors through which to consider the mental condition of Jones. They were also presented with overwhelming evidence of Jones's guilt and the callous and heinous way in which Jones calculated and executed the murder. They also considered the other aggravating factors surrounding the murder. Under these circumstances, there is no reasonable probability the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death, even if it had knowledge that, at the time of the murder, Jones was under the influence of a mental disturbance. Accordingly, Jones fails to establish ineffective assistance of counsel under *Strickland*.

The dissent posits that *Strickland*'s standard (whether there is a reasonable probability that, absent the errors, the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death) is a specific application under the Florida statutory sentencing scheme, and does not have applicability here because South Carolina has a different statutory scheme. A perusal of *Strickland* itself, as well as other cases, will reveal that *Strickland* is not so limited. In relation to its prejudice prong, *Strickland* declared:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Strickland, 466 U.S. at 695, 104 S.Ct. at 2068–69, 80 L.Ed.2d at 698. The United States Supreme Court set forth the above standard for determining prejudice for all ineffective assistance of counsel cases challenging death sentences. It did not restrict the above test to cases arising under statutory sentencing schemes such as that utilized in Florida.

This was confirmed by *Plath v. Moore*, 130 F.3d 595 (4th Cir.1997). In *Plath*, the Fourth Circuit considered an ineffective assistance of counsel claim by John Plath, who had been sentenced to death in South Carolina. In affirming the denial of a petition for writ of habeas corpus, the Court stated:

> [W]hen considered against the sheer magnitude of the aggravating evidence against Plath, it is difficult to see the allegedly unreasonable omission of this mitigating evidence as prejudicial. As in *Strickland*, "[g]iven the overwhelming aggravating factors, there is no reasonable probability

3. *See Truesdale v. Moore*, 142 F.3d 749, 753–54 (1998) ("The Supreme Court has instructed us to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' Thus we ask not whether, with the benefit of hindsight, we would have conducted the defense differently.... Rather we must place ourselves in the shoes of [defendant's] attorneys and ask only whether their choices were objectively unreasonable.") (internal citation omitted).

> that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.

Plath, 130 F.3d at 602; *see also Waldrop v. Jones*, 77 F.3d 1308, 1312 (11th Cir.) ("When challenging a death sentence, a petitioner must show that 'there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' "), *cert. denied*, —— U.S. ——, 117 S.Ct. 247, 136 L.Ed.2d 175 (1996).

B. Evidence of Previous Death Sentence

[3] Jones next argues that he was denied the right to effective assistance of counsel because of counsel's introduction of evidence that Jones had previously been sentenced to death. We disagree.

At the resentencing hearing, Jones's attorney called Sylvester Williams to testify. In the course of his testimony, Williams recounted an incident between Jones and himself:

> The officer let me out my cell to get a haircut, and on my way back to the cell Donald Jones was around my side, and he was supposed to be on death row, and inmates on lock-up and death row don't suppose to mingle together, so he was down there with no handcuffs on, and I was handcuffed in the front, and me and him had had a few words about a week ago, and the correction officer had told me—. . . .

and,

> It really wasn't no conflict. It was words, you know, and death row inmates is up on the third—like a two story house. It's a three story house. . . .

Jones argues that as a result of these references to "death row," the reliability of the jury's verdict and sentence was diminished by the knowledge that another jury had sentenced Jones to die for the same offenses that were under consideration at the resentencing hearing.

In *Romano v. Oklahoma*, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994), the United States Supreme Court held that evidence of a defendant's prior death sentence did not deprive him of a fair sentencing proceeding. Jones argues *Romano* is distinguishable because in that case, the jury was made aware that the defendant had been sentenced to die for another offense.

Jones's ineffectiveness argument lacks merit for several reasons. In the present case, there was no formal introduction of evidence of his previous death sentence. There was only a passing reference to "death row" from which the jury may have inferred that Jones had been sentenced to death before. Second, the statement did not state that he was on death row for committing the crimes against the Plylers. It may have been construed by the jury as a death sentence for a previous crime.

Most importantly, however, Jones cannot escape the underlying rationale of *Romano*: "We do not believe that the admission of evidence regarding petitioner's prior death sentence affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility." *Id.* at 10, 114 S.Ct. at 2010, 129 L.Ed.2d at 11; *see also State v. Bell*, 302 S.C. 18, 24, 393 S.E.2d 364, 368 ("[W]e also reject Bell's argument that the jurors' knowledge of the previous death sentence diminished their sense of responsibility in deciding what sentence to impose."), *cert. denied*, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990). Jones has not established how this passing reference to "death row" has misled the jury regarding its role in the sentencing process or diminished its sense of responsibility. Because Jones clearly fails to meet *Strickland*'s prejudice prong, we need not address the first prong of the test.

Conclusion

For the foregoing reasons, the PCR court's order is **AFFIRMED.**

MOORE, WALLER and BURNETT, JJ., concur.

FINNEY, C.J., dissenting in separate opinion.

FINNEY, Chief Justice:

I respectfully dissent and would grant petitioner a new sentencing hearing.

On direct appeal from his resentencing proceeding, petitioner contended the trial judge committed reversible error in denying petitioner's request to charge the jury on the statutory mitigating circumstance that the murder was committed under the influence of mental or emotional disturbance. S.C.Code Ann. § 16–3–20(C)(b)(2) (Supp. 1995). The majority of the Court affirmed the refusal to charge, holding, "There was no evidence at trial that, at the time of the murder, Jones was under the influence of a mental or emotional disturbance." *State v. Jones*, 298 S.C. 118, 123, 378 S.E.2d 594, 597 (1989), *cert. denied*, 494 U.S. 1060, 110 S.Ct. 1534, 108 L.Ed.2d 773 (1990). I alone dissented, finding evidence in the record to support the requested charge. *Id.* at 126, 378 S.E.2d at 598 (Finney, A.J., dissenting). In light of the majority opinion in petitioner's direct appeal, it is *res judicata* that there was ***no evidence*** presented at the resentencing proceeding that petitioner was suffering from any mental or emotional disturbance at the time he killed Mr. Plyler and assaulted Mrs. Plyler. *State v. Gilbert*, 277 S.C. 53, 283 S.E.2d 179 (1981) (subsequent history omitted) (issues decided in first appeal are *res judicata* in later proceedings).

In this post-conviction relief (PCR) proceeding, petitioner alleged resentencing counsel were ineffective in failing to present evidence of his mental and emotional state so as to entitle him to a charge on the "mental/emotional disturbance" mitigating circumstance. The PCR judge denied relief. Rather than review the actual issue before this Court today, the majority opinion restates the question, and concludes that the evidence presented at the PCR hearing regarding petitioner's mental and emotional condition was merely cumulative to that presented at the original resentencing proceeding, and thus petitioner cannot meet his burden of demonstrating prejudice.

It appears that the Court today has recognized that my position in 1989 was correct, and that the evidence presented at the resentencing entitled petitioner to a mitigating charge. We were therefore in error in failing to reverse that resentencing on direct appeal. In my view, it is patently unfair and disingenuous to use our 1989 error as the reason we must also deny petitioner relief in 1997. The procedural posture of this case is that **no** evidence was presented at the resentencing proceeding that petitioner suffered from any mental or emotional disturbance at the time he committed this crime. *State v. Jones, supra.* The **new** evidence presented at the PCR hearing, as documented by the majority opinion, clearly would have entitled petitioner to a mitigating charge on mental/emotional disturbance. Counsel's failure to present this evidence was deficient.

The majority concludes petitioner failed to meet the prejudice prong of *Strickland* because "there is no reasonable probability the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death." This standard is a specific application of the oft-cited general rule of *Strickland* that to establish prejudice the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694, 104 S.Ct. 2052. This specific application of the rule is premised in *Strickland* on the United States Supreme Court's repeated recognition in that case that a capital penalty proceeding under Florida law requires the sentencer to weigh aggravating and mitigating circumstances. *See* Fla.Stat. § 921.141 (1997) (advisory jury must make finding whether mitigating circumstances outweigh aggravating circumstances; sentencing judge must find mitigating circumstances do not outweigh aggravating to impose death).

As noted by the majority, South Carolina, unlike Florida, does not require a weighing of aggravating and mitigating circumstances. Although a finding of an aggravating circumstance is necessary to support a death sentence, life may be imposed irrespective of such a finding and even in the absence of any mitigating circumstances. *See State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990); S.C.Code Ann. § 16–3–20 (Supp.1997). The sentencer always retains the discretion to impose a life sentence. Consequently, this Court has repeatedly held the failure to

submit to the sentencing jury a mitigating circumstance supported by the evidence is reversible error with no requirement that actual prejudice be shown. *See State v. Young*, 305 S.C. 380, 409 S.E.2d 352 (1991); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990); *State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986).

Because South Carolina's capital sentencing procedure is unlike Florida's, the specific application in *Strickland* of the prejudice prong is not controlling here. We cannot determine prejudice by weighing the aggravating and mitigating circumstances since there is no objective standard by which to revisit the impact of aggravating and mitigating circumstances on the sentencer's decision. In my opinion, this Court must look instead to *Strickland*'s general rule that prejudice is shown by demonstrating a reasonable probability that the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S.Ct. 2052.[1]

Here, petitioner was sentenced to death without the benefit of having the trial judge submit to the jury a mitigating circumstance to which he was entitled, and which could have swayed the jury, or even one juror, to impose life despite the aggravating circumstances in this case. *See* § 16–3–20(C) (jury shall not recommend death unless unanimous). This defect in petitioner's sentencing proceeding cannot help but undermine our confidence in the outcome. To conclude otherwise is to deny *Strickland*'s stated purpose—"to ensure a fair trial." 466 U.S. at 686, 104 S.Ct. 2052. I would reverse and remand for a new sentencing proceeding.

1. "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." 466 U.S. at 693, 104 S.Ct. 2052.

Ronald AUGHTRY, Employee, Claimant, Respondent,

v.

ABBEVILLE COUNTY SCHOOL DISTRICT # 60, Employer, and SC School Board Insurance Trust Fund, Carrier, Defendants, Appellants.

No. 2835.

Court of Appeals of South Carolina.

Submitted Aug. 13, 1998.

Decided Aug. 13, 1998.

Rehearing Denied Sept. 18, 1998.

Claimant sought workers' compensation benefits from school district for injuries he sustained in an automobile accident while going to work. The Circuit Court, Greenwood County, C. Victor Pyle, Jr., J., affirmed full Workers' Compensation Commission's finding that claimant's injury arose out of and in course and scope of his employment, and school district appealed. On rehearing, the Court of Appeals, Howard, J., held that: (1) going and coming rule applied to preclude claimant from receipt of benefits; (2) accident did not arise out of claimant's employment, even if going and coming rule's ban on receipt of benefits did not apply; (3) accident did not occur in the course of claimant's employment; (4) inherently dangerous exception to going and coming rule did not apply to accident; and (5) accident was not brought within scope of claimant's employment by an implied agreement that he use public road to get to work.

Reversed.

Anderson, J., filed dissenting opinion.

1. Workers' Compensation ⇐1939.4(4)

Findings of the full Workers' Compensation Commission will be set aside only if unsupported by substantial evidence.

1728 . 3932

APPENDIX G

No documents satisfy your query.

Your database is **SC-CS-ALL**

Your query:
"UNIQUELY UNDERMINE!"

No documents satisfy your query.

Your database is **ALLCASES-OLD**

Your query:
"UNIQUELY UNDERMINE!"

No documents satisfy your query.

Your database is **ALLCASES**

Your query:
"UNIQUELY UNDERMINE!"

APPENDIX H

obtains or requests counsel, *ante*, at 1181, the Court simply asserts that the defendant must make "a knowing and voluntary waiver of the right to counsel." *Ante*, at 1182.[14] The interview at issue in this case occurred after the right to counsel had been implemented, when respondent had been in custody for over two months and was to be tried in only a few days. Although [368]the interview was conducted by a police officer rather than a lawyer, it was in many respects comparable to a pretrial deposition. The value of representation by counsel is evident. If respondent had been properly advised by counsel in preparation for such a deposition, he would have reviewed all of the facts he intended to describe in his trial testimony and been counseled not to omit any significant details, including presumably the three whose omission the State made use of as impeachment here.[15] Interrogation outside the presence of counsel at this advanced stage of the proceedings can impair counsel's representation of his client and interfere with trial strategy.

Regardless of whether or not the Court is prepared to accept a finding that respondent's participation in such a pretrial deposition was "voluntary"—as measured by some undisclosed standard—it surely denigrates the value of the constitutional interest in the assistance of counsel to condone such a shabby practice.

IV

Apparently as a means of identifying rules that it disfavors, the Court repeatedly uses the term "prophylactic rule." See *ante*, at 1177, 1179, 1180, 1181, and 1182. It is important to remember, however, that all rules of law are prophylactic.[369] Speed limits are an example; they are designed to prevent accidents. The Sixth Amendment is another; it is designed to prevent unfair trials. An argument that a rule of law may be ignored, avoided, or manipulated simply because it is "prophylactic" is nothing more than an argument against the rule of law itself. The tragedy of today's decision is not merely its denigration of the constitutional right at stake; it also undermines the principle that those who are entrusted with the power of government have the same duty to respect and obey the law as the ordinary citizen.

I respectfully dissent.

494 U.S. 370, 108 L.Ed.2d 316

[370]**Richard BOYDE, Petitioner**

v.

CALIFORNIA.

No. 88–6613.

Argued Nov. 28, 1989.

Decided March 5, 1990.

Rehearing Denied April 30, 1990.

See 495 U.S. 924, 110 S.Ct. 1961.

Defendant was convicted in the Superior Court, Riverside County, Robert K. Garst, J.,

ny. We hold that it may do so." *Ante*, at 1177–1178.

14. "[W]e need not consider the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel."

15. As the Court acknowledges, *ante*, at 1178, and n. 2, the entire basis for the prosecutor's attempt to impeach respondent rested upon his failure to mention three details at his deposition. Respondent testified that he and the victim had smoked cocaine in the victim's house on the night of the incident and that another man and woman had been present during part of the time. App. 5–6. He testified at trial that he did not know the man's name, *id.*, at 36, but in the statement he had indicated that he "thought" his name was "Michael." *Id.*, at 37. Moreover, he also testified that this other man "had some caine, too, and he was smoking his. So we were like exchanging." *Id.*, at 39. But the statement had only mentioned cocaine that respondent had provided. *Ibid.* Finally, although respondent testified that he pushed the victim away after she threatened him with a fork, he neglected to mention during his deposition that he wrested the fork from her and threw it to the floor. *Id.*, at 44.

of robbery, kidnapping for robbery and first-degree murder. On automatic appeal following entry of death sentence, the California Supreme Court, 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25, affirmed. Defendant petitioned for writ of certiorari. The Supreme Court, Chief Justice Rehnquist, held that: (1) mandatory nature of jury instruction's "shall impose" language did not prevent jury from making individualized assessment of death penalty's appropriateness; (2) proper legal standard for reviewing claim that challenged instruction was ambiguous and therefore subject to erroneous interpretation was whether there was a reasonable likelihood that jury applied instruction in a way that prevented consideration of constitutionally relevant evidence; and (3) there was no reasonable likelihood that jurors in penalty phase interpreted trial court's instructions to preclude consideration of mitigating evidence of defendant's background and character.

Affirmed.

Justice Marshall filed a dissenting opinion in which Justice Brennan joined, and in which Justices Blackmun and Stevens joined in part.

1. **Criminal Law** ⇐1213.7, 1213.8(8)

Mandatory language in jury instruction listing factors that jury "shall consider, take into account and be guided by" in determining whether to impose death sentence or life imprisonment did not violate Eighth Amendment by precluding jury from evaluating absolute weight of aggravating circumstances and determining whether they justified the death penalty. U.S.C.A. Const.Amend. 8.

2. **Criminal Law** ⇐1208.1(6), 1213.7

There is no constitutional requirement of unfettered sentencing discretion in the jury; states are free to structure and shape consideration of the mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty. U.S.C.A. Const.Amend. 8.

3. **Criminal Law** ⇐1213.7, 1213.8(8)

The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by a criminal defendant in capital sentencing proceedings. U.S.C.A. Const.Amend. 8.

4. **Criminal Law** ⇐1172.1(1, 5)

In case involving jury instruction alleged to be ambiguous and therefore subject to erroneous interpretation, proper legal standard for reviewing instruction was whether there was a reasonable likelihood that jury had applied challenged instruction in a way that prevented consideration of constitutionally relevant evidence. U.S.C.A. Const. Amend. 8.

5. **Criminal Law** ⇐1213.7, 1213.8(8)

Although a defendant who alleges that a jury instruction is ambiguous and therefore subject to erroneous interpretation need not establish that jury was more likely than not to have been impermissibly inhibited by instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. U.S.C.A. Const.Amend. 8.

6. **Criminal Law** ⇐796

There was no reasonable likelihood that jurors in death penalty proceeding interpreted jury instruction to prevent consideration of mitigating evidence of defendant's background and character where jury was instructed that it was to consider any other circumstance which extenuated the gravity of the crime, even though it was not a legal excuse for the crime, and was given a definition of the term "extenuate" as meaning "to lessen the seriousness of a crime as by giving an excuse"; instruction did not improperly limit jury's consideration only to other circumstances of the crime. U.S.C.A. Const. Amend. 8.

7. **Criminal Law** ⇐796

Arguably ambiguous instruction allowing jury to consider other circumstances that might excuse the crime, when considered in

context of proceedings, did not pose reasonable likelihood that jurors would interpret instructions to preclude consideration of mitigating evidence of defendant's background and character in case in which all defense evidence presented at penalty phase, consisting of four days of testimony consuming over 400 pages of trial transcript, related to defendant's background and character and was admitted without objection. U.S.C.A. Const. Amend. 8.

8. **Criminal Law** ⇐722(2), 796

Prosecutorial arguments made immediately before jury's sentencing deliberations did not reinforce impermissible interpretation of catchall instruction allowing for consideration of other mitigating evidence so as to make it likely that jurors arrived at improper understanding of instruction, in light of generally lower weight accorded to arguments of counsel than to instructions from the court, and particularly since thrust of prosecutor's argument was to urge jury that defendant had to accept responsibility for his actions despite past difficulties as shown by background and character evidence. U.S.C.A. Const.Amend. 8.

Syllabus *

All of the evidence presented by petitioner Boyde during the penalty phase of his state-court capital murder trial related to his background and character. The trial court instructed the jury, *inter alia*, in accordance with instructions 8.84.1 and 8.84.2, 1 California Jury Instructions, Criminal (4th ed.) (CALJIC), both of which have since been amended. At the time, CALJIC 8.84.1 listed 11 factors that the jury "shall consider" in determining whether to impose a sentence of death or life imprisonment, the last of which was the so-called "unadorned version" of factor (k), which read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The court also instructed the jury, pursuant to former CALJIC 8.84.2, to consider all applicable aggravating and mitigating circumstances, and directed that it "shall impose" a sentence either of death or of life imprisonment depending upon whether the aggravating circumstances outweighed the mitigating circumstances or vice versa. The jury imposed the death sentence, and the State Supreme Court affirmed, rejecting Boyde's contention that the aforesaid versions of CALJIC 8.84.1 and 8.84.2 violated the Eighth and Fourteenth Amendments.

Held:

1. The giving of former CALJIC 8.84.2 did not violate the Eighth Amendment. Boyde's claim that the mandatory nature of the instruction's "shall impose" language prevented the jury from making an "individualized assessment" of the death penalty's appropriateness is foreclosed by *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 which rejected a challenge to an instruction with similar mandatory language, holding that the requirement of individualized capital sentencing is satisfied by allowing the jury to consider all relevant mitigating evidence. Boyde has not alleged that the instruction's mandatory language interfered with the consideration of such evidence. Moreover, there is no constitutional basis for his suggestion that the jury must have unfettered discretion to decline to impose the death penalty even if it decides that the aggravating circumstances "outweigh" the mitigating circumstances. States are free to structure and shape consideration of mitigating evidence to achieve a more rational and equitable administration of the death penalty. P. 1196.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

2. The giving of former CALJIC 8.84.1 did not violate the Eighth Amendment by precluding the jury from considering non-crime-related [371] factors, such as Boyde's background and character, as mitigating evidence. Pp. 1196–1201.

(a) Where, as here, the claim is that a challenged instruction is ambiguous and therefore subject to erroneous interpretation, the proper inquiry is whether there is a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding does not violate the Eighth Amendment if there is only a possibility of such an inhibition. Pp. 1196–1198.

(b) There is not a reasonable likelihood that the jurors here interpreted the trial court's instructions to preclude consideration of mitigating evidence of Boyde's background and character. "Unadorned" factor (k) standing alone did not, as Boyde seems to suggest, limit the jury's consideration to "any other circumstance *of the crime*," but directed the jury to consider *any other circumstance* that might excuse a crime, which certainly includes background and character. Moreover, when factor (k) is viewed together with other CALJIC 8.84.1 factors allowing for consideration of mitigating evidence not associated with the crime itself—such as the absence of prior criminal activity by, or felony convictions of, the defendant, and youth—it seems even more improbable that the jurors would have arrived at an interpretation that precluded consideration of all non-crime-related evidence. Similarly, reasonable jurors surely would not have felt constrained by the factor (k) instruction to ignore *all* of Boyde's unobjected-to penalty-phase evidence—four days of testimony consuming over 400 pages of transcript—particularly since the jury was also instructed that it "*shall consider all of the evidence* ... received during any part of the trial." Pp. 1198–1200.

(c) There is no merit to Boyde's assertion that arguments by the prosecutor immediately before the jury's sentencing deliberations made it likely that the jurors would adopt an impermissible interpretation of the factor (k) instruction. Such arguments generally carry less weight with a jury than do instructions from the court, are subject to objection and to correction by the court, and must be judged in the context in which they are made. Here, although the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence could not be considered. In fact, he made statements that explicitly assumed that such evidence was relevant, and defense counsel stressed the necessity of a broad reading of factor (k). Pp. 1200–1201.

46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25 (1988), affirmed.

[372] REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in Parts I, II, III, and IV of which BLACKMUN and STEVENS, JJ., joined, *post*, p. 1201.

Dennis A. Fischer, Santa Monica, for petitioner.

Frederick R. Millar, Jr., San Diego, for respondent.

Chief Justice REHNQUIST delivered the opinion of the Court.

This case requires us to decide whether two California jury instructions used in the penalty phase of petitioner's capital murder trial and in other California capital cases before each was modified in 1983 and 1985, respectively, are consistent with the requirements of the Eighth Amendment. We hold that they are.

Petitioner Richard Boyde was found guilty by a jury in the robbery, kidnaping, and murder of Dickie Gibson, the night clerk at a 7–Eleven Store in Riverside, California. The State introduced evidence at trial that about 2:30 a.m. on January 15, 1981, Boyde entered the store and robbed the clerk at gunpoint of $33 from the cash register. Petitioner then |373forced Gibson into a waiting car, which was driven by petitioner's nephew, and the three men drove to a nearby orange grove. There, Boyde brought Gibson into the grove and ordered him to kneel down with his hands behind his head. As Gibson begged for his life, Boyde shot him once in the back of the head and again in the forehead, killing him. The jury returned a special verdict that Boyde personally committed the homicide with "express malice aforethought and premeditation and deliberation."

At the penalty phase of the trial, the jury was instructed, *inter alia*, in accordance with instructions 8.84.1 and 8.84.2, 1 California Jury Instructions, Criminal (4th ed. 1979) (CALJIC), both of which have since been amended. The former lists 11 factors that the jury "shall consider, take into account and be guided by" in determining whether to impose a sentence of death or life imprisonment.[1] The eleventh is a |374"catch-all," factor (k), which reads: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[2] The court's concluding instruction, pursuant to CALJIC 8.84.2, again told the jury to consider all applicable aggravating and mitigating circumstances and followed with this direction: "If you conclude

1. The complete instruction provides:

"In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

2. In *People v. Easley*, 34 Cal.3d 858, 196 Cal. Rptr. 309, 671 P.2d 813 (1983), the Supreme Court of California stated that in order to avoid potential misunderstanding over the meaning of factor (k) in the future, trial courts "should inform the jury that it may consider as a mitigating factor 'any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime' and any other 'aspect of [the] defendant's character or record ... that the defendant proffers as a basis for a sentence less than death.' " *Id.*, at 878, n. 10, 196 Cal. Rptr., at 322, n. 10, 671 P.2d, at 826, n. 10 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion)). CALJIC 8.84.1 has since been formally amended and the present factor (k) instruction directs the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial ...]." 1 California Jury Instructions, Criminal 8.85(k) (5th ed. 1988).

that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you *shall impose* a sentence of confinement in the state prison for life without the possibility of parole." (Emphasis added.)[3] After hearing[375] six days of testimony concerning the appropriate penalty, the jury returned a verdict imposing the sentence of death, and the trial court denied Boyde's motion to reduce the sentence.

On appeal, the Supreme Court of California affirmed. 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25 (1988). It rejected petitioner's contention that the jury instructions violated the Eighth Amendment because the so-called "unadorned version" of factor (k) did not allow the jury to consider mitigating evidence of his background and character. The court noted that all of the defense evidence at the penalty phase related to Boyde's background and character, that the jury was instructed to consider " 'all of the evidence which has been received during any part of the trial of this case,' " and that the prosecutor "never suggested that the background and character evidence could not be considered." *Id.*, at 251, 250 Cal.Rptr., at 105, 758 P.2d, at 47. Therefore, the court found it "inconceivable the jury would have believed that, though it was permitted to hear defendant's[376] background and character evidence and his attorney's lengthy argument concerning that evidence, it could not consider that evidence." *Ibid.*

With regard to the "shall impose" language of CALJIC 8.84.2, the court agreed with petitioner that the instruction could not permissibly require a juror to vote for the death penalty " 'unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances.' " 46 Cal.3d, at 253, 250 Cal. Rptr., at 106, 758 P.2d, at 48 (quoting *People v. Brown*, 40 Cal.3d 512, 541, 230 Cal.Rptr. 834, 849, 726 P.2d 516, 532 (1985)). It concluded, however, that in this case "[t]he jury was adequately informed as to its discretion in determining whether death was the appropriate penalty." 46 Cal.3d, at 253, 250 Cal. Rptr., at 106, 758 P.2d, at 48. Three justices dissented from the court's affirmance of the death sentence. The dissenters argued that the mandatory feature of instruction 8.84.2 misled the jury into believing that it was required to impose the death penalty if the aggravating factors "outweighed" the mitigating factors, even though an individual juror might not have thought death was the appropriate penalty in this case. *Id.*, at 257–

3. In *People v. Brown*, 40 Cal.3d 512, 230 Cal. Rptr. 834, 726 P.2d 516 (1986), the Supreme Court of California acknowledged that the "shall impose" language of instruction 8.84.2 "le[ft] room for some confusion as to the jury's role." *Id.*, at 544, n. 17, 230 Cal.Rptr., at 852, n. 17, 726 P.2d, at 534, n. 17. The court believed that the Eighth and Fourteenth Amendments required that the jury have the discretion to decide whether, under all of the relevant circumstances, a defendant deserves the punishment of death or life without parole, *id.*, at 540, 230 Cal.Rptr., at 848, 726 P.2d, at 531, and stated that each case in which the mandatory language was used "must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." *Id.*, at 544, n. 17, 230 Cal.Rptr., at 852, n. 17, 726 P.2d, at 534, n. 17. The court noted that a proposed instruction, which has since been adopted almost verbatim, see 1 CALJIC 8.88 (5th ed. 1988), would conform to its opinion: " 'The weighing of aggravating and mitigating circumstances does not mean a mere mechanical weighing of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence [circumstances] is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.' " 40 Cal.3d, at 545, n. 19, 230 Cal.Rptr., at 853, n. 19, 726 P.2d, at 535, n. 19.

266, 250 Cal.Rptr., at 109–115, 758 P.2d, at 51–57. We granted certiorari, 490 U.S. 1097, 109 S.Ct. 2447, 104 L.Ed.2d 1002 (1989), and now affirm.

Petitioner reiterates in this Court his argument that the mandatory nature of former CALJIC 8.84.2 resulted in a sentencing proceeding that violated the Eighth Amendment, because the instruction prevented the jury from making an "individualized assessment of the appropriateness of the death penalty." See *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947, 106 L.Ed.2d 256 (1989). Specifically, Boyde contends that the "shall impose" language of the jury instruction precluded the jury from evaluating the "absolute weight" of the aggravating circumstances and determining whether they justified the death penalty. He further asserts that the jury was prevented from deciding whether, in light of all the aggravating and mitigating evidence, death was the appropriate penalty. In response, the State argues that the sentencing proceeding was consistent [377] with the Eighth Amendment, because a reasonable juror would interpret the instruction as allowing for the exercise of discretion and moral judgment about the appropriate penalty in the process of weighing the aggravating and mitigating circumstances.

[1, 2] We need not discuss petitioner's claim at length, because we conclude that it is foreclosed by our decision earlier this Term in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). In *Blystone*, we rejected a challenge to an instruction with similar mandatory language, holding that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Id.*, at 307, 110 S.Ct., at 1083. Although Blystone, unlike Boyde, did not present any mitigating evidence at the penalty phase of his capital trial, the legal principle we expounded in *Blystone* clearly requires rejection of Boyde's claim as well, because the mandatory language of CALJIC 8.84.2 is not alleged to have interfered with the consideration of mitigating evidence. Petitioner suggests that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances "outweigh" the mitigating circumstances. But there is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty." *Franklin v. Lynaugh*, 487 U.S. 164, 181, 108 S.Ct. 2320, 2331, 101 L.Ed.2d 155 (1988) (plurality opinion). Petitioner's claim that the "shall impose" language of CALJIC 8.84.2 unconstitutionally prevents "individualized assessment" by the jury is thus without merit.

[3] The second issue in this case is whether petitioner's capital sentencing proceedings violated the Eighth Amendment because the trial court instructed the jury in accordance with former CALJIC 8.84.1, including the "unadorned" factor (k). The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence [378] offered by petitioner. See *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Penry, supra*. In assessing the effect of a challenged jury instruction, we follow the familiar rule stated in *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973):

> "In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd v. United States*, 271 U.S. 104, 107 [46 S.Ct. 442, 443, 70 L.Ed. 857] (1926)." *Id.*, at 146–147, 94 S.Ct., at 400.

Petitioner contends that none of the 11 statutory factors in CALJIC 8.84.1 allowed

the jury to consider non-crime-related factors, such as his background and character, which might provide a basis for a sentence less than death. Nine of the factors, he argues, focused only on the immediate circumstances of the crime itself. Two others, factors (b) and (c), which center on the presence or absence of prior violent criminal activity and prior felony convictions, were in petitioner's view simply vehicles for the consideration of aggravating evidence not directly related to the crime. Finally, petitioner claims that the "catch-all" factor (k) did not allow the jury to consider and give effect to non-crime-related mitigating evidence, because its language—"[a]ny other circumstance which extenuates the gravity of the crime"—limited the jury to other evidence that was *related to the crime.*

The legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence is less than clear from our cases. In *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), we said that "[t]he question ... is ... what a reasonable juror *could have understood* the charge as meaning." *Id.*, at 315–316, 105 S.Ct., at 1972 (emphasis added). See also *Sandstrom v. Montana*, 442 U.S. 510, 516–517, 99 S.Ct. 2450, 2455–2466, 61 L.Ed.2d 39 (1979). But our subsequent decisions, while sometimes purporting 1379 to apply the *Francis* standard, have not adhered strictly to that formulation. In *California v. Brown*, 479 U.S. 538, 541–542, 107 S.Ct. 837, 839–840, 93 L.Ed.2d 934 (1987), we made reference both to what a reasonable juror *"could"* have done and what he *"would"* have done. And two Terms ago in *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), we alluded to at least three different inquiries for evaluating such a challenge: whether reasonable jurors *"could have"* drawn an impermissible interpretation from the trial court's instructions, *id.*, at 375–376, 108 S.Ct., at 1866 (emphasis added); whether there is a *"substantial possibility* that the jury may have rested its verdict on the 'improper' ground," *id.*, at 377, 108 S.Ct., at 1867 (emphasis added); and how reasonable jurors *"would have"* applied and understood the instructions. *Id.*, at 389, 108 S.Ct., at 1872 (WHITE, J., concurring) (emphasis added). Other opinions in the area likewise have produced a variety of tests and standards. See, *e.g.*, *Penry v. Lynaugh*, 492 U.S., at 326, 109 S.Ct., at 2951 ("[A] reasonable juror *could well have believed* that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence") (emphasis added); *Franklin v. Lynaugh*, *supra*, 487 U.S., at 192, 108 S.Ct., at 2337 (STEVENS, J., dissenting) ("[N]either of the Special Issues as they *would have been understood by reasonable jurors* gave the jury the opportunity to consider petitioner's mitigating evidence") (emphasis added); see also *Andres v. United States*, 333 U.S. 740, 752, 68 S.Ct. 880, 885, 92 L.Ed. 1055 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning ... *is probable*") (emphasis added).

Although there may not be great differences among these various phrasings, it is important to settle upon a single formulation for this Court and other courts to employ in deciding this kind of federal question. Our cases, understandably, do not provide a single standard for determining whether various claimed errors in instructing a jury require reversal of a conviction. In some instances, to be sure, we have held that "when a case is submitted to the jury on alternative 380 theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, *e.g.*, *Stromberg v. California*, 283 U.S. 359 [51 S.Ct. 532, 75 L.Ed. 1117] (1931)." *Leary v. United States*, 395 U.S. 6, 31–32, 89 S.Ct. 1532, 1545–1546, 23 L.Ed.2d 57 (1969); see also *Bachellar v. Maryland*, 397 U.S. 564, 571, 90 S.Ct. 1312, 1316, 25 L.Ed.2d 570 (1970). In those cases, a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal

theory, as well as on a proper theory or theories. Although it is possible that the guilty verdict may have had a proper basis, "it is equally likely that the verdict ... rested on an unconstitutional ground," *Bachellar, supra,* at 571, 90 S.Ct., at 1316, and we have declined to choose between two such likely possibilities.

[4, 5] In this case we are presented with a single jury instruction. The instruction is not concededly erroneous, nor found so by a court, as was the case in *Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation. We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation.[4] Jurors do not sit in [1381] solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

[6] Applying this standard to factor (k) of CALJIC 8.84.1 standing alone, we think there is not a reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character. The jury was instructed, according to factor (k), that "you shall consider ... [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," and the term "extenuate" was defined by the court to mean "to lessen the seriousness of a crime as by giving an excuse." App. 34. Petitioner contends that this instruction did not permit the jury to give effect to evidence—presented by psychologists, family, and friends—of his impoverished and deprived childhood, his inadequacies as a school student, and his strength of character in the face of these obstacles. But as we explained last [1382] Term in *Penry v. Lynaugh*: " 'evidence about the defendant's background and character is relevant be-

4. In other contexts, we have held that a defendant cannot establish a constitutional violation simply by demonstrating that an alleged trial-related error could or might have affected the jury. To establish that ineffective assistance of counsel violates the Sixth Amendment, for example, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Deportation of potential defense witnesses does not violate due process unless "there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 874, 102 S.Ct. 3440, 3450, 73 L.Ed.2d 1193 (1982). And failure of the prosecution to disclose allegedly exculpatory evidence to the defense violates due process "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). To receive a new trial based on newly discovered evidence, a defendant must demonstrate that the evidence would more likely than not lead to a different outcome. See *INS v. Abudu,* 485 U.S. 94, 107, n. 12, 108 S.Ct. 904, 913, n. 12, 99 L.Ed.2d 90 (1988).

cause of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*'" 492 U.S., at 319, 109 S.Ct., at 2947 (quoting *California v. Brown*, 479 U.S., at 545, 107 S.Ct., at 841 (O'CONNOR, J., concurring)) (emphasis added). Petitioner had an opportunity through factor (k) to argue that his background and character "extenuated" or "excused" the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, "long held by society," that in an appropriate case such evidence would counsel imposition of a sentence less than death. The instruction did not, as petitioner seems to suggest, limit the jury's consideration to "any other circumstance *of the crime* which extenuates the gravity of the crime." The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character.[5]

[7] 383 Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in CALJIC 8.84.1 allow for consideration of mitigating evidence not associated with the crime itself, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, and youth. When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence.

All of the defense evidence presented at the penalty phase—four days of testimony consuming over 400 pages of trial transcript—related to petitioner's background and character, and we think it unlikely that reasonable jurors would believe the court's instructions transformed all of this "favorable testimony into a virtual charade." *California v. Brown*, 479 U.S., at 542, 107 S.Ct., at 840. The jury was instructed that it "*shall consider all of the evidence* which has been received during any part of the trial of this case," App. 33 (emphasis added), and in our view reasonable jurors surely would not have

5. The dissent focuses on the terms "gravity" and "seriousness" and argues that background and character evidence has no effect on the seriousness of the crime. But the jury was instructed to consider any circumstance which "*extenuates* the gravity of the crime even though it is not a legal excuse for the crime" or "lessens the seriousness of a crime *as by giving an excuse.*" The instruction directs the jury to consider "any other circumstance" which might provide such an excuse, and we think jurors would naturally consider background and character as a possible excuse.

At oral argument (though not in his brief), counsel for petitioner also argued that testimony that Boyde won a prize for his dance choreography while in prison showed that he could lead a useful life behind bars, and that the jury must be able to consider that evidence as a mitigating circumstance under our decision in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Factor (k), he argued, did not allow for such consideration. In *Skipper*, we held that a capital defendant must be permitted to introduce in mitigation evidence of postcrime good prison behavior to show that he would not pose a danger to the prison community if sentenced to life imprisonment rather than death. The testimony that petitioner had won a dance contest while in prison, however, was introduced not to demonstrate that he was a "model prisoner" like Skipper and therefore unlikely to present a risk of future dangerousness, but to show that he had artistic ability. Tr. 4607–4608. Moreover, although the record is not clear on this point, petitioner apparently won the dance prize during a prison term served *prior* to the Gibson murder, and the evidence thus did not pertain to prison behavior after the crime for which he was sentenced to death, as was the case in *Skipper*. The testimony about dancing ability was presented as part of petitioner's overall strategy to portray himself as less culpable than other defendants due to his disadvantaged background and his character strengths in the face of those difficulties. As with other evidence of good character, therefore, the jury had the opportunity to conclude through factor (k) that petitioner's dancing ability extenuated the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character.

felt constrained by the factor (k) instruction to *ignore all* of the evidence[384] presented by petitioner during the sentencing phase. Presentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence. But the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous. This case is unlike those instances where we have found broad descriptions of the evidence to be considered insufficient to cure statutes or instructions which clearly directed the sentencer to disregard evidence. See, *e.g., Hitchcock v. Dugger*, 481 U.S. 393, 398–399, 107 S.Ct. 1821, 1824–1825, 95 L.Ed.2d 347 (1987) ("[I]t could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances . . ."); *Lockett*, 438 U.S., at 608, 98 S.Ct., at 2966 (plurality opinion) (Even under Ohio's "liberal" construction of the death penalty statute, "only the three factors specified in the statute can be considered in mitigation of the defendant's sentence").

[8] Petitioner also asserts that arguments by the prosecutor immediately before the jury's sentencing deliberations reinforced an impermissible interpretation of factor (k) and made it likely that jurors would arrive at such an understanding. But arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, see Tr. 3933, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. See *Carter v. Kentucky*, 450 U.S. 288, 302–304, and n. 20, 101 S.Ct. 1112, 1120–1121, and n. 20, 67 L.Ed.2d 241 (1981); *Quercia v. United States*, 289 U.S. 466, 470, 53 S.Ct. 698, 699, 77 L.Ed. 1321 (1933); *Starr v. United States*, 153 U.S. 614, 626, 14 S.Ct. 919, 923, 38 L.Ed. 841 (1894). Arguments of counsel which misstate the law are subject to objection and to correction by the court. *E.g., Greer v. Miller*, 483 U.S. 756, 765–766, and n. 8, 107 S.Ct. 3102, 3109, and n. 8, 97 L.Ed.2d 618 (1987). This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as [385]having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made. *Greer, supra*, at 766, 107 S.Ct., at 3109; *Darden v. Wainwright*, 477 U.S. 168, 179, 106 S.Ct. 2464, 2470, 91 L.Ed.2d 144 (1986); *United States v. Young*, 470 U.S. 1, 11–12, 105 S.Ct. 1038, 1044–1045, 84 L.Ed.2d 1 (1985); see also *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974) ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

We find no objectionable prosecutorial argument in this case. Petitioner maintains that the prosecutor encouraged an intolerably narrow view of factor (k) when he argued to the jury that the mitigating evidence did not "suggest that [petitioner's] crime is less serious or that the gravity of the crime is any less," App. 24, and that "[n]othing I have heard lessens the seriousness of this crime." *Id.*, at 29. But we agree with the Supreme Court of California, which was without dissent on this point, that "[a]lthough the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence could not be considered." 46 Cal.3d, at 251, 250 Cal. Rptr., at 105, 758 P.2d, at 47. His principal tack was not to contend that background and character were irrelevant, but to urge the jury that despite petitioner's past difficulties, he must accept responsibility for his actions. See App. 28–30. Indeed, the prosecutor explicitly assumed that petitioner's character evidence was a proper factor in the weighing

process, but argued that it was minimal in relation to the aggravating circumstances:

> "The Defendant can dance. The Defendant ... may have some artistic talent. The Defendant may, in fact, have been good with children. During the course of twenty-four years, even on a basis of just random luck, you are going to have to have picked up something or [386] done something .... we can all approve of, *but if you consider that on the weight that goes against it, ... it is not even close.*" Tr. 4820–4821 (emphasis added).

Defense counsel also stressed a broad reading of factor (k) in his argument to the jury: "[I]t is almost a catchall phrase. Any other circumstance, and it means just that, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse." App. 31.[6]

In sum, we conclude there is not a reasonable likelihood that the jurors in petitioner's case understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner. We thus hold that the giving of the jury instructions at issue in this case, former CALJIC 8.84.1 and 8.84.2, did not violate the Eighth and Fourteenth Amendments to the United States Constitution. The judgment of the Supreme Court of California is *Affirmed.*

Justice MARSHALL, with whom Justice BRENNAN joins, and with whom Justice BLACKMUN and Justice STEVENS join as to Parts I, II, III, and IV, dissenting.

It is a bedrock principle of our capital punishment jurisprudence that, in deciding whether to impose a sentence of death, a sentencer must consider not only the nature of the offense but also the "'character and propensities of the offender.[387]'" *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion) (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937)); see also *ante*, at 1198. Without question, our commitment to individualized sentencing in capital proceedings provides some hope that we can avoid administering the death penalty "discriminatorily, wantonly and freakishly." *Gregg v. Georgia* 428 U.S. 153, 220–221, 96 S.Ct. 2909, 2947, 49 L.Ed.2d 859 (1976) (WHITE, J., concurring in judgment) (footnotes omitted). The insistence in our law that the sentencer know and consider the defendant as a human being before deciding whether to impose the ultimate sanction operates as a shield against arbitrary execution and enforces our abiding judgment that an offender's circumstances, apart from his crime, are relevant to his appropriate punishment.

The Court holds today that Richard Boyde's death sentence must be affirmed even if his sentencing jury reasonably could have believed that it could not consider mitigating evidence regarding his character and background. Eschewing the fundamental principle that "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty ... is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments," *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978), the

6. We find no merit to the contention of petitioner and *amicus* that arguments of prosecutors in *other* California cases bear on the validity of the factor (k) instruction in this case. Petitioner's jury obviously was not influenced by comments made in other California capital trials. Nor do we think the fact that prosecutors in other cases may have pressed a construction of factor (k) that would cause the sentencing proceedings to violate the Eighth Amendment means that reasonable jurors are likely to have arrived at an such an interpretation. Prosecutors are interested advocates, and the arguments that one or more prosecutors may have made in urging a particular construction of factor (k) in other cases is not a weighty factor in deciding whether the jury in petitioner's case would have felt precluded from considering mitigating evidence.

Court adopts an unduly stringent standard for reviewing a challenge to a sentencing instruction alleged to be constitutionally deficient. Under the majority's approach, a capital sentence will stand unless "there is a reasonable likelihood that the jury has applied the challenged instruction" unconstitutionally. *Ante*, at 1198. Because the majority's "reasonable likelihood" standard is not met where a " 'reasonable' juror could or might have interpreted" a challenged instruction unconstitutionally, *ibid.*, that standard is inconsistent with our longstanding focus, in reviewing challenged instructions in all criminal contexts, on whether a juror *could* reasonably interpret the instructions in an unconstitutional manner. See, 388 *e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Even more striking, the majority first adopts this standard in its review of a capital sentencing instruction. I have long shared this Court's assessment that death is qualitatively different from all other punishments, see *Spaziano v. Florida*, 468 U.S. 447, 468, and n. 2, 104 S.Ct. 3154, 3166, and n. 2, 82 L.Ed.2d 340 (1984) (STEVENS, J., concurring in part and dissenting in part) (collecting cases), but I have never understood this principle to mean that we should review death verdicts with less solicitude than other criminal judgments. By adopting its unprecedented standard, the majority places too much of the risk of error in capital sentencing on the defendant.

Further, the majority's conclusion that "there is not a reasonable likelihood that the jurors in petitioner's case understood the challenged instructions to preclude consideration of relevant mitigating evidence," *ante*, at 1201, is belied by both the plain meaning of the instructions and the context in which they were given. Because the instructions given to Boyde's jury were constitutionally inadequate under *any* standard, including the one adopted by the Court today, I dissent.

I

At the penalty phase of his trial, Richard Boyde presented extensive mitigating evidence regarding his background and character. He presented testimony regarding his impoverished background, his borderline intelligence, his inability to get counseling, and his efforts to reform. Friends and family testified that, notwithstanding his criminal conduct, Boyde possesses redeeming qualities, including an ability to work well with children.

In accordance with California's then-operative capital jury instructions, the trial court instructed the jury that it should "consider, take into account and be guided by" 11 sentencing factors in deciding whether to return a verdict of death. 1 California Jury Instructions, Criminal 8.84.1 (4th ed. 1979) (CALJIC). Because none of these factors explicitly informed 389 the jury that it could consider evidence of a defendant's background and character, see *People v. Easley*, 34 Cal.3d 858, 878, 196 Cal.Rptr. 309, 321, 671 P.2d 813, 825 (1983), Boyde argues that the trial court's instructions were constitutionally inadequate. The State responds that the instructions fully informed the jury of its responsibility to consider character and background evidence through factor (k), which provided that a jury could consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Boyde replies that a reasonable juror could have understood factor (k) as permitting consideration only of evidence related to the circumstances of the crime.

II

It is an essential corollary of our reasonable-doubt standard in criminal proceedings that a conviction, capital or otherwise, cannot stand if the jury's verdict *could* have rested on unconstitutional grounds. See, *e.g.*, *Stromberg v. California*, 283 U.S. 359, 367–368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931); *Williams v. North Carolina*, 317 U.S. 287, 291–292, 63 S.Ct. 207, 209–210, 87 L.Ed. 279

(1942); *Cramer v. United States*, 325 U.S. 1, 36, n. 45, 65 S.Ct. 918, 935, n. 45, 89 L.Ed. 1441 (1945); *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957); *Leary v. United States*, 395 U.S. 6, 31–32, 89 S.Ct. 1532, 1545–1547, 23 L.Ed.2d 57 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 571, 90 S.Ct. 1312, 1316, 25 L.Ed.2d 570 (1970); see also *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"). In a society that values the presumption of innocence and demands resolution of all reasonable doubt before stripping its members of liberty or life, the decision to leave undisturbed a sentence of death that could be constitutionally infirm is intolerable.

Contrary to the majority's intimation that the legal standard is "less than clear from our cases," see *ante*, at 1197, we have firmly adhered to a strict standard in our review of challenged jury instructions. In *Sandstrom v. Montana*, *supra*, the petitioner claimed that the trial court's instructions unconstitutionally shifted to him the burden of proof regarding his intent at the time of the crime. Rejecting the State's claim that the jury might not have understood the instruction in an unconstitutional manner, we declared that "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror *could* have interpreted the instruction." *Id.*, 442 U.S., at 514, 99 S.Ct., at 2454 (emphasis added). Because we had "no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction," *id.*, at 526, 99 S.Ct., at 2460, we held that his conviction must be set aside. Likewise, in *Francis v. Franklin*, 471 U.S. 307, 319, 105 S.Ct. 1965, 1973, 85 L.Ed.2d 344 (1985), we applied *Sandstrom* to invalidate a conviction where "a reasonable juror could ... have understood" that the instructions placed the burden of proof on the defendant. We emphasized that the "[t]he question ... is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror *could have understood the charge as meaning.*" 471 U.S., at 315–316, 105 S.Ct., at 1971–1972 (citing *Sandstrom*, *supra*, 442 U.S., at 516–517, 99 S.Ct., at 2455–2456) (emphasis added).

Sandstrom is equally applicable to claims challenging the constitutionality of capital sentencing instructions. See, *e.g.*, *California v. Brown*, 479 U.S. 538, 541, 107 S.Ct. 837, 839, 93 L.Ed.2d 934 (1987) (in deciding whether a "mere sympathy" instruction impermissibly excludes consideration of mitigating evidence, "'[t]he question ... [is] what a reasonable juror could have understood the charge as meaning'") (quoting *Francis*, *supra*, 471 U.S., at 315–316, 105 S.Ct., at 1971–1972). As recently as *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), this Court unequivocally confirmed that, in reviewing sentencing instructions alleged to preclude full consideration of mitigating circumstances, "[t]he critical question ... is whether petitioner's interpretation of the sentencing process is one a reasonable jury *could* have drawn from the instructions given by the trial judge." *Id.*, at 375–376, 108 S.Ct., at 1866 (citing *Francis*, *supra*, 471 U.S., at 315–316, 105 S.Ct., at 1971–1972; *Sandstrom*, 442 U.S., at 516–517, 99 S.Ct., at 2455–2456; and *Brown*, *supra*, at 541, 107 S.Ct., at 839) (emphasis added).

These cases leave no doubt as to the appropriate standard of review.[1] To be sure,

1. The majority attributes some of the uncertainty regarding the proper standard to this Court's decision in *Andres v. United States*, 333 U.S. 740, 752, 68 S.Ct. 880, 886, 92 L.Ed. 1055 (1948), quoting the Court as follows: " 'That reasonable men might derive a meaning from the instructions given other than the proper meaning ... *is probable.*" *Ante*, at 1197 (ellipsis and emphasis added by majority). The majority fails to quote the Court's following sentence, in which the Court declared that "[i]n death cases doubts such as those presented here should be resolved in favor of the accused." 333 U.S., at 752, 68 S.Ct., at 886. Read in context, the passage suggests

the *dissent* in *Francis* disagreed with what it acknowledged to be "the Court's legal standard, which finds constitutional error where a reasonable juror *could* have understood the charge in a particular manner." 471 U.S., at 332, 105 S.Ct., at 1980 (REHNQUIST, J., dissenting). But the *Francis* majority squarely and unqualifiedly rejected the dissent's[392] proposal that, for constitutional error to be found, there must be something more than a "reasonable possibility of an unconstitutional understanding" of the challenged instruction. *Id.*, at 323, n. 8, 105 S.Ct., at 1975, n. 8. As the *Francis* Court stated, "it has been settled law since *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." *Ibid.*

The majority defends the adoption of its "reasonable likelihood" standard on the ground that it "better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction." *Ante*, at 1198. The majority fails, however, to explain how the new standard differs from *Sandstrom*'s "could have" standard other than to suggest that the new standard, unlike *Sandstrom*'s, requires more than "speculation" to overturn a capital sentence. *Ibid.* It is difficult to conceive how a *reasonable* juror *could* interpret an instruction unconstitutionally where there is no "reasonable likelihood" that a juror would do so. Indeed, if the majority did not explicitly allow for such a possibility, lower courts would have good reason to doubt that the two standards were different at all; the majority's more stringent version of the "reasonable likelihood" standard is inconsistent with the cases from which the majority appropriates that standard.

The "reasonable likelihood" language first appeared in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), in which the Court reversed a state-court determination that a prosecutor's failure to correct perjured testimony did not affect the verdict. The Court rejected the claim that it was "bound by [the state court's] determination that the false testimony could not *in any reasonable likelihood* have affected the judgment of the jury." *Id.*, at 271, 79 S.Ct., at 1178 (emphasis added). Based on its own review[393] of the record, the Court overturned the defendant's conviction because the false testimony "*may have had an effect on the outcome of the trial.*" *Id.*, at 272, 79 S.Ct., at 1178 (emphasis added). The language in *Napue* thereafter provided the governing standard for determining whether a prosecutor's knowing use of perjured testimony mandates

only that in a case where an instruction was probably misinterpreted, any doubt must be resolved in favor of the accused; it does not suggest, as the majority implies, that it *must* be probable that an instruction could be misinterpreted before a conviction will be overturned.

The majority likewise mischaracterizes this Court's holding in *Bachellar v. Maryland*, 397 U.S. 564, 571, 90 S.Ct. 1312, 1316, 25 L.Ed.2d 570 (1970). The majority suggests that *Bachellar* turned on the fact that it was " 'equally likely that the verdict . . . rested on an unconstitutional ground,' " *ante*, at 1198 (quoting 397 U.S., at 571, 90 S.Ct., at 1316) (ellipsis added by majority), and that *Bachellar* thus reflects only our refusal "to choose between two such likely possibilities," *ante*, at 1198. The majority's misrepresentation of the *Bachellar* holding becomes apparent when the ellipsis inserted by the majority is removed:

"[S]o far as we can tell, it is equally likely that the verdict resulted 'merely because [petitioners' views about Vietnam were] themselves offensive to their hearers.' *Street v. New York*, [394 U.S. 576, 592, 89 S.Ct. 1354, 1366, 22 L.Ed.2d 572 (1969)]. Thus, since petitioners' convictions *could have rested on an unconstitutional ground*, they must be set aside." 397 U.S., at 571, 90 S.Ct., at 1316 (emphasis added).

As the complete quotation makes clear, the *holding* in *Bachellar* is that a conviction cannot stand if it "could have rested on an unconstitutional ground." The Court's observation that, in the case before it, the verdict was "equally likely" to be unconstitutional was just that—an observation. See also *id.*, at 569, 90 S.Ct., at 1315 ("[I]n light of the instructions given by the trial judge, the jury *could* have rested its verdict on a number of grounds") (emphasis added).

reversal of a sentence. See *United States v. Bagley*, 473 U.S. 667, 679, n. 9, 105 S.Ct. 3375, 3382, n. 9, 87 L.Ed.2d 481 (1985) (opinion of BLACKMUN, J.).

As Justice BLACKMUN explained in *Bagley*, the "reasonable likelihood" standard should be understood to be an equivalent of the "harmless error" standard adopted in *Chapman v. California*:

> "The rule that a conviction be obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict derives from *Napue v. Illinois*. *Napue* antedated *Chapman v. California*, 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] (1967), where the 'harmless beyond a reasonable doubt' standard was established. The Court in *Chapman* noted that there was little, if any, difference between a rule formulated, as in *Napue*, in terms of 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,' and a rule 'requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' 386 U.S., at 24 [87 S.Ct., at 828]. It is therefore clear ... that this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard." 473 U.S., at 679–680, n. 9, 105 S.Ct., at 3382 (citations and internal quotation marks omitted).

The history of the "reasonable likelihood" standard thus confirms that the majority's version of the standard has no precedential support; where the Court has used "reasonable likelihood"[394] language in the past, it has regarded such language as focusing, no less than the standards in *Chapman* and *Sandstrom*, on whether an error *could* have affected the outcome of a trial. See *supra*, at 1202–1204.[2]

To the extent the Court's new standard does require a defendant to make a greater showing than *Sandstrom*, the malleability of the standard encourages ad hoc review of challenged instructions by lower courts. Although the standard, as the majority adopts it, requires a defendant challenging the constitutionality of an instruction to demonstrate more than a reasonable "possibility" that his jury was "impermissibly inhibited by the instruction," a defendant "need not establish that the jury ... more likely than not" was misled. *Ante*, at 1198. Beyond this suggestion that error must be more than possible but less than probable, the Court is silent. Thus, appellate courts, familiar with applying the *Sandstrom* standard to ambiguous instructions, are now required to speculate whether an instruction that *could* have been misunderstood creates a "reasonable likelihood" that it was in fact misunderstood. *Ante*, at 1198. I cannot discern how principled review of alleged constitutional errors is advanced by[395] this standard.[3] That this Court has regarded the two standards as

2. That the majority perceives little difference between our longstanding approach to challenged jury instructions and its reformulated "reasonable likelihood" standard suggests an alarming insensitivity to the premises underlying our criminal justice system. Just as the "reasonable doubt" standard at trial reflects our awareness of the meaning and serious consequences that our society attaches to a criminal conviction, the insistence on reasonable certainty in the correctness of capital sentencing instructions is commensurate with our heightened concern for accuracy in capital proceedings. Thus, the majority's assertion that "there may not be great differences among these various phrasings," *ante*, at 1197, is unfounded. To the contrary, in reviewing criminal judgments we have described the difference between a standard that demands reasonable certainty on the one hand, and one that tolerates significant doubt on the other, as the difference that sets apart "a society that values the good name and freedom of every individual." *In re Winship*, 397 U.S. 358, 363–364, 90 S.Ct. 1068, 1072–1073, 25 L.Ed.2d 368 (1970).

3. Our repudiation of such a malleable standard in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), where we rejected a proposed "more likely than not" standard, is no less applicable here:

> "This proposed alternative standard provides no sound basis for appellate review of jury in-

identical in prior cases, see *supra*, at 1203, will no doubt contribute to confusion in the lower courts.

More fundamentally, the majority offers no persuasive basis for altering our standard of review regarding capital instructions alleged to be constitutionally infirm. Despite the majority's declaration to the contrary, our "strong policy in favor of accurate determination of the appropriate sentence in a capital case" is *not* equaled by our "strong policy against retrials" based on alleged deficiencies in jury instructions. *Ante*, at 1198. We have long embraced a commitment to resolving doubts about the accuracy of a death verdict in favor of a capital defendant. See, *e.g.*, *Beck v. Alabama*, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392 (1980) ("[T]he risk of an unwarranted conviction ... cannot be tolerated in a case in which the defendant's life is at stake"). Indeed, to characterize our commitment to accurate capital verdicts as a "policy" is inappropriately dismissive of our heightened dedication to fairness and accuracy in capital proceedings. See, *e.g.*, *Bullington v. Missouri*, 451 U.S. 430, 445–446, 101 S.Ct. 1852, 1861–1862, 68 L.Ed.2d 270 (1981); *Woodson*, 428 U.S., at 304, 96 S.Ct., at 2991 (plurality opinion).

Moreover, the finality concerns to which the majority alludes are far less compelling in this context than the majority suggests. In addressing certain post-trial challenges to presumptively valid convictions, this Court has identified specific justifications for requiring a heightened showing by a defendant. Thus, the Court demands a showing greater than the "possibility" of error in reviewing a defendant's request [396] for a new trial based on newly discovered evidence, *INS v. Abudu*, 485 U.S. 94, 107, n. 12, 108 S.Ct. 904, 913, n. 12, 99 L.Ed.2d 90 (1988), because the "finality concerns are somewhat weaker" in the context of such claims. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Our adoption of this "high standard for newly discovered evidence claims presuppose[d] that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result [was] challenged." *Ibid.*

Likewise, in *Strickland*, the Court held that a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ibid.* In adopting this more demanding standard, the Court relied heavily on the special circumstances which give rise to ineffective-assistance claims. In particular, the Court emphasized the government's inability to assure a defendant effective counsel in a given case and the difficulties reviewing courts face in discerning the precise effects of various representation-related errors:

> "Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.*, at 693, 104 S.Ct., at 2067.

structions. Its malleability will certainly generate inconsistent appellate results and thereby compound the confusion that has plagued this area of the law. Perhaps more importantly, the suggested approach provides no incentive for trial courts to weed out potentially infirm language from jury instructions...." *Id.*, at 322–323, n. 8, 105 S.Ct., at 1975–1976, n. 8.

For these reasons, the Court in *Strickland* refused to overturn a verdict whenever a defendant shows that the errors of [397] his attorney "had some conceivable effect on the outcome of the proceeding." *Ibid.* Instead, the Court determined that the "reasonable probability" test more appropriately addresses the risk of error that attaches to ineffective-assistance claims in light of the fact that *all* trial decisions have *some* effect on the course of a trial.

In contrast, this case does not require the Court to relitigate facts or to speculate about the possible effects of alternative representation strategies that Boyde's counsel might have pursued at trial. Quite simply, the issue here is whether the trial court properly instructed the jury regarding its capital sentencing role. Such a challenge goes to the core of the accuracy of the verdict; it asks whether the defendant was sentenced by the jury according to the law. *Bollenbach v. United States*, 326 U.S. 607, 613, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946) ("A conviction ought not to rest on an equivocal direction to the jury on a basic issue"). In such a circumstance, a capital defendant's interest in an exacting review of the alleged error is unquestionably at its height, because there is no "presumptive validity" regarding the jury's sentence. The State, on the other hand, retains no strong reliance interest in sustaining a capital verdict that may have been obtained based on a misunderstanding of the law.

Our refusal to apply a standard less protective than "reasonable doubt" to alleged errors in criminal trials in part guarantees the reliability of the jury's determination. But it also reflects our belief that appellate courts should not "invad[e] [the] factfinding function which in a criminal case the law assigns solely to the jury." *Carella v. California*, 491 U.S. 263, 268, 109 S.Ct. 2419, 2422, 105 L.Ed.2d 218 (1989) (SCALIA, J., concurring in judgment) (internal quotation marks omitted; citations omitted). Thus, where jury instructions are unclear, an appellate court may not choose the preferred construction because "[t]o do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of [398] measuring the evidence by appropriate legal yardsticks." *Bollenbach, supra*, 326 U.S., at 614, 66 S.Ct., at 406.

This reasoning is no less applicable to California's capital sentencing proceedings, in which the factfinding function is assigned to the jury. See *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980) (where defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion," it violates due process to affirm his sentence "simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh" had they been properly instructed). To ignore a reasonable possibility that jurors were misled about the range of mitigating evidence that they could consider is to undermine confidence that the *jury* actually decided that Boyde should be sentenced to death in accordance with the law. It overrides California's "fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968).

Accordingly, I would review the challenged instructions in this case to determine whether a reasonable juror *could* have understood them to preclude consideration of mitigating evidence regarding Boyde's character and background.

III

Under any standard, though, the instructions are inadequate to ensure that the jury considered *all* mitigating evidence. The majority's conclusion that factor (k) would be understood by reasonable jurors to permit consideration of mitigating factors unrelated to the crime does not accord with the plain

meaning of the factor's language.[4] A "circumstance$_{399}$ which extenuates the gravity of the crime" unambiguously refers to circumstances *related to the crime*. Jurors, relying on ordinary language and experience, would not view the seriousness of a crime as dependent upon the background or character of the offender. A typical juror would not, for example, describe a particular murder as "a less serious crime" because of the redeeming qualities of the murderer; surely Boyde's murder of Gibson could not be considered less grave, as the majority suggests, because Boyde demonstrated that his "criminal conduct was an aberration from otherwise good character," *ante*, at 1199, n. 5.[5] Rather, an offender's background and character unrelated to his crime should be considered by the sentencer because of society's deeply felt view that punishment should reflect *both* the seriousness of a crime *and* the nature of the offender. See, *e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947, 106 L.Ed.2d 256 (1989) (a sentence should " 'reflect a reasoned *moral* response to the defendant's$_{400}$ background, character, and crime' " (quoting *California v. Brown*, 479 U.S., at 545, 107 S.Ct., at 841 (O'CONNOR, J., concurring)).

A

The majority resists the natural understanding of the instruction by focusing on language in *Penry* that describes " 'the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*' " *Ante*, at 1199 (quoting *Penry*, *supra*, at 319, 109 S.Ct. at 2947) (emphasis added by majority). According to the majority, this statement reveals that jurors could understand background and character evidence as extenuating the seriousness of a crime. But this language does not prove what the majority would have it prove. The language tells us, as is clear from several of our cases, that a criminal defendant may be considered *less culpable* and thus less deserving of severe punishment if he encountered unusual difficulties in his background, suffers from limited intellectual or emotional resources, or possesses redeeming qualities. See, *e.g.*, *Woodson*, 428 U.S., at 304, 96 S.Ct., at 2991 (plurality opinion). The language in *Penry* does not, however, suggest that because an offender's culpability is lessened his crime, too, is less serious. Rather than answering the central question of this case—whether character and background evidence can be regarded as "extenuat[ing] the gravity of the crime" as opposed to lessening the offender's moral culpability—*Penry* simply confirms that an offender's background and

4. As the majority concedes, see *ante*, at 1194, n. 2, several years after Boyde's trial, the California Supreme Court recognized the "potential misunderstanding" generated by the instructions challenged in his case and thereafter required lower courts to supplement the unadorned factor (k) instruction with language that would explicitly inform the jury that it could consider any " 'aspect of [the] defendant's character or record ... that the defendant proffers as a basis for a sentence less than death.' " *People v. Easley*, 34 Cal.3d 858, 878, n. 10, 196 Cal.Rptr. 309, n. 10, 671 P.2d 813, 826, n. 10 (1983) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)).

5. Thus, it is unsurprising that a criminal treatise, in describing the evolution of offense classification in our criminal system, reports that "serious offenses" such as murder, manslaughter, rape, and arson came to be called felonies, whereas other, presumably "less serious" offenses, came to be called misdemeanors. 1 C. Torcia, Wharton's Criminal Law § 17, p. 81 (14th ed. 1978); see also *Argersinger v. Hamlin*, 407 U.S. 25, 34, 92 S.Ct. 2006, 2011, 32 L.Ed.2d 530 (1972) ("[E]ven in prosecutions for offenses less serious than felonies, a fair trial may require the presence of a lawyer"). The characterization of felonies, which are defined by certain offense-related elements, as serious crimes *regardless of the nature of the offender* captures our intuitive sense that a crime is not made less serious by factors extrinsic to it, but *only* by circumstances surrounding the offense itself. For similar reasons, the doctrine of justification and excuse in our criminal law focuses solely on factors related to the commission of the crime, such as duress, necessity, entrapment, and ignorance or mistake. See, *e.g.*, 1 W. LaFave & A. Scott, Substantive Criminal Law, Ch. 5 (1986).

character, apart from his crime, must be considered in fixing punishment.[6]

[401]The majority appears to rest its position on the assumption that it would be nonsensical, given society's "long held" belief that character and background evidence is relevant to a sentencing determination, to conclude that the jury might have thought that it could not consider such evidence. *Ante*, at 1198. If the value of giving effect to such mitigating evidence is so deeply held, the assumption holds, surely the jury could not have been misled by the trial court's instructions. The sad irony of the majority's position is that, under its reasoning, the more fundamentally rooted a legal principle is in our constitutional values, the less scrutiny we would apply to jury instructions that run counter to that principle. For example, because "the presumption of innocence [is] that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law,' " *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 402, 39 L.Ed. 481 (1895)), the majority apparently would resolve doubts about the adequacy of a reasonable-doubt instruction against the accused on the assumption that jurors share our "long held" belief in the presumption of innocence. The majority's position would therefore encourage trial courts to be exacting in their instructions regarding legal minutiae but leave in barest form instructions regarding those principles "indispensable to command the respect and confidence of the community in applications of the criminal law." 397 U.S., at 364, 90 S.Ct., at 1072. Because this argument inverts the degree of concern we should exhibit toward fundamental errors in criminal proceedings, it is unacceptable.

B

As the majority maintains, the adequacy of an instruction must be judged " 'in the context of the overall charge.' " [402]*Ante*, at 1196 (citations omitted). Nothing in the charge here, however, overcame the constitutional inadequacy of factor (k) in failing to instruct the jury to consider all mitigating evidence.

The majority suggests that factor (k), by referring to " '[a]ny *other* circumstance which extenuates the gravity of the crime' " (emphasis added), signaled that character and background evidence could be considered because "[o]ther factors listed in CALJIC 8.84.1 allow for consideration of mitigating evidence not associated with the crime itself." *Ante*, at 1197, 1199. The majority thus believes that the jury would be unlikely to read a limitation into factor (k) that was not shared by all of the "other" factors to which the prefatory language in factor (k) refers. But the "any other" language in factor (k) need not refer to *all* of the preceding factors; it could well refer *solely* to those factors that permit consideration of mitigating evidence related to the offense.[7] The understanding of the instruction must turn on the meaning of "circumstance which extenuates the gravi-

6. To the extent it has spoken to the issue, this Court supports the view that circumstances that extenuate the gravity of a crime are analytically distinct from evidence regarding an offender's character and background. The commitment to considering background and character evidence in our capital punishment jurisprudence is traceable, in part, through *Woodson*, to the following passage in *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 54–55, 58 S.Ct. 59, 60–61, 82 L.Ed. 43 (1937) (emphasis added): "[P]unishment of like crimes may be made more severe if committed by ex-convicts.... For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense *together with* the character and propensities of the offender."

7. Indeed, at least seven of the ten factors preceding factor (k)—factors (a), (d), (e), (f), (g), (h), and (j)—relate solely to circumstances surrounding the commission of the offense. See *ante*, at 1194, n. 1 (quoting complete instruction).

any way suggest that this crime is less serious or that the gravity of the crime is any less; I don't think so." App. 24. The majority suggests that this argument merely went to the *weight* the jury should assign to Boyde's character and background evidence. *Ante,* at 1200. But the argument directly tracks the language of factor (k) specifying what evidence may be considered, not what weight should be attached to such evidence. The argument does not suggest that Boyde's background and character evidence was untrue or insubstantial, but rather emphasizes that the evidence did not, indeed could not *in any way,* lessen the seriousness or the gravity of the crime itself.

The prosecutor's closing statement likewise reinforced the message that evidence unrelated to the crime did not fall within the scope of factor (k): "If you look and you read what it says about extenuation, it says, 'To lessen the seriousness of a crime as by giving an excuse.' Nothing I have heard lessens the seriousness of this crime." App. 29. Again, the prosecutor designed his argument to bring home to the jury |405 the plain meaning of the sentencing instructions. That the argument focuses more on the language of factor (k) than on the substance of Boyde's mitigating evidence confirms that the prosecutor sought to prevent the jury from considering non-crime-related evidence.

Nor is this a case in which potentially misleading prosecutorial argument can be discounted because the trial court's instructions satisfactorily informed the jury of its proper sentencing role. Rather, the prosecutor exploited the constitutional inadequacy of factor (k) and sought to ensure that the limited scope of factor (k) did not escape the attention of the jury. Thus, *both* the prosecutor's comments and the trial court's charge failed to communicate to the jury that it could give effect to mitigating character and background evidence. At the very least, a reasonable juror *could* have understood the charge and the prosecutor's arguments as so limited. Accordingly, neither the words of the charge nor the context in which they were given provide sufficient assurance that the jury considered all mitigating evidence.

IV

"When the State brings a criminal action to deny a defendant liberty or life, ... 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" *Santosky v. Kramer,* 455 U.S. 745, 755, 102 S.Ct. 1388, 1395, 71 L.Ed.2d 599 (1982) (quoting *Addington v. Texas,* 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979)). I cannot conclude with any confidence that Boyde's jury understood that it could consider, as mitigating factors, evidence of Boyde's difficult background and limited personal resources.[8] That the majority regards |406 confidence in such a conclusion as unnecessary to its affirmance of Boyde's death sentence reflects the Court's growing and unjustified hostility to claims of constitutional violation by capital defendants. When we tolerate the possibility of error in capital proceedings, and "leav[e] people in doubt," *In re Winship,* 397 U.S., at 364, 90 S.Ct., at 1072, whether defendants undeserving of that fate are put to their death, we hasten our return to the discriminatory, wanton, and freakish administration of the death penalty that we found intoler-

8. For the reasons canvassed in Justice BRENNAN's dissent in *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), I also believe that the mandatory language of California's sentencing scheme deprives a capital defendant of an independent judgment by the sentencer that death is the appropriate punishment. Like the instruction in *Blystone,* Boyde's instruction required the sentencer to deliver a verdict of death if the aggravating circumstance or circumstances, no matter how insubstantial, outweighed the mitigating circumstances. Channeling sentencing discretion is indeed an essential aspect of a constitutional capital punishment scheme, but it should not be understood to deprive the sentencer of the choice to reject the ultimate sanction where the aggravating circumstances do not warrant it.

able in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

V

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S., at 231–241, 96 S.Ct., at 2973–2977 (MARSHALL, J., dissenting), I would in any case vacate the decision below affirming Boyde's death sentence.

494 U.S. 407, 108 L.Ed.2d 347

[407]**Horace BUTLER, Petitioner**

v.

Kenneth D. McKELLAR, Warden, et al.

No. 88–6677.

Argued Oct. 30, 1989.

Decided March 5, 1990.

Rehearing Denied April 23, 1990.

See 495 U.S. 915, 110 S.Ct. 1941.

Defendant collaterally attacked his capital murder conviction and death sentence by way of petition for federal habeas corpus. The United States District Court for the District of South Carolina, George Ross Anderson, Jr., J., dismissed petition on motion for summary judgment. The Court of Appeals for the Fourth Circuit, 846 F.2d 255, affirmed. On motion for rehearing, the Court of Appeals, 864 F.2d 24, held that defendant was not entitled to retroactive benefit of United States Supreme Court decision announced on same day as denial of his habeas corpus appeal. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) ruling in *Roberson*, that Fifth Amendment bars police-initiated interrogation following suspect's request for counsel in separate investigation, was new rule not dictated by precedent existing at time, and (2) the rule was not applicable to collateral review of defendant's conviction where it did not fall within either of two narrow exceptions to general rule of nonapplicability of new rules to cases on collateral review.

Judgment of Court of Appeals affirmed.

Justice Brennan filed dissenting opinion, in which Justice Marshall joined, and in which Justices Blackmun and Stevens joined as to Parts I, II and III.

1. **Courts ⇐100(1)**

Principle that "new rule" will not be applied to cases on collateral review, unless rule falls into one of two exceptions, validates reasonable, good-faith interpretations of existing precedent made by state courts, even though those interpretations are shown to be contrary to later decisions.

2. **Courts ⇐100(1)**

Fact that court says that its decision is within "logical compass" of earlier decision, or indeed that it is "controlled" by prior decision, is not conclusive for purposes of deciding whether current decision is "new rule" which will not be applied to cases on collateral review, since courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts.

3. **Courts ⇐100(1)**

Holding in *Roberson*, that Fifth Amendment bars police-initiated interrogation following suspect's request for counsel in separate investigation, announced "new rule" since its result was not dictated by existing precedent, and was therefore inapplicable to cases on collateral review, absent applicability of exception. U.S.C.A. Const.Amend. 5.

APPENDIX I

same, cover the same subject matter, and both were executed during the course of the same transaction by the same parties for the same purpose. We find no indicia of an intention contrary to the five-year restriction.

[9] Additionally, appellant argues that the specific portion of the Covenant which precludes appellant from hiring certain of respondent's employees is contrary to public policy and renders the Covenant invalid in its entirety. Appellant claims the absence of geographical limitations, time restrictions, or a proviso releasing employees who voluntarily leave employment at Cafe Europa is a fatal defect prohibiting enforcement of any part of the Covenant. We disagree.

We find it unnecessary to determine the validity of the challenged restriction in order to reach a disposition of this case. Where there are several different restrictive agreements in a covenant, the Court has invalidated one and upheld another in the same document. *Oxman v. Sherman*, 239 S.C. 218, 122 S.E.2d 559 (1961).

Accordingly, this case is affirmed.

AFFIRMED.

GREGORY, C.J., and HARWELL, CHANDLER and TOAL, JJ., concur.

The STATE, Respondent,

v.

William H. BELL, Jr., Appellant.

No. 23425.

Supreme Court of South Carolina.

Heard Sept. 25, 1990.

Decided June 24, 1991.

Rehearing Denied July 24, 1991.

Defendant was convicted by jury in the Superior Court, Anderson County, William Ballenger, J., of murder and armed robbery and was sentenced to death. On appeal, the Supreme Court, Gregory, C.J., held that: (1) solicitor could exercise peremptory strike against prospective juror who expressed reservations about capital punishment and had children near defendant's age; (2) trial judge's opening remarks during jury that "there may be certain conflicting or contradicting testimony in case" did not reflect adversely on defendant's right to remain silent; and (3) there was otherwise no prejudicial error at guilt or sentencing phase.

Affirmed.

Finney, J., dissented and filed opinion.

1. Jury ⇐33(5.1)

Vacillating responses to voir dire questions regarding death penalty will support use of peremptory strike against *Batson* challenge. U.S.C.A. Const.Amend. 14.

2. Jury ⇐33(5.1)

Where solicitor perceives person will have difficulty imposing death penalty, he may exercise peremptory challenge against juror upon this ground as racially neutral reason, even if juror merely expresses scruples against death penalty that would not be sufficient to excuse him or her for cause. U.S.C.A. Const.Amend. 14.

3. Jury ⇐33(5.1)

Solicitor could exercise peremptory strike in capital murder case against juror who expressed reservations about capital punishment and had children near defendant's age; seated white jurors with children defendant's age did not vacillate regarding death penalty, and Supreme Court would not substitute its judgment for that of Solicitor regarding subjective responses to death penalty voir dire questions in face of claims that comparable white jurors were seated. U.S.C.A. Const.Amend. 14.

4. Criminal Law ⇐769

Test to determine propriety of trial judge's charge is what reasonable juror would have understood charge to mean.

5. Criminal Law ⇐656(7)

Trial judge's opening remark "there may be certain conflicting or contradicting testimony in the case" did not reflect adversely on defendant's right to remain silent; reasonable juror would not have interpreted that remark in any way other than as guide to determine credibility when necessary, and jury was clearly charged at close of evidence in both guilt and sentencing phases that it was not to consider defendant's failure to testify. U.S.C.A. Const.Amend. 5.

6. Criminal Law ⇐730(2)

Any error from solicitor's opening statement that reasonable doubt was substantial doubt was cured by trial judge's charge defining reasonable doubt as "just what the term implies, a reasonable doubt."

7. Criminal Law ⇐519(8)

Violation of Defense of Indigents Act requirement that every person arrested for commission of crime be taken as soon as practicable before designated official for purpose of securing right to counsel does not require suppression of any confession so long as confession is voluntarily given after *Miranda* warnings are issued. Sup. Ct.Rules, Rule 51, subd. A (Repealed).

8. Arrest ⇐70(2)

Criminal Law ⇐412.1(3)

Even if taking defendant who was arrested on Thursday before magistrate on Monday was not "as soon as practicable" as required by Defense of Indigents Act, defendant did not show prejudice from delay; there was no evidence that defendant's statements were involuntary or that appropriate *Miranda* warnings were not given. Sup.Ct.Rules, Rule 51, subd. A (Repealed).

9. Criminal Law ⇐814(5)

Defendant was not entitled to charge on attempted larceny based on unsuccessful attempt to remove cassette player from victim's car, where he was not indicted for unlawfully taking any property other than victim's wallet; conviction for larceny of cassette player based on indictment for robbery of wallet would have been invalid

10. Criminal Law ⇐778(5)

Instruction that malice was "the doing of a wrongful act intentionally and without just cause or excuse" did not create unconstitutional burden-shifting presumption.

11. Criminal Law ⇐1208.1(5)

Sentencing jury in capital case may not be precluded from considering as mitigating evidence any aspect of defendant's character or record and any circumstances of crime that may serve as basis for sentence less than death.

12. Criminal Law ⇐622, 1208.1(5)

Codefendant's "demeanor" was not mitigating evidence, and trial judge's refusal to require State to try defendant in capital case with codefendant did not deprive defendant of opportunity to present mitigating evidence by allowing jury to observe that demeanor.

13. Criminal Law ⇐1208.1(6)

Evidence relating to circumstances of crime is relevant in capital sentencing proceeding if it provides information relevant to defendant's moral culpability.

14. Criminal Law ⇐1208.1(6)

Proffered evidence of codefendant's previous conviction of assault and battery with intent to kill was not probative in capital case on issue of defendant's moral culpability, absent evidence establishing its logical relevance to circumstances of crime.

15. Criminal Law ⇐790

There is no requirement under Omnibus Criminal Justice Improvements Act that jury be charged regarding defendant's parole eligibility, and defendant has burden of showing that request for that charge was made.

16. Criminal Law ⇐986.2(1)

Parole eligibility is not relevant evidence in mitigation.

17. Criminal Law ⇐720(8, 9)

Solicitor's remarks during sentencing phase in capital case summarizing psychiatrist's testimony as indicating that defendant "would be likely to [illegible]

lent leaders in committing violence" and was "prone toward violence" were supported by record; psychiatrist stated on cross-examination that if another prisoner were to provoke defendant it was his opinion that defendant would retaliate, that defendant's character was that of follower, and that if defendant attached himself to leader inclined toward violence he would follow.

18. Criminal Law ⇐796

There was no reasonable likelihood that charge on mitigating circumstances prevented jury from considering any mitigating evidence in fairness and mercy.

19. Criminal Law ⇐1208.1(4)

Death sentence for defendant involved in armed robbery and murder of elementary school principal was not arbitrarily imposed and was proportionate to penalty in similar cases. Code 1976, § 16–3–25.

Assistant Appellate Defender Tara Dawn Shurling, of the South Carolina Office of Appellate Defense, Columbia, for appellant.

Attorney Gen. T. Travis Medlock, Asst. Attys. Gen. Harold M. Coombs, Jr. and Miller W. Shealy, Jr., Columbia, and Sol. George M. Ducworth, Anderson, for respondent.

GREGORY, Chief Justice:

Appellant was convicted of murder and armed robbery and was sentenced to death. We affirm.

The victim in this case, Dennis Hepler, was the principal of West Franklin Street Elementary School in Anderson, South Carolina. His body was found outside the school around 1:00 o'clock a.m. on September 1, 1988. He had been shot twice with a .25 caliber pistol, once in the back and once in the back of the head. Appellant's fingerprints were found on the victim's red car which was parked on the street in front of the school. Two witnesses from a nearby apartment complex placed appellant in the area between 10:00 and 11:00 o'clock p.m. on August 31 with John Glen and Kevin Young.

Appellant was arrested on the night of September 1. That night, he gave police officers the first of four statements in which he denied ever having been at the West Franklin Street School. On September 3, appellant asked a guard at the detention center to contact the arresting officers. Appellant then gave a second statement. He stated he was walking near the school with John Glen and Kevin Young. Appellant stopped to talk with a girl. When he rejoined his friends, John Glen was inside a red car that was parked in front of the school and was trying to remove a cassette player. At Glen's request, appellant held the car door open. A man came out of the school and shouted at them. Kevin Young stepped from behind a wall in front of the school and shot the man in the back. While appellant and Glen ran from the scene, they heard a second gunshot. When Young caught up with them, the three obtained a ride with a fourth youth. Young still had the gun. The next day, Young threw the gun into some bushes in front of his house.

On September 4, appellant gave two more statements. First, he told police officers that he, Young, and Glen were walking on the school grounds on the night of August 31. Appellant and Glen attempted unsuccessfully to get the cassette player out of the car. They heard the sound of a door opening and joined Young behind a wall near the school building. Young said, "The man probably has a wallet." When a man came out of the school, Young moved behind him and told him to relinquish his wallet. The victim complied and Young shot him in the back. The gun jammed. The victim begged them not to shoot him again. Young shot again. The three fled the scene and obtained a ride with a fourth youth. They split $67.00 from the wallet, $20.00 for each of the three and $7.00 for the driver of the car, and threw the wallet out of the car.

Finally, appellant gave a fourth statement essentially identical to the third except that it states he took the gun from Young after it jammed, unjammed it, and shot the victim himself. All four state-

ments were admitted into evidence after an extensive *Jackson v. Denno* [1] hearing. Appellant did not testify at either phase of the trial.

GUILT PHASE

[1–3] First, appellant claims the Solicitor violated *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), in the exercise of a peremptory strike against Juror Galloway. The Solicitor explained this strike by stating Juror Galloway "appeared to be very weak on the death penalty." He noted her reluctance to answer death penalty voir dire questions and the fact she had several children about the same age as appellant and concluded she would have a difficult time returning a death sentence. Appellant claims this articulated reason was merely pretext because white jurors were seated who expressed reservations about capital punishment or who had children near appellant's age.

The record discloses that in response to questions regarding her ability to choose a death verdict, Juror Galloway indicated at various points she could not give a definite answer. At one point during questioning she stated, "I believe it's wrong for someone to take somebody else's life." In context, it is unclear whether this statement referred to the offense committed or the jury's verdict. Ultimately, however, she told the judge she could vote for the death penalty and she was not challenged for cause.

Vacillating responses to voir dire questions regarding the death penalty will support the use of a peremptory strike against a *Batson* challenge. *State v. Elmore*, 300 S.C. 130, 386 S.E.2d 769 (1989). Where the Solicitor perceives a person will have difficulty imposing the death penalty, he may exercise a peremptory challenge against the juror upon this ground as a racially neutral reason. *State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990). Such a challenge is proper even if the juror merely expresses scruples against the death penalty that would not be sufficient to excuse him or her for cause. *Id.* The record supports the Solicitor's reason for his strike based on Juror Galloway's responses on voir dire regarding the death penalty. Seated jurors with children appellant's age did not vacillate regarding the death penalty. Moreover, this Court has repeatedly declined to substitute its judgment for that of the Solicitor regarding subjective responses to death penalty voir dire questions in the face of claims comparable white jurors were seated. *State v. Patterson (Patterson II)*, — S.C. —, 396 S.E.2d 366 (1990); *State v. Woodruff*, 300 S.C. 265, 387 S.E.2d 453 (1989).

[4, 5] Appellant next challenges the propriety of the trial judge's opening remarks to the jury regarding credibility. The trial judge stated:

> However, if this case is as the usual case of this nature that's tried in this court, *there may be certain conflicting or contradicting testimony in the case.* Now, how are you as a jury going to determine what true facts are from conflicting, if there should be any, or contradicting testimony? You will do that by using your good judgment and common sense, and by passing upon the credibility or believability, that's what credibility means, believability of the witnesses.

Appellant claims these remarks reflected adversely on his right to remain silent.

The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean. *State v. Rothell*, 301 S.C. 168, 391 S.E.2d 228 (1990); *State v. Patterson (Patterson I)*, 299 S.C. 280, 384 S.E.2d 699 (1989). We find a reasonable juror would not have interpreted this remark in any way other than as a guide to determine credibility when necessary. Further, the trial judge clearly charged at the close of the evidence in both the guilt and sentencing phases that the jury was not to consider appellant's failure to testify.

[6] Appellant complains the solicitor improperly defined "reasonable doubt." In

1. 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

his opening statement the solicitor stated, "Reasonable doubt is not just any fanciful doubt. It is a very substantial, it's a substantial doubt." This Court has held it is not error to define a reasonable doubt as a substantial doubt. *State v. Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982); *State v. Butler*, 277 S.C. 452, 290 S.E.2d 1 (1982). We need not address whether this definition violates the recent holding of the United States Supreme Court in *Cage v. Louisiana*, 498 U.S. ——, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). The trial judge defined reasonable doubt as "just what the term implies, a reasonable doubt." The judge's charge cures any error in the Solicitor's statement of the law. *State v. Jones*, 298 S.C. 118, 378 S.E.2d 594 (1989).

[7, 8] Appellant contends his statements should have been suppressed. At the *Jackson v. Denno* hearing, all the police officers testified that appellant was given his *Miranda* [2] warnings and waived his rights before each statement, that he acted voluntarily, and that he did not request an attorney. Appellant's testimony at the hearing does not deny this. Appellant claims, however, the statements should have been suppressed because the State did not bring him before a magistrate "as soon as practicable" as required by the Defense of Indigents Act, Supreme Court Rule 51(A).

> Rule 51(A) requires:
> Every person arrested for commission of a crime ... shall be taken as soon as practicable before [a designated official] for the purpose of securing to the accused the right to counsel.

Appellant was arrested on Thursday night and taken before a magistrate on Monday. Appellant claims the delay denied him procedural safeguards in violation of due process.

This Court has specifically held a violation of this procedural rule does not require suppression of any confession so long as the confession is voluntarily given after *Miranda* warnings are issued. *State v. Bishop*, 256 S.C. 158, 181 S.E.2d 477 (1971). There is no evidence the statements were involuntary or that the appropriate warnings were not given. Appellant was repeatedly advised of his right to counsel and waived it each time he gave a statement. Even if the delay violated Rule 51(A), appellant has shown no prejudice.

[9] Appellant challenges the trial judge's charge on several grounds. Appellant was indicted for armed robbery for taking the victim's wallet containing $67.00. The trial judge submitted both armed robbery and robbery to the jury. Appellant claims the jury could have found him guilty only of "attempted larceny" for the unsuccessful attempt to remove the cassette player from the victim's car as stated in his second statement to police.

Appellant was not indicted for unlawfully taking any property other than the victim's wallet. A conviction for larceny of the cassette player based on the indictment for robbery of the victim's wallet would have been invalid. *State v. Munn*, 292 S.C. 497, 357 S.E.2d 461 (1987). Moreover, defense counsel repeatedly asked the trial judge not to submit larceny to the jury. This exception has no merit.

Appellant further claims the trial judge inadequately charged the jury on accomplice liability. The trial judge charged the jury as follows:

> Now, I'm going to charge you the hand of one is the hand of all. Now, as to the law that the hand of one is the hand of all and that all could be guilty of the acts of others, before you could find the Defendant guilty of murder you would have to find beyond a reasonable doubt from all of the evidence presented *that two or more persons committed armed robbery or robbery and that the two or more persons have conspired together or planned together to do such by either verbal agreement or shown by their concerted act or acts.*
>
> You would further, you would have to find beyond a reasonable doubt that the two or more persons were knowingly together and either acting together or as-

2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

sisting together or participating together in the commission of the offense, and *you should further find that a killing or homicide was a natural or probable consequence of the unlawful armed robbery or robbery.* All that beyond a reasonable doubt. If so, then the law is that under these or those circumstances, the act of one is the act of all; the hand of one is the hand of all.

First, appellant contends the charge did not clearly instruct the jury that in order to be convicted of armed robbery under a theory of accomplice liability, the jury would have to find appellant combined with others to commit the armed robbery rather than a lesser crime. To the contrary, we find the underscored language of the first paragraph of the charge permits the jury to find appellant guilty only of whichever act he combined with others to commit, armed robbery *or* robbery. This charge is adequate under the reasonable juror standard. *State v. Rothell, supra; Patterson I, supra.*

Second, appellant claims the charge was defective because it did not instruct the jury to find the killing was a natural and probable consequence of the specific act appellant combined with others to commit. *See State v. Peterson,* 287 S.C. 244, 335 S.E.2d 800 (1985). We disagree. The underscored language of the second paragraph of the charge instructs the jury it must find the killing was a natural and probable consequence of whichever act appellant was an accomplice to, armed robbery *or* robbery. This charge is adequate under the reasonable juror standard. *State v. Rothell, supra; Patterson I, supra.*

[10] Appellant complains the trial judge improperly defined malice as "the doing of a wrongful act intentionally and without just cause or excuse." He claims the instruction created an unconstitutional burden-shifting presumption. We disagree. The trial judge's definition of malice is correct, *State v. Judge,* 208 S.C. 497, 38 S.E.2d 715 (1946), and the charge given is devoid of any presumption. Moreover, the trial judge clearly instructed the jury it was the State's burden to prove malice.

SENTENCING PHASE

[11, 12] Appellant claims the trial judge's refusal to require the State to try him with his codefendant Kevin Young deprived him of the opportunity to present evidence in mitigation by allowing the jury to observe Young's demeanor.

The sentencing jury in a capital case may not be precluded from considering as mitigating evidence any aspect of the defendant's character or record and any circumstances of the crime that may serve as a basis for a sentence less than death. *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *State v. Cooper,* 291 S.C. 332, 353 S.E.2d 441 (1986). A codefendant's "demeanor" does not fall within this category of evidence. The trial judge did not abuse his discretion in refusing appellant's motion for joinder.

[13, 14] Further, at trial, counsel proffered evidence that codefendant Young was previously convicted of assault and battery with intent to kill. Appellant claims the trial judge erred in excluding this evidence because it was relevant to two statutory mitigating circumstances submitted to the jury: (1) that appellant was merely an accomplice whose participation was relatively minor; and (2) that he acted under duress or the domination of another. S.C.Code Ann. § 16–3–20(C)(b)(4) and (5) (Supp.1989).

Essentially, appellant's argument contesting the exclusion of Young's record rests on the hypothesis it was evidence regarding circumstances of the crime. Evidence relating to the circumstances of the crime is relevant in a capital sentencing proceeding if it provides "information relevant to the defendant's moral culpability." *South Carolina v. Gathers,* 490 U.S. 805, 812, 109 S.Ct. 2207, 2211, 104 L.Ed.2d 876, 883 (1989). We find the proffered evidence of Young's prior record, absent any evidence establishing its logical relevance to the circumstances of the crime, is not probative on the issue of appellant's moral culpability.

HARWELL, CHANDLER and TOAL, JJ., concur.

FINNEY, J., dissenting in separate opinion.

FINNEY, Justice (dissenting):

I respectfully dissent. In my opinion, the state's articulated racially neutral reason for striking prospective black juror Katherine M. Galloway (Galloway) was clearly a pretext, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *State v. Oglesby*, 298 S.C. 279, 379 S.E.2d 891 (1989). I would reverse.

The state claims Galloway was excluded because she "appeared to be very weak on the death penalty," based upon her answers to voir dire questions, and the fact that she had children of about the same age as the appellant.

According to this record, the state accepted white jurors whose answers bore a marked similarity to Galloway's. Additionally, white jurors seated by the state had children of about the same age as the appellant.

Following is the pertinent portion of Galloway's voir dire testimony.

COURT: Are you in favor of the death penalty, opposed to it or just where do you sit?

GALLOWAY: I—I believe in our legal system, and I feel when everything is brought to the court and presented to the court, I do believe in the jury selection, well, choosing a verdict. I don't really—can't say yes or no.

. . . . . .

GALLOWAY: I believe its wrong for someone to take somebody else's life.

COURT: Well, could you, however—could you, just answer, not in this case, but if the facts were bad enough, could you return a death penalty?

GALLOWAY: If all the evidence pointed to that person, I believe I could.

. . . . . .

COURT: And you could return a verdict that speaks the truth according to your finding either a life sentence or if it was, as you stated, the other way, a death penalty, you could do that? You could consider both?

GALLOWAY: I could consider them both.

COURT: Could you sign your name to a death penalty along with all the other twelve jurors?

. . . . . .

GALLOWAY: I think it would be kind of difficult, but I—if I—if that's what we chose as a verdict—

. . . . . .

STATE: Would the fact that the Defendant might be about the same age as some of your children might make it more difficult for you to vote for the death penalty?

GALLOWAY: That's hard to say. I don't—I, or [sic] course, think that I have a child that age. I sound ruthless when I say, but this is something that's happened that needs to be decided upon, and if I've been chosen as a juror, I would do my best with everybody else to be fair, and I would sign.

. . . . . .

As an example, the voir dire testimony of one white juror, Grace Ann Gast, follows for comparison with Galloway's voir dire responses.

COURT: ... What is your position on the death penalty?

GAST: I hadn't give it a whole lot of thought until I was called for this particular case. I know in South Carolina it has the death penalty in this state. Personally I feel if somebody admits to a crime that they have murdered somebody, then I feel like the death penalty is in order. If its—you know, the person maintains he's innocent, we have to go through and a group of twelve people decide, first of all, innocence or guilty, and then decide what the punishment should be, I have a personal problem with, you know, can I sit up there and be the person that says this man's got to die. I don't know—I don't know how I feel about that.

COURT: Would you auto—just automatically regardless of what the facts are, only return life imprisonment? Could you consider both sides?

GAST: I guess it gets down to the point of the moral issue. Even if we have all of this evidence and, you know, eleven other people in that room says, you know, yes, the death penalty on that, you know, I look at it I'm the last vote, hypothetical situation, would I be able to say, you know, put my vote in and say, yes. To me it's like playing God in some cases. I don't know. I've never been in that position. I don't know what I would do.

. . . . .

COURT: Let me ask you this, not about this case, talking about any case. If the facts were bad enough in any case, now not this one, if the facts were bad enough—

. . . . .

COURT: —could you return a verdict of death along with the other eleven jurors?

GAST: Possibly.

COURT: You could consider it?

GAST: Uh-huh.

. . . . .

Without posing any questions, the state accepted Juror Gast whose position was, in my view, more vacillatory than Galloway's. Thus, I would conclude that the state's "neutral" reason of excluding prospective jurors "weak on the death penalty" is a pretext for racial discrimination where, of two persons expressing similar viewpoints, the state accepts the white venireperson and rejects the black venireperson on the basis of her viewpoint. *See State v. Patterson*, (Patterson II), — S.C. —, 396 S.E.2d 366 (1990) (Finney dissenting).

The state's second articulated reason for striking Galloway was that she had children of about the same age as the appellant. Six white venirepersons had children of similar age, all of whom were accepted by the state. Of the six, three were excluded by the defense and three were seated on the jury. The state contends the appellant has not shown that the solicitor was aware of information concerning the ages of venirepersons' children. The record reflects that this information is furnished on juror questionnaire sheets completed prior to the court term. I find ludicrous any suggestion that such information was not available to the state.

I would hold that the state's asserted racially neutral reasons for excluding black venireperson Galloway were a pretext for racial discrimination since the state accepted similarly situated white jurors. *State v. Oglesby, supra.* I would reverse.

ANDERSON BROTHERS BANK, Respondent,

v.

Howard R. ADAMS, Deborah D. Adams, The South Carolina Tax Commission, Conway National Bank, Whatcha McCollum Car Rental, National Bank of South Carolina, First Citizens Bank & Trust Company of S.C., Larry Chandler and William C. Lyerly, Jr., Defendants,

Of Whom Larry Chandler and William C. Lyerly, Jr., are Appellants.

and

Larry CHANDLER and William C. Lyerly, Jr., Appellants,

v.

Howard ANDERSON, Respondent.

No. 23428.

Supreme Court of South Carolina.

Heard Jan. 9, 1991.

Decided July 8, 1991.

Rehearing Denied Aug. 5, 1991.

Foreclosure action was brought. The Circuit Court, Horry County, Marion H.

APPENDIX J

negligence on the part of the stevedore company.

Whether from the standpoint of negligence or unseaworthiness I see no basis for the holding in this case. Presumably the result reached by the Court would be the same—at least consistency demands that it should be the same—if this accident had occurred on the dock while the beans were being *loaded* rather than unloaded. Yet in neither case is there warrant for holding the shipowner to have breached any obligation, for in neither case does it own or control the place where the accident occurred and in neither case is the ship's equipment, property, or crew in any way responsible, with or without fault, for the injury.

Accordingly, I would affirm.

373 U.S. 83

John L. BRADY, Petitioner,

v.

STATE OF MARYLAND.

No. 490.

Argued March 18 and 19, 1963.

Decided May 13, 1963.

Proceeding for post-conviction relief. Dismissal of the petition by the trial court was affirmed by the Maryland Court of Appeals, 226 Md. 422, 174 A.2d 167, which remanded the case for retrial on the question of punishment but not the question of guilt. On certiorari, the Supreme Court, speaking through Mr. Justice Douglas, held that where the question of admissibility of evidence relating to guilt or innocence was for the court under Maryland law, and the Maryland Court of Appeals held that nothing in the suppressed confession of petitioner's confederate could have reduced petitioner's offense below murder in the first degree, the decision of that court to remand the case, because of such confession withheld by the prosecution, for retrial on the issue of punishment only did not deprive petitioner of due process.

Affirmed.

Mr. Justice Harlan and Mr. Justice Black dissented.

1. Courts ⇐397½

Decision of Maryland Court of Appeals, on petitioner's appeal in post-conviction proceeding remanding case for retrial on question of punishment but not on question of guilt was "final judgment" within statute relating to federal Supreme Court review of final judgments by certiorari. Code Md.1957, art. 27, § 413; Code Supp.Md. art. 27, § 645A et seq.; 28 U.S.C.A. § 1257(3); U.S.C.A. Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐257

Prosecution's action, on defendant's request to examine extra-judicial statements made by defendant's confederate, in withholding one such statement, in which confederate admitted he had done actual killing, denied due process as guaranteed by Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

3. Constitutional Law ⇐257

Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. U.S.C.A. Const. Amend. 14.

4. Criminal Law ⇐734

Under Maryland law, despite constitutional provision that jury in criminal case are judges of law, as well as of fact, trial courts pass upon admissibility of evidence which jury may consider on

issue of innocence or guilt of accused. Const.Md. art. 15, § 5.

5. Courts ⇐359

State courts, state agencies and state legislatures are final expositors of state law under our federal regime. Const.Md. art. 15, § 5.

6. Constitutional Law ⇐271

Where question of admissibility of evidence relating to guilt or innocence was for court under Maryland law, and Maryland Court of Appeals ruled that suppressed confession of confederate would not have been admissible on issue of guilt or innocence since nothing in confession could have reduced petitioner's offense below murder in first degree, remandment of case, because of such confession withheld by prosecution, for retrial on issue of punishment but not on issue of guilt did not deprive petitioner of due process. Code Md.1957, art. 27, § 413; Code Supp.Md. art. 27, § 645A et seq.; Const.Md. art. 15, § 5; U.S.C.A.Const. Amend. 14.

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E. Clinton Bamberger, Jr., Baltimore, Md., for petitioner.

Thomas W. Jamison, III, Baltimore, Md., for respondent.

Opinion of the Court by Mr. Justice DOUGLAS, announced by Mr. Justice BRENNAN.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A.2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

[1] Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland

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Post Conviction Procedure Act. 222 Md. 442, 160 A.2d 912. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A.2d 167. The case is here on certiorari, 371 U.S. 812, 83 S.Ct. 56, 9 L.Ed.2d 54.[1]

1. Neither party suggests that the decision below is not a "final judgment" within the meaning of 28 U.S.C. § 1257(3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed. 204) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528) that "is fundamental to the further conduct of the case" (United States v. General Motors Corp., 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311). This ques-

The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." 3 Md.Ann.Code, 1957, Art. 27, § 413. In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." Art. XV, § 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

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[2] We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals—United States ex rel. Almeida v. Baldi, 195 F.2d 815, 33 A.L.R. 2d 1407, and United States ex rel. Thompson v. Dye, 221 F.2d 763—which, we agree, state the correct constitutional rule.

This ruling is an extension of Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791, where the Court ruled on what nondisclosure by a prosecutor violates due process:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

In Pyle v. Kansas, 317 U.S. 213, 215–216, 63 S.Ct. 177, 178, 87 L.Ed. 214, we phrased the rule in broader terms:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791."

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The Third Circuit in the Baldi case construed that statement in Pyle v. Kansas to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217, we extended the test formulated in Mooney v. Holohan when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." And see Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; Wilde v. Wyoming, 362 U.S. 607, 80 S.Ct. 900, 4 L.Ed.2d 985. Cf. Durley v. Mayo, 351 U.S. 277, 285, 76 S.Ct. 806, 811, 100 L.Ed. 1178 (dissenting opinion).

[3] We now hold that the suppression by the prosecution of evidence favorable to an accused upon request vio-

tion is "independent of, and unaffected by" (Radio Station WOW v. Johnson, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See Largent v. Texas, 318 U.S. 418, 421–422, 63 S.Ct. 667, 668–669, 87 L.Ed. 873. Cf. Local No. 438 Const. and General Laborers' Union v. Curry, 371 U.S. 542, 549, 83 S.Ct. 531, 536, 9 L.Ed.2d 514.

lates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." [2] A prosecution that withholds evidence on demand of an accused which, if made available,

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would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169.

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

> "There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. * * * [I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady.*
>
> "Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. * * *
>
> "The appellant's sole claim of prejudice goes to the punishment imposed. *If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree.* We, therefore, see no occasion to retry that issue." 226 Md., at 429–430, 174 A. 2d, at 171. (Italics added.)

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If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense "below murder in the first degree"? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

[4–6] But Maryland's constitutional provision making the jury in criminal

2. Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:
"The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."

cases "the Judges of Law" does not mean precisely what it seems to say.[3] The present status of that provision was reviewed recently in Giles v. State, 229 Md. 370, 183 A.2d 359, appeal dismissed, 372 U.S. 767, 83 S.Ct. 1102, where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that "Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." 229 Md., at 383, 183 A.2d, at p. 365. The cases cited make up a long line going back nearly a century. Wheeler v. State, 42 Md. 563, 570, stated that instructions to the jury were advisory only, "except in regard to questions as to what shall be considered as evidence." And the court "having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction." Bell v. State, 57 Md. 108, 120. And see Beard v. State, 71 Md. 275, 280, 17 A. 1044, 1045, 4 L.R.A. 675; Dick v. State, 107 Md. 11, 21, 68 A. 286, 290. Cf. Vogel v. State, 163 Md. 267, 162 A. 705.

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We usually walk on treacherous ground when we explore state law,[4] for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the "admissibility of evidence" pertinent to "the issue of the innocence or guilt of the accused." Giles v. State, supra. In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession "could have reduced the appellant Brady's offense below murder in the first degree." We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record.[5] But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a

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bifurcated trial (cf. Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

Affirmed.

Separate opinion of Mr. Justice WHITE.

1. The Maryland Court of Appeals declared, "The suppression or withholding by the State of material evidence exculpatory to an accused is a violation

3. See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md.St.Bar Assn.Rept. 246, 253–254.

4. For one unhappy incident of recent vintage see Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 60 S.Ct. 215, 84 L.Ed. 447, 537, that replaced an earlier opinion in the same case, 309 U.S. 703.

5. "In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?" Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39. See also Bell v. State, supra, 57 Md. at 120; Vogel v. State, 163 Md., at 272, 162 A., at 706–707.

of due process" without citing the United States Constitution or the Maryland Constitution which also has a due process clause.* We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See New York City v. Central Savings Bank, 306 U.S. 661, 59 S.Ct. 790, 83 L.Ed. 1058; Minnesota v. National Tea Co., 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939,

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wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, "The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment." After discussing at some length and disposing of the suppression matter in federal constitutional terms it says the question still to be decided is the same as it was before: "The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment."

The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rule-making or legislative process after full consideration by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

Mr. Justice HARLAN, whom Mr. Justice BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's Fourteenth Amendment right to equal protection?[1] In my opinion an affirmative answer would

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be required *if* the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

The Court, however, holds that the Fourteenth Amendment was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases "the Judges of Law, as

* Md.Const., Art. 23; Home Utilities Co., Inc., v. Revere Copper & Brass, Inc., 209 Md. 610, 122 A.2d 109; Raymond v. State ex rel. Szydlouski, 192 Md. 602, 65 A.2d 285; County Com'rs of Anne Arundel County v. English, 182 Md. 514, 35 A.2d 135, 150 A.L.R. 842; Oursler v. Tawes, 178 Md. 471, 13 A.2d 763.

1. I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 1196–1197 of its opinion.

well as of fact," as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under § 645G of the Maryland Post Conviction Procedure Act, Md.Code, Art. 27 (1960 Cum.Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case,[2] rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. 226 Md., at 430, 174 A.2d, at 171. This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the admissibility of third-party confessions, which falls short of saying anything that is dispositive

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of the crucial issue here. 226 Md., at 427–429, 174 A.2d, at 170.[3]

Nor do I find anything in any of the other Maryland cases cited by the Court (ante, p. 1197) which bears on the admissibility *vel non* of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not "overrule" the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that "in the final analysis the jury are the judges of both the *law* and the facts, and the verdict in this case is *entirely* the jury's responsibility." (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement *would* have been admissible at the trial on the issue of guilt.[4]

In this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not in terms

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address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. Minnesota v. National Tea Co., 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920.

2. Section 645G provides in part: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper." Rule 870 provides that the Court of Appeals "will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended."

3. It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of Day v. State, 196 Md. 384, 76 A.2d 729. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

4. In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: "It would have been, yes."

APPENDIX K

those courts, I would affirm the Alabama Supreme Court's judgment.

513 U.S. 298

Lloyd SCHLUP, Petitioner,

v.

Paul K. DELO, Superintendent, Potosi Correctional Center.

No. 93–7901.

Argued Oct. 3, 1994.

Decided Jan. 23, 1995.

Death-row petitioner filed a second petition for writ of habeas corpus. The United States District Court for the Eastern District of Missouri, Jean C. Hamilton, J., dismissed petition. Petitioner appealed and moved for stay of execution. The Court of Appeals for the Eighth Circuit, Beam, Circuit Judge, 11 F.3d 738, denied motion and affirmed order. Writ of certiorari was granted. The Supreme Court, Justice Stevens, held that standard of *Carrier*, which requires a procedurally defaulted habeas petitioner to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent, rather than more stringent *Sawyer* standard, governs miscarriage of justice inquiry when petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to consideration of merits of constitutional claims.

Vacated and remanded.

Justice O'Connor filed a concurring opinion.

Chief Justice Rehnquist filed a dissenting opinion in which Justices Kennedy and Thomas joined.

Justice Scalia filed a dissenting opinion in which Justice Thomas joined.

1. Habeas Corpus ⇐897, 898(2)

Habeas petitioner who had been unable to establish cause and prejudice sufficient to excuse his failure to present his evidence in support of his first federal habeas petition could obtain review of his constitutional claims only if he fell within the narrow class of cases implicating a fundamental miscarriage of justice.

2. Habeas Corpus ⇐897

Habeas corpus petitioner's claim of actual innocence was not a constitutional claim, but instead a gateway through which he had to pass to have his otherwise barred constitutional claim considered on the merits in a successive petition to the extent that his claim for relief depended on validity of his ineffective assistance of counsel and *Brady* claims. U.S.C.A. Const.Amend. 6.

3. Habeas Corpus ⇐897

Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred habeas claim; however, if habeas petitioner presents evidence of innocence so strong that a court cannot have confidence in the outcome of trial, unless the court is also satisfied that trial was free of nonharmless constitutional error, petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims in a successive habeas petition.

4. Habeas Corpus ⇐897

A "successive habeas petition" raises grounds identical to those raised and rejected on the merits on a prior petition.

See publication Words and Phrases for other judicial constructions and definitions.

5. Habeas Corpus ⇐896, 898(1)

An "abusive habeas petition" occurs where prisoner files petition raising grounds that were available but not relied upon in a prior petition, or engages in other conduct that disentitles him to the relief he seeks.

See publication Words and Phrases for other judicial constructions and definitions.

6. Habeas Corpus ⇐897, 898(2)

Standard of *Murray v. Carrier*, which requires habeas petitioner to show that a constitutional violation probably resulted in the conviction of one who is actually innocent, rather than more stringent *Sawyer* standard for demonstrating actual innocence to permit a court to consider merits of abusive or successive habeas claims, governs miscarriage of justice inquiry when a habeas petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.

7. Habeas Corpus ⇐897, 898(3)

For a claim of actual innocence to be credible, claim requires habeas petitioner asserting actual innocence in successive or abusive petition to support his allegations of constitutional error with new reliable evidence, whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that was not presented at trial.

8. Habeas Corpus ⇐897, 898(3), 899

To establish requisite probability that constitutional violation has probably resulted in the conviction of one who is actually innocent, habeas petitioner asserting actual innocence in an abusive or successive petition must show that it is more likely than not that no reasonable jury would have convicted him in the light of the new evidence and, thus, petitioner is required to make a stronger showing than that needed to establish prejudice; petitioner must show that it is more likely than not that no reasonable jury would have found petitioner guilty beyond a reasonable doubt.

9. Habeas Corpus ⇐897, 898(3), 899

In assessing adequacy of successive or abusive habeas petitioner's showing of actual innocence, district court is not bound by rules of admissibility that would govern at trial; instead, emphasis on actual innocence allows reviewing tribunal also to consider probative force of relevant evidence that was either excluded or unavailable at trial.

10. Criminal Law ⇐1159.2(3)

Jackson standard for reviewing sufficiency of evidence focuses on whether any rational juror could have convicted and looks to whether there is sufficient evidence which, if credited, could support the conviction.

11. Criminal Law ⇐1159.4(1)

Under *Jackson* standard for reviewing sufficiency of the evidence to sustain conviction, assessment of credibility of witnesses is generally beyond scope of review.

12. Habeas Corpus ⇐897, 898(2)

Under *Carrier* standard, which requires a successive or abusive habeas petitioner to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent, habeas court must consider what reasonable triers of facts are likely to do in considering the evidence of actual innocence.

13. Habeas Corpus ⇐897, 898(3), 899

Under proper application of either *Sawyer*, which provides that to demonstrate actual innocence to permit court to consider merits of abusive or successive habeas claims that fail cause and prejudice requirement petitioner must show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found petitioner eligible for death penalty under applicable state law, or *Carrier*, which requires habeas petitioner to show that constitutional violation has probably resulted in conviction of one who is actually innocent, petitioner's showing of innocence is not insufficient solely because trial record contains sufficient evidence to support jury's verdict.

Syllabus *

Petitioner Schlup, a Missouri prisoner, was convicted of participating in the murder of a fellow inmate and sentenced to death. In this, his second federal habeas petition, he alleged that constitutional error at his trial

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

deprived the jury of critical evidence that would have established his innocence. The District Court declined to reach the petition's merits, holding that Schlup could not satisfy the threshold showing of "actual innocence" required by *Sawyer v. Whitley*, 505 U.S. ——, ——, 112 S.Ct. 2514, 2515, 120 L.Ed.2d 269, under which a petitioner must demonstrate "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found" him guilty.

Held: The standard of *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397—which requires a habeas petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent," *id.*, at 496, 106 S.Ct., at 2649—rather than the more stringent *Sawyer* standard, governs the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims. Pp. 860–869.

(a) In contrast to the actual innocence claim asserted in *Herrera v. Collins*, 506 U.S. ——, 113 S.Ct. 853, 122 L.Ed.2d 203—that the execution of an innocent person convicted in an error-free trial violates the Eighth Amendment—Schlup's claim is accompanied by an assertion of constitutional error at trial: the ineffectiveness of his counsel and the withholding of evidence by the prosecution. As such, his conviction may not be entitled to the same degree of respect as one that is the product of an error-free trial, and his evidence of innocence need carry less of a burden. In *Herrera*, the evidence of innocence would have had to be strong enough to make the execution "constitutionally intolerable" *even if* the conviction was the product of a fair trial, while here the evidence must establish sufficient doubt about Schlup's guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was the product of a fair trial. Pp. 860–862.

(b) The societal interests in finality, comity, and conservation of scarce judicial resources dictate that a habeas court may not ordinarily reach the merits of successive or abusive claims, absent a showing of cause and prejudice. However, since habeas corpus is, at its core, an equitable remedy, a court must adjudicate even successive claims when required to do so by the ends of justice. Thus, in a trio of cases, this Court firmly established an exception for fundamental miscarriages of justice. *Carrier*, 477 U.S., at 495, 106 S.Ct., at 2649; *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364; *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434. To ensure that the fundamental miscarriage of justice exception would remain "rare" and be applied only in the "extraordinary case," while at the same time ensuring that relief would be extended to those who are truly deserving, the Court has explicitly tied the exception to the petitioner's innocence. *Carrier* and *Kuhlmann* also expressed the standard of proof that should govern consideration of such claims: The petitioner must show that the constitutional error "probably" resulted in the conviction of one who was actually innocent. The *Sawyer* Court made no attempt to reconcile its more exacting standard of proof with *Carrier's* use of "probably." Pp. 862–865.

(c) *Carrier*, rather than *Sawyer*, properly strikes the balance between the societal interests and the individual interest in justice, when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent. Though challenges to the propriety of imposing a death sentence are routinely asserted in capital cases, a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare and must be supported by new reliable evidence that was not presented at trial, evidence obviously unavailable in the vast majority of cases. Thus, the threat to judicial resources, finality, and comity posed by actual innocence claims is significantly less than that posed by sentencing claims. More importantly, the individual interest in avoiding injustice is most compelling in the context of actual innocence, since the quintessential miscarriage of justice is the execution of an innocent person. The less exacting *Carrier* standard of proof reflects the relative importance attached to the ultimate decision. Application of the

stricter *Sawyer* standard would give insufficient weight to the correspondingly greater injustice that is implicated by an actual innocence claim. Pp. 865–867.

(d) To satisfy *Carrier's* "actual innocence" standard, a petitioner must show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. The focus on actual innocence means that a district court is not bound by the admissibility rules that would govern at trial, but may consider the probative force of relevant evidence that was either wrongly excluded or unavailable at trial. The district court must make a probabilistic determination about what reasonable, properly instructed jurors would do, and it is presumed that a reasonable juror would consider fairly all of the evidence presented and would conscientiously obey the trial court's instructions requiring proof beyond a reasonable doubt. The *Carrier* standard, although requiring a substantial showing, is by no means equivalent to the standard governing review of insufficient evidence claims. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, distinguished. In applying the *Carrier* standard to Schlup's request for an evidentiary hearing, the District Court must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial. The court is not required to test the new evidence by a standard appropriate for deciding a motion for summary judgment, but may consider how the submission's timing and the affiants' likely credibility bear on the probable reliability of that evidence. Pp. 867–869.

11 F.3d 738, (CA 8 1993) vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a concurring opinion. REHNQUIST, C.J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.

Sean D. O'Brien, Kansas City, Mo., for petitioner.

Jeremiah W. Nixon, Jefferson City, Mo., for respondent.

For U.S. Supreme Court briefs, see:

1994 WL 249158 1994 WL 379178 (Pet. Brief)

1994 WL 369730 (Resp.Brief)

1994 WL 444672 (Reply.Brief)

Justice STEVENS delivered the opinion of the Court.

Petitioner Lloyd E. Schlup, Jr., a Missouri prisoner currently under a sentence of death, filed a second federal habeas corpus petition alleging that constitutional error deprived the jury of critical evidence that would have established his innocence. The District Court, without conducting an evidentiary hearing, declined to reach the merits of the petition, holding that petitioner could not satisfy the threshold showing of "actual innocence" required by *Sawyer v. Whitley*, 505 U.S. ——, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Under *Sawyer*, the petitioner must show "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner" guilty. *Id.*, at ——, 112 S.Ct., at 2515. The Court of Appeals affirmed. We granted certiorari to consider whether the *Sawyer* standard provides adequate protection against the kind of miscarriage of justice that would result from the execution of a person who is actually innocent.

I

On February 3, 1984, on Walk 1 of the high security area of the Missouri State Penitentiary, a black inmate named Arthur Dade was stabbed to death. Three white inmates from Walk 2, including petitioner, were charged in connection with Dade's murder.

At petitioner's trial in December 1985, the State's evidence consisted principally of the testimony of two corrections officers who had witnessed the killing. On the day of the murder, Sergeant Roger Flowers was on duty on Walk 1 and Walk 2, the two walks on the lower floor of the prison's high security area. Flowers testified that he first released the inmates on Walk 2 for their noon meal

and relocked their cells. After unlocking the cells to release the inmates on Walk 1, Flowers noticed an inmate named Rodnie Stewart moving against the flow of traffic carrying a container of steaming liquid. Flowers watched as Stewart threw the liquid in Dade's face. According to Flowers, Schlup then jumped on Dade's back, and Robert O'Neal joined in the attack. Flowers shouted for help, entered the walk, and grabbed Stewart as the two other assailants fled.

Officer John Maylee witnessed the attack from Walk 7, which is three levels and some 40–50 feet above Walks 1 and 2.[1] Maylee first noticed Schlup, Stewart, and O'Neal as they were running from Walk 2 to Walk 1 against the flow of traffic. According to Maylee's testimony, Stewart threw a container of liquid at Dade's face, and then Schlup jumped on Dade's back. O'Neal then stabbed Dade several times in the chest, ran down the walk, and threw the weapon out a window. Maylee did not see what happened to Schlup or Stewart after the stabbing.

The State produced no physical evidence connecting Schlup to the killing, and no witness other than Flowers and Maylee testified to Schlup's involvement in the murder.[2]

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Schlup's defense was that the State had the wrong man.[3] He relied heavily on a videotape from a camera in the prisoners' dining room. The tape showed that Schlup was the first inmate to walk into the dining room for the noon meal, and that he went through the line and got his food. Approximately 65 seconds after Schlup's entrance, several guards ran out of the dining room in apparent response to a distress call. Twenty-six seconds later, O'Neal ran into the dining room, dripping blood.[4] Shortly thereafter, Schlup and O'Neal were taken into custody.

Schlup contended that the videotape, when considered in conjunction with testimony that he had walked at a normal pace from his cell to the dining room,[5] demonstrated that he could not have participated in the assault. Because the videotape showed conclusively that Schlup was in the dining room 65 seconds before the guards responded to the distress call, a critical element of Schlup's defense was determining when the distress call went out. Had the distress call sounded shortly after the murder, Schlup would not have had time to get from the prison floor to the dining room, and thus he could not have participated in the murder. Conversely, had there been a delay of several minutes between the murder and the distress call, Schlup might have had sufficient time to participate in the murder and still get to the dining room over a minute before the distress call went out.[6] 304

1. Maylee was unavailable to testify at Schlup's trial. Testimony from Maylee's pretrial deposition was admitted in evidence and was read to the jury.

2. In contrast, the evidence of the involvement of Stewart and O'Neal in Dade's murder was substantial. Stewart, for example, was apprehended by Flowers during the struggle itself. And when O'Neal was taken into custody, his clothes were covered with blood and he was bleeding from lacerations on his right hand.

3. Schlup did not testify at the guilt phase of the trial. At the sentencing hearing, Schlup did testify and maintained his innocence of the offense. He continued to maintain his innocence even after the jury had sentenced him to death.

4. After stabbing Dade, O'Neal broke a window with his hand and threw the knife out the window. That resulted in multiple lacerations to his right hand. Before leaving the prison floor, O'Neal paused briefly at a utilities sink on Walk 2 to try to wash off the blood, and then continued on to the dining room. O'Neal was followed into the dining room by inmate Randy Jordan, who is identified in some affidavits attesting to petitioner's innocence as the third participant in the crime. See *infra*, at 858. However, Jordan's name was not mentioned at Schlup's trial.

5. Schlup's cell was at the end of Walk 2, closest to the dining room.

6. A necessary element of Schlup's defense was that Flowers and Maylee were mistaken in their identification of Schlup as one of the participants in the murder. Schlup suggested that Flowers had taken a visitor to Schlup's cell just 30 minutes before the murder. Schlup argued that Flowers therefore had Schlup "on the brain," Trial Tr. 493–494, thus explaining why, in the confusion surrounding the murder, Flowers might have mistakenly believed that he had seen Schlup.

Schlup argued that Maylee's identification was suspect because Maylee was three floors away from the murder and did not have an unobstruct-

The prosecutor adduced evidence tending to establish that such a delay had in fact occurred. First, Flowers testified that none of the officers on the prison floor had radios, thus implying that neither he nor any of the other officers on the floor was able to radio for help when the stabbing occurred. Second, Flowers testified that after he shouted for help, it took him "a couple [of] minutes" to subdue Stewart.[7] Flowers then brought Stewart downstairs, encountered Captain James Eberle, and told Eberle that there had been a "disturbance."[8] Eberle testified that he went upstairs to the prison floor, and then radioed for assistance. Eberle estimated that the elapsed time from when he first saw Flowers until he radioed for help was "approximately a minute."[9] The prosecution also offered testimony from a prison investigator who testified that he was able to run from the scene of the crime to the dining room in 33 seconds and to walk the distance at a normal pace in a minute and 37 seconds.

Neither the State nor Schlup was able to present evidence establishing the exact time of Schlup's release from his cell on Walk 2, the exact time of the assault on Walk 1, or the exact time of the radio distress call. Further, there was no evidence suggesting that Schlup had hurried to the dining room.[10]

After deliberating overnight, the jury returned a verdict of guilty. Following the penalty phase, at which the victim of one of Schlup's prior offenses testified extensively about the sordid details of that offense,[11] the jury sentenced Schlup to death. The Missouri Supreme Court affirmed Schlup's conviction and death sentence, *State v. Schlup*, 724 S.W.2d 236 (Mo.1987), and this Court denied certiorari, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 685 (1987).[12]

II

On January 5, 1989, after exhausting his state collateral remedies,[13] Schlup filed a *pro se* petition for a federal writ of habeas corpus, asserting the claim, among others, that his trial counsel was ineffective for failing to interview and to call witnesses who could establish Schlup's innocence.[14] The District

ed view of the murder scene. Schlup further suggested that Maylee's identification of Schlup had been influenced by a postincident conversation between Maylee and another officer who had talked to Flowers.

Schlup also argued that there were inconsistencies between the description of the murder provided by Flowers and that provided by Maylee. For example, Maylee testified that he saw Schlup, Stewart, and O'Neal running together against the flow of traffic, and that the three men had stopped when they encountered Dade. See *id.*, at 332. Flowers noticed only Stewart running against the flow of traffic, and he testified that O'Neal and Schlup were at the other end of the walk on the far side of Dade. See *id.*, at 249.

7. *Id.*, at 243.

8. *Id.*, at 245.

9. *Id.*, at 212, 214–215.

10. In fact, the evidence presented was to the contrary. Two inmates, Bernard Bailey and Arthur St. Peter, testified that they were behind Schlup in line on the way to the dining room and that they had all walked at a normal pace. Lieutenant Robert Faherty, the corrections officer on duty in the corridor leading from the prison floor to the dining room, testified that Schlup was the first inmate into the corridor on the day of the murder. Faherty also testified that he saw Schlup pause and yell something out one of the windows in the corridor, and that he told Schlup to move on. Faherty testified that nothing else unusual had occurred while Schlup was in the corridor.

On the other hand, both Maylee's testimony and the videotape establish that O'Neal ran from Walk 1 to the dining room.

11. Schlup had been convicted of sodomy and assault in connection with a series of attacks on a cellmate while he was being held in a county jail.

12. The other alleged participants in the crime were convicted in earlier, separate trials. O'Neal, who did the stabbing, was sentenced to death, see *State v. O'Neal*, 718 S.W.2d 498 (Mo. 1986); Stewart, who was apprehended by Flowers at the scene, was sentenced to 50 years' imprisonment without eligibility for probation or parole, see *State v. Stewart*, 714 S.W.2d 724 (Mo.App.1986).

13. The denial of Schlup's motion for postconviction relief was affirmed by the Missouri Supreme Court on October 18, 1988. See *Schlup v. State*, 758 S.W.2d 715 (Mo.1988).

14. Schlup identified three nonparticipant witnesses who he claimed had witnessed the murder: Van Robinson, Lamont Griffin Bey, and Ricky McCoy. Schlup also faulted trial counsel for failing to interview Randy Jordan

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Court concluded that Schlup's ineffectiveness claim was procedurally barred, and it denied relief on that claim without conducting an evidentiary hearing.[15] The Court of Appeals affirmed, though it did not rely on the alleged procedural bar. 941 F.2d 631 (CA8 1991). Instead, based on its own examination of the record, the Court found that trial counsel's performance had not been constitutionally ineffective, both because counsel had reviewed statements that Schlup's potential witnesses had given to prison investigators, and because the testimony of those witnesses "would be repetitive of the testimony to be presented at trial." *Id.*, at 639.[16] But cf. *Schlup v. Delo*, 11 F.3d 738, 746, n. 3 (CA8 1993) (Heaney, J., dissenting) (challenging the conclusion that such testimony would have been "repetitive"). The Court of Appeals denied a petition for rehearing and suggestion for rehearing en banc, 945 F.2d 1062 (1991), and we denied a petition for certiorari. 503 U.S. ——, 112 S.Ct. 1273, 117 L.Ed.2d 499 (1992).

On March 11, 1992, represented by new counsel, Schlup filed a second federal habeas corpus petition. That petition raised a number of claims, including that (1) Schlup was actually innocent of Dade's murder, and that his execution would therefore violate the Eighth and Fourteenth Amendments, cf. *Herrera v. Collins*, 506 U.S. ——, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); (2) trial counsel was ineffective for failing to interview alibi witnesses; and (3) the State had failed to disclose critical exculpatory evidence. The petition was supported by numerous affidavits from inmates attesting to Schlup's innocence.

The State filed a response arguing that various procedural bars precluded the District Court from reaching the merits of Schlup's claims and that the claims were in any event meritless. Attached to the State's response were transcripts of inmate interviews conducted by prison investigators just five days after the murder. One of the transcripts contained an interview with John Green, an inmate who at the time was the clerk for the housing unit. In his interview, Green stated that he had been in his office at the end of the walks when the murder occurred. Green stated that Flowers had told him to call for help, and that Green had notified base of the disturbance shortly after it began.[17]

Schlup immediately filed a traverse arguing that Green's affidavit provided conclusive proof of Schlup's innocence. Schlup contended that Green's statement demonstrated that

Schlup identified as the third participant in the murder.

15. Schlup had presented the ineffectiveness claim in his state postconviction motion, but had failed to raise it on appeal. See *Schlup v. Armontrout*, 1989 U.S.Dist. LEXIS 18285, *11–*13 (ED Mo.1989).

Schlup's first federal habeas petition also raised several other claims, all of which were denied either as procedurally barred or on the merits.

16. The Court of Appeals also addressed Schlup's other claims. Over Judge Heaney's dissent, the court rejected Schlup's claim that his counsel had been ineffective for failing to adduce available mitigating evidence at the penalty hearing. *Schlup v. Armontrout*, 941 F.2d 631, 639 (CA8 1991). The court also rejected Schlup's separate claim challenging the denial of his request for an evidentiary hearing in the District Court. Schlup had requested such a hearing to develop evidence so that he could in turn challenge the failure of the state court to grant his request for a continuance of his state postconviction proceedings. Schlup had requested that continuance to obtain additional evidence to support his claim of innocence. The Court of Appeals held that Schlup's challenge to the state court's failure to grant a continuance was not cognizable in a federal habeas corpus action. *Id.*, at 642.

17. "BROOKS: John, whenever you saw Dade fall what did you do then?

"GREEN: I stepped out of the office and I heard Sgt. Flowers calling for officers cause they had had a fight. Couldn't get nobody so he told me to call base to notify them of the fight and that's what I did.

"DEARIXON: That's all I have, John. Thank you very much." Response to Order To Show Cause Why a Writ of Habeas Corpus Should Not Be Granted, Exhibit T (Transcripts of Inmate Interviews), p. 31.

If the total time required for Green to respond to Flowers' instruction and for the base to send out a distress call in response to Green's call amounted to a mere 15–17 seconds, O'Neal running at top speed would have had 8–10 seconds to wash his hands and still would have been able to arrive in the dining room some 26 seconds after the distress call.

a call for help had gone out shortly after the incident. Because the videotape showed that Schlup was in the dining room some 65 seconds before the guards received the distress call, Schlup argued that he could not have been involved in Dade's murder. Schlup emphasized that Green's statement was not likely to have been fabricated, because at the time of Green's interview, neither he nor anyone else would have realized the significance of Green's call to base. Schlup tried to buttress his claim of innocence with affidavits from inmates who stated that they had witnessed the event and that Schlup had not been present.[18] Two of those affidavits suggested that Randy Jordan—who occupied the cell between O'Neal and Stewart in Walk 2, and who, as noted above, see n. 4, *supra*, is shown on the videotape arriving at lunch with O'Neal—was the third assailant.

On August 23, 1993, without holding a hearing, the District Court dismissed Schlup's second habeas petition and vacated the stay of execution that was then in effect. The District Court concluded that Schlup's various filings did not provide adequate cause for failing to raise his new claims more promptly. Moreover, the Court concluded that Schlup had failed to meet the *Sawyer v. Whitley*, 505 U.S. ——, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), standard for showing that a refusal to entertain those claims would result in a fundamental miscarriage of justice. In its discussion of the evidence, the Court made no separate comment on the significance of Green's statement.[19]

On September 7, 1993, petitioner filed a motion to set aside the order of dismissal, again calling the Court's attention to Green's statement. Two days later, Schlup filed a supplemental motion stating that his counsel had located John Green[20] and had obtained an affidavit from him. That affidavit confirmed Green's postincident statement that he had called base shortly after the assault. Green's affidavit also identified Jordan rather than Schlup as the third assailant.[21] The

18. In the District Court, Schlup attempted to supplement the record with several detailed affidavits from inmates attesting to his innocence. For example, Lamont Griffin Bey, a black inmate, submitted an affidavit in which he stated, "The first thing I saw of the fight was Rodney [*sic*] Stewart throw liquid in Arthur Dade's face, and O'Neal stab him.... I knew Lloyd Schlup at that time, but we were not friends. Lloyd Schlup was not present at the scene of the fight." Affidavit of Lamont Griffin Bey, pp. 2–3 (Apr. 7, 1993). Griffin Bey also stated, "When this happened, there was a lot of racial tension in the prison.... I would not stick my neck out to help a white person under these circumstances normally, but I am willing to testify because I know Lloyd Schlup is innocent." *Id.*, at 4.

Similarly, inmate Donnell White swore an affidavit in which he stated, "Three white guys were coming the opposite way. One of them had a tumbler of something that he threw in [Dade's] face. One or two of the other ones started sticking [Dade] with an icepick-type knife." Affidavit of Donnell White, at 1 (Apr. 21, 1993). White further stated, "I have seen Lloyd Schlup, and I know who he is. He is definitely not one of the guys I saw jump Arthur Dade.... I know that one of the three men involved has never been prosecuted, and I know that Lloyd Schlup is innocent. I barely know Lloyd Schlup, and I have no reason to lie for him. I told the investigators that I didn't see anything because I didn't want to get involved." *Id.*, at 3.

Though the District Court ultimately denied Schlup's motion to supplement the record, the inmate affidavits are part of the record on appeal.

19. The District Court focused primarily on the "suspect" nature of affidavits that are produced after a long delay, cf. *Herrera v. Collins*, 506 U.S. ——, ——, 113 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993) (O'CONNOR, J., concurring), and that come from inmates. The Court concluded that the affidavits presented by Schlup, when considered against the positive identifications made by Flowers and Maylee, failed to constitute a sufficiently persuasive showing of actual innocence. App. 79.

20. Green had been released from prison on January 29, 1986. Green Affidavit, at 4 (Sept. 7, 1993).

21. Green's affidavit stated:

"I looked down one walk, and I saw Randy Jordan holding Arthur Dade. Jordan was standing behind Dade, and had Dade's arms pinned to his sides from behind. I saw Robert O'Neal stab Dade several times in the chest while Jordan was holding him.

"Dade broke loose and ran straight toward me. I saw him collide with Rodnie Stewart and fall to the ground near the paint storage area. Sergeant Flowers hollered for help. I think there was so much noise that he didn't think the other guards in the Housing Unit heard him, so he told me to call base. He was on his way to break up the fight when he told me to call base. I imme-

District Court denied the motion and the supplemental motion without opinion.

Petitioner then sought from the Court of Appeals a stay of execution pending the resolution of his appeal. Relying on Justice Powell's plurality opinion in *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), Schlup argued that the District Court should have entertained his second habeas corpus petition, because he had supplemented his constitutional claim "with a colorable showing of factual innocence." *Id.*, at 454, 106 S.Ct., at 2627.

On October 15, 1993, the Court of Appeals denied the stay application. In an opinion that was subsequently vacated, the majority held that petitioner's claim of innocence was governed by the standard announced in *Sawyer v. Whitley*, 505 U.S. ——, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), and it concluded that under that standard, the evidence of Schlup's guilt that had been adduced at trial foreclosed consideration of petitioner's current constitutional claims.[22]

Judge Heaney dissented. Relying on Green's affidavit, the videotape, and the affidavits of four other eyewitnesses, Judge Heaney concluded that the petitioner had met both the *Kuhlmann* standard and a proper reading of the *Sawyer* standard.[23] Cf. *infra*, at ——. He believed that the district court should have conducted an evidentiary hearing in which the affiants would have been subjected to examination by the State so "their credibility could be accurately determined." [24]

In the meantime, petitioner's counsel obtained an affidavit from Robert Faherty, the former lieutenant at the prison whom Schlup had passed on the way to lunch on the day of the murder and who had reprimanded Schlup for shouting out the window. See n. 10, *supra*. Faherty's affidavit stated that Schlup had been in Faherty's presence for at least two and a half minutes; that Schlup was walking at a leisurely pace; and that Schlup "was not perspiring or breathing hard, and he was not nervous." Affidavit of Robert Faherty ¶¶ 4, 6 (Oct. 26, 1993).[25]

On November 15, 1993, the Court of Appeals vacated its earlier opinion and substituted a more comprehensive analysis of the law to support its decision to deny Schlup's request for a stay. 11 F.3d 738. The majority adhered to its earlier conclusion that *Sawyer* stated the appropriate standard for evaluating Schlup's claim of actual innocence. 11 F.3d, at 740. The opinion also contained an extended discussion of Schlup's new evidence. The Court noted in particular that Green's new affidavit was inconsistent in part with both his prison interview and his testimony at the Stewart trial. *Id.*, at 742. The Court viewed Faherty's affidavit as simply "an effort to embellish and expand upon his

diately went into the office, picked up the phone, and called base.

"A sergeant at the base picked up the phone. I told him there was a fight in Housing Unit 5A. He said something like, 'OK,' and I hung up the phone." *Id.*, at 2–3.

Green stated that his call to base came "within seconds of Dade hitting the ground. It could not have been more than a half minute or a minute after he was stabbed by Jordan and O'Neal. It happened very fast." *Id.*, at 4.

Green also explained why he had earlier denied witnessing the murder: "I told [investigators] I didn't [see the murder] because I was concerned about my safety. I know that Jordan and O'Neal were in the Aryan Brotherhood, and if I said I saw them do it, they could easily have me killed." *Id.*, at 3–4.

Green continued: "If I had been contacted before Schlup's trial, I would have told his attorney that he was not there when Dade was stabbed, and I would have testified that I called base within seconds after Dade hit the ground. I might have been reluctant to snitch on Jordan and O'Neal. I'm not afraid now because I haven't been in prison for more than 7½ years, and I have been working steadily ever since. I have no intention of going back to prison." *Id.*, at 6.

22. *Schlup v. Delo*, 11 F.3d 738, 740–741 (CA8 1993).

23. *Schlup v. Delo*, 11 F.3d 738, 744 (CA8 1993).

24. *Id.*, at 747.

25. Faherty had testified at Schlup's trial, but he had not been asked about the significant details of his encounter with Schlup that are recited in his affidavit. Faherty Affidavit ¶ 9 (Oct. 26, 1993). Faherty left the Department of Corrections in 1989. He stated in his affidavit that he had been prompted to come forward after hearing about Schlup's case through an article in the local newspaper. *Id.*, ¶ 11.

testimony" and concluded "that a habeas court should not permit retrial on such a basis." *Id.*, at 743.

Judge Heaney again dissented, concluding that Schlup had "presented truly persuasive evidence that he is actually innocent," and that the District Court should therefore have addressed the merits of Schlup's constitutional claims. *Id.*, at 744. Judge Heaney also argued that Schlup's ineffectiveness claim was substantial. He noted that Schlup's trial counsel failed to conduct individual interviews with Griffin Bey, McCoy, or any of the other inmates who told investigators that they had seen the killing. Moreover, counsel failed to interview Green about his statement that he had called base. In fact, counsel apparently failed to conduct individual interviews with any of the potential witnesses to the crime.

Judge Heaney adhered to his conclusion that Schlup's counsel was ineffective, even though counsel allegedly had reviewed 100 interviews conducted by prison investigators.[26] Judge Heaney argued that counsel's review of the interview transcripts—rather than demonstrating counsel's effectiveness—made counsel's failure to conduct his own interviews with Green and the few inmates who admitted seeing the attack even more troubling. See *id.*, at 747, n. 5. Judge Heaney concluded that Schlup's case should be remanded to the District Court to conduct an evidentiary hearing and, if appropriate, to address the merits of Schlup's constitutional claims.

On November 17, 1993, the Court of Appeals denied a suggestion for rehearing en banc. Dissenting from that denial, three judges joined an opinion describing the question whether the majority should have applied the standard announced in *Sawyer v. Whitley, supra*, rather than the *Kuhlmann* standard as "a question of great importance in habeas corpus jurisprudence." 11 F.3d, at 755. We granted certiorari to consider that question. 511 U.S. ——, 114 S.Ct. 1368, 128 L.Ed.2d 45 (1994).[27]

III

As a preliminary matter, it is important to explain the difference between Schlup's claim of actual innocence and the claim of actual innocence asserted in *Herrera v. Collins*, 506 U.S. ——, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In *Herrera*, the petitioner advanced his claim of innocence to support a novel substantive constitutional claim, namely that the execution of an innocent person would violate the Eighth Amendment.[28] Under petitioner's theory in *Herrera*, even if the proceedings that had resulted in his conviction and sentence were entirely fair and error-free, his innocence would render his execution a "constitutionally intolerable event." *Id.*, at ——, 113 S.Ct., at 870 (O'CONNOR, J., concurring).

[1] Schlup's claim of innocence, on the other hand, is procedural, rather than substantive. His constitutional claims are based not on his innocence, but rather on his contention that the ineffectiveness of his counsel, see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and the withholding of evidence by the prosecution, see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), denied him the full panoply of protections afforded to criminal defendants by the Constitution. Schlup, however, faces procedural obstacles that he must overcome before a federal court may address the merits of those constitution-

26. The transcripts of the individual interviews conducted by the prison investigators were relatively brief: the entire written transcript of the investigators' interview with Green, for example, takes up less than one page. The vast majority of the interviews consisted of simple statements that the interviewee had not seen Dade's killing.

27. Though the Court of Appeals denied Schlup's motion for a stay of execution, the Governor of Missouri granted a stay one day before Schlup's execution date. The Governor then ordered a Board of Inquiry to conduct clemency proceedings. Those proceedings are apparently continuing.

28. In *Herrera*, we assumed for the sake of argument "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U.S., at ——, 113 S.Ct., at 856.

al claims. Because Schlup has been unable to establish "cause and prejudice" sufficient to excuse his failure to present his evidence in support of his first federal petition, see *McCleskey v. Zant*, 499 U.S. 467, 493–494, 111 S.Ct. 1454, 1469–1470, 113 L.Ed.2d 517 (1991),[29] Schlup may obtain review of his constitutional claims only if he falls within the "narrow class of cases ... implicating a fundamental miscarriage of justice." *Id.*, at 494, 111 S.Ct., at 1470. Schlup's claim of innocence is offered only to bring him within this "narrow class of cases."

[2] Schlup's claim thus differs in at least two important ways from that presented in *Herrera*. First, Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims.[30] Schlup's claim of innocence is thus "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S., at ——, 113 S.Ct., at 862; see also 11 F.3d, at 740.[31]

More importantly, a court's assumptions about the validity of the proceedings that resulted in conviction are fundamentally different in Schlup's case than in Herrera's. In *Herrera*, petitioner's claim was evaluated on the assumption that the trial that resulted in his conviction had been error-free. In such a case, when a petitioner has been "tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants," 506 U.S., at ——, 113 S.Ct., at 870 (O'CONNOR, J., concurring), it is appropriate to apply an "'extraordinarily high'" standard of review. *Id.*, at ——, 113 S.Ct., at 874 (O'CONNOR, J., concurring).[32]

[3] Schlup, in contrast, accompanies his claim of innocence with an assertion of constitutional error at trial. For that reason, Schlup's conviction may not be entitled to the same degree of respect as one, such as Herrera's, that is the product of an error-free trial. Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Consequently, Schlup's evidence of innocence need carry less of a burden. In *Herrera* (on the assumption that petitioner's claim was, in principle, legally well founded), the evidence of innocence would have had to be strong enough to make his execution "constitutionally intolerable" *even if* his conviction was the product of a fair trial. For Schlup, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of jus-

29. Schlup argued in the District Court that the lack of diligence of his appointed postconviction counsel, coupled with problems created by the State, established cause and prejudice. See App. 38–43 (state postconviction proceedings); *id.*, at 43–45 (proceedings on first federal habeas). That argument was rejected by the District Court and the Court of Appeals, and petitioner does not renew it in this Court.

30. In light of our conclusion that the courts below applied the wrong standard in evaluating Schlup's gateway innocence claim, see *infra*, at 866, we need not express a view concerning the merits of Schlup's underlying constitutional claims.

31. In his submissions to the federal courts, Schlup has consistently argued that his execution would violate the Eighth and Fourteenth Amendments because he is actually innocent. That *Herrera* claim was rejected in the District Court and in the Court of Appeals. In the dissent from the denial of rehearing en banc, three judges stated that they were persuaded by Judge Heaney's dissent that there was "at least a substantial likelihood" that Schlup could meet even the extraordinarily high showing required by *Herrera*. We denied certiorari on Schlup's *Herrera* claim, and accordingly we express no opinion as to its merits.

32. In *Herrera*, it was not necessary to determine the appropriate standard of review because petitioner had failed to make "a truly persuasive demonstration of 'actual innocence'" under any reasonable standard.

tice *unless* his conviction was the product of a fair trial.

Our rather full statement of the facts illustrates the foregoing distinction between a substantive *Herrera* claim and Schlup's procedural claim. Three items of evidence are particularly relevant: the affidavit of black inmates attesting to the innocence of a white defendant in a racially motivated killing; the affidavit of Green describing his prompt call for assistance; and the affidavit of Lieutenant Faherty describing Schlup's unhurried walk to the dining room. If there were no question about the fairness of the criminal trial, a *Herrera*–type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish Schlup's innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims.

IV

As this Court has repeatedly noted, "[a]t common law, res judicata did not attach to a court's denial of habeas relief." *McCleskey*, 499 U.S., at 479, 111 S.Ct., at 1462. Instead, "'a renewed application could be made to every other judge or court in the realm, and each court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not to be influenced by the previous decisions refusing discharge.'" *Ibid.*, quoting W. Church, Writ of Habeas Corpus § 386, p. 570 (2d ed. 1893).

The Court has explained the early tolerance of successive petitions, in part, by the fact that the writ originally performed only the narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention. See *McCleskey*, 499 U.S., at 478, 111 S.Ct., at 1461–1462; *Wainwright v. Sykes*, 433 U.S. 72, 78, 97 S.Ct. 2497, 2502, 53 L.Ed.2d 594 (1977).[33] The scope of the writ later expanded beyond its original narrow purview to encompass review of constitutional error that had occurred in the proceedings leading to conviction. See *McCleskey*, 499 U.S., at 478–479, 111 S.Ct., at 1461–1462; *Wainwright v. Sykes*, 433 U.S., at 79, 97 S.Ct., at 2502. That broadening of the scope of the writ created the risk that repetitious filings by individual petitioners might adversely affect the administration of justice in the federal courts. Such filings also posed a threat to the finality of state court judgments and to principles of comity and federalism. See, *e.g.*, *McCleskey*, 499 U.S., at 491, 111 S.Ct., at 1468–1469; *Murray v. Carrier*, 477 U.S. 478, 487, 106 S.Ct. 2639, 2644–2645, 91 L.Ed.2d 397 (1986).

To alleviate the increasing burdens on the federal courts and to contain the threat to finality and comity, Congress attempted to fashion rules disfavoring claims raised in second and subsequent petitions. For example, in 1966, Congress amended 28 U.S.C. § 2244(b) "to introduce 'a greater degree of finality of judgments in habeas corpus proceedings.'" *Kuhlmann v. Wilson*, 477 U.S., at 450, 106 S.Ct., at 2625, quoting S.Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966) (Senate Report); see also *McCleskey*, 499 U.S., at 486, 111 S.Ct., at 1466. Similarly, in 1976, Congress promulgated Rule 9(b) of the Rules Governing Habeas Corpus Proceedings in part to deal with the problem of repetitive filings.

[4, 5] These same concerns resulted in a number of recent decisions from this Court that delineate the circumstances under which a district court may consider claims raised in a second or subsequent habeas petition. In those decisions, the Court held that a habeas court may not ordinarily reach the merits of successive claims, *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, or abusive claims, *McCleskey*, 499 U.S., at 493, absent a show-

33. As this Court noted in *Wainwright v. Sykes*, there have been "divergent discussions of the historic role of federal habeas corpus." 433 U.S., at 77, n. 6, 97 S.Ct., at 2501, n. 6. One recent commentator has offered a new perspective on the history of the writ. See Liebman, Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum.L.Rev. 1997 (1992).

ing of cause and prejudice, see *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).[34] The application of cause and prejudice to successive and abusive claims conformed to this Court's treatment of procedurally defaulted claims. *Carrier*, 477 U.S. 478, 106 S.Ct. 2639; see also *McCleskey*, 499 U.S., at 490–491, 111 S.Ct., at 1468–1469 ("The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review"). See generally *Sawyer*, 505 U.S., at ——, 112 S.Ct., at 2518. The net result of this congressional and judicial action has been the adoption in habeas corpus of a "'qualified application of the doctrine of res judicata.'" *McCleskey*, 499 U.S., at 486, 111 S.Ct., at 1466, quoting S.Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966) (Senate Report).[35]

At the same time, the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata. Thus, for example, in *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." *Id.*, at 15–17, 83 S.Ct., at 1077–1078; see also *McCleskey*, 499 U.S., at 495, 111 S.Ct., at 1470–1471. The *Sanders* Court applied this equitable exception even to petitions brought under 28 U.S.C. § 2255, though the language of § 2255 contained no reference to an "ends of justice" inquiry. *Sanders*, 373 U.S., at 12–15, 83 S.Ct., at 1075–1077.

We firmly established the importance of the equitable inquiry required by the ends of justice in "a trio of 1986 decisions" handed down on the same day. *Sawyer*, 505 U.S., at ——, 112 S.Ct., at 2518 (referring to *Kuhlmann*, 477 U.S. 436, 106 S.Ct. 2616, *Carrier*, 477 U.S. 478, 106 S.Ct. 2639, and *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). In *Kuhlmann*, seven Members of this Court squarely rejected the argument that in light of the 1966 amendments, "federal courts no longer must consider the 'ends of justice' before dismissing a successive petition." See 477 U.S., at 451, 106 S.Ct., at 2625 (plurality opinion); *id.*, at 468–471, 106 S.Ct., at 2634–2636 (Brennan, J., dissenting); *id.*, at 476–77, 106 S.Ct., at 2638–39 (STEVENS, J., dissenting); see also *Sawyer v. Whitley*, 505 U.S., at ——, 112 S.Ct., at 2519 (noting that in *Kuhlmann*, "[w]e held that despite the removal of [the reference to the ends of justice] from 28 U.S.C. § 2244(b) in 1966, the miscarriage of justice exception would allow successive claims to be heard"). Thus, while recognizing that successive petitions are generally precluded from review, Justice Powell's plurality opinion expressly noted that there are "limited circumstances under which the interests of the prisoner in relitigating constitutional claims held meritless on a prior petition may outweigh the countervailing interests served by according finality to the prior judgment." 477 U.S., at 452, 106 S.Ct., at 2626. Similarly, writing for the Court in

34. A "'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." *Kuhlmann v. Wilson*, 477 U.S. 436, 444, n. 6, 106 S.Ct. 2616, 2622 n. 6, 91 L.Ed.2d 364 (1986) (plurality opinion). An "abusive petition" occurs "where a prisoner files a petition raising grounds that were available but not relied upon in a prior petition, or engages in other conduct that 'disentitle[s] him to the relief he seeks.'" *Ibid.*, quoting *Sanders v. United States*, 373 U.S. 1, 17–19, 83 S.Ct. 1068, 1078–1079, 10 L.Ed.2d 148 (1963).

35. This Court has repeatedly noted the interplay between statutory language and judicially-managed equitable considerations in the development of habeas corpus jurisprudence. For example, in *McCleskey*, the Court noted that the doctrine of abuse of the writ of habeas corpus "refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." 499 U.S., at 489, 111 S.Ct., at 1467. Similarly, in *Wainwright v. Sykes*, the Court noted its "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." 433 U.S., at 81, 97 S.Ct., at 2503; see also *Kuhlmann*, 477 U.S., at 446–447, 106 S.Ct., at 2622–2623 (explaining that the Court has both expanded and limited the scope of the writ); *Brecht v. Abrahamson*, 507 U.S. ——, ——, 113 S.Ct. 1710, 1719, 123 L.Ed.2d 353 (1993) ("We have filled the gaps of the habeas corpus statute with respect to other matters").

the pre-*Sawyer* regime, "in virtually every case, the allegation of actual innocence has been summarily rejected." [40] The threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing.

Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent.[41] Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372, 90 S.Ct. 1068, 1077, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). See also Starkie, Evidence 751 (1824) ("The maxim of the law is ... that it is better that ninety-nine ... offenders shall escape than that one innocent man be condemned"). See generally Newman, Beyond "Reasonable Doubt," 68 N.Y.U.L.Rev. 979, 980–981 (1993).

The overriding importance of this greater individual interest merits protection by imposing a somewhat less exacting standard of proof on a habeas petitioner alleging a fundamental miscarriage of justice than on one alleging that his sentence is too severe. As this Court has noted, "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S., at 370, 90 S.Ct., at 1076 (Harlan, J., concurring); see also *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1807–1808, 60 L.Ed.2d 323 (1979). The standard of proof thus reflects "the relative importance attached to the ultimate decision." *Id.*, at 423, 99 S.Ct. at 1808. Though the *Sawyer* standard was fashioned to reflect the relative importance of a claim of an erroneous sentence, application of that standard to petitioners such as Schlup would give insufficient weight to the correspondingly greater injustice that is implicated by a claim of actual innocence. The paramount importance of avoiding the injustice of executing one who is actually innocent thus requires application of the *Carrier* standard.[42]

We recognize, as the State has reminded us, that in *Sawyer* the Court applied its new standard not only to the penalty phase of the case but also to Sawyer's responsibility for arson, one of the elements of the offense of first-degree murder.[43] This fact does not require application of the *Sawyer* standard to a case such as Schlup's. Though formulated as an element of the offense of first-degree murder, the arson functioned essentially as a sentence enhancer. That claim, therefore, is readily distinguishable from a claim, like the one raised by Schlup, that the petitioner is

40. Steiker, Innocence and Federal Habeas, 41 UCLA L.Rev. 303, 377 (1993); see also *id.*, at n. 370 (collecting cases).

41. See, *e.g.*, *Lankford v. Idaho*, 500 U.S. 110, 125, 111 S.Ct. 1723, 1731, 114 L.Ed.2d 173 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 750, n. 4, 110 S.Ct. 1441, 1449, n. 4, 108 L.Ed.2d 725 (1990); *Booth v. Maryland*, 482 U.S. 496, 509, n. 12, 107 S.Ct. 2529, 2536 n. 12, 96 L.Ed.2d 440 (1987); *Solem v. Helm*, 463 U.S. 277, 294, 103 S.Ct. 3001, 3011–3012, 77 L.Ed.2d 637 (1983); *Gardner v. Florida*, 430 U.S. 349, 357–358, 97 S.Ct. 1197, 1204–1205, 51 L.Ed.2d 393 (plurality opinion) (1977); *Woodson v. North Carolina*, 428 U.S. 280, 303–304, 305, 96 S.Ct. 2978, 2990–2991, 2991–2992, 49 L.Ed.2d 944 (1976) (plurality opinion of Stewart, Powell, and STEVENS, JJ.).

42. By our references to *Winship*, of course, we do not suggest that Schlup comes before a habeas court in the same situation as one who has merely been accused of a crime. Having been convicted by a jury of a capital offense, Schlup no longer has the benefit of the presumption of innocence. Cf. *Herrera v. Collins*, 506 U.S., at ——, 113 S.Ct., at 870–871 (O'CONNOR, J., concurring). To the contrary, Schlup comes before the habeas court with a strong—and in the vast majority of the cases conclusive—presumption of guilt. Our reference to *Winship* is intended merely to demonstrate that it is quite consistent with our jurisprudence to give content through a burden of proof to the understanding that fundamental injustice would result from the erroneous conviction and execution of an innocent person.

43. See *Sawyer*, 505 U.S., at ——, n. 8, ——, 112 S.Ct., at 2520, n. 8, 2523–2525.

actually innocent. Fealty to the doctrine of *stare decisis* does not, therefore, preclude application of the *Carrier* standard to the facts of this case.[44]

Accordingly, we hold that the *Carrier* "probably resulted" standard rather than the more stringent *Sawyer* standard must govern the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.

VI

[8] The *Carrier* standard requires the habeas petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." 477 U.S., at 496, 106 S.Ct., at 2649–2650. To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The petitioner thus is required to make a stronger showing than that needed to establish prejudice.[45] At the same time, the showing of "more likely than not" imposes a lower burden of proof than the "clear and convincing" standard required under *Sawyer*. The *Carrier* standard thus ensures that petitioner's case is truly "extraordinary," *McCleskey*, 499 U.S., at 494, 111 S.Ct., at 1470, while still providing petitioner a meaningful avenue by which to avoid a manifest injustice.

Carrier requires a petitioner to show that he is "actually innocent." As used in *Carrier*, actual innocence is closely related to the definition set forth by this Court in *Sawyer*. To satisfy the *Carrier* gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.

[9] Several observations about this standard are in order. The *Carrier* standard is intended to focus the inquiry on actual innocence. In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the *Carrier* standard, we believe that Judge Friendly's description of the inquiry is appropriate: the habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." [46]

The consideration in federal habeas proceedings of a broader array of evidence does not modify the essential meaning of "innocence." The *Carrier* standard reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt. See *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068. Indeed, even in *Sawyer*, with its emphasis on eligibility for the death penalty, the Court did not stray from the understanding that the eligibility determination must be made with reference to reasonable doubt. Thus, whether a court is assessing eligibility for the death penalty under *Sawyer*, or is deciding whether a petitioner has made the requisite showing of innocence under *Carrier*, the analysis must incorporate the understanding that proof beyond a reasonable

44. Nor do we believe that confining *Sawyer*'s more rigorous standard to claims involving eligibility for the sentence of death is anomalous. Our recognition of the significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence is reflected in our decisions that permit reduced procedural protections at sentencing. See, *e.g.*, *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

45. See *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984); *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383–3384, 87 L.Ed.2d 481 (1985) (Blackmun, J.); *id.*, at 685, 105 S.Ct. at 3385 (White, J., concurring).

46. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 160 (1970).

doubt marks the legal boundary between guilt and innocence.[47]

329 The meaning of actual innocence as formulated by *Sawyer*, and *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

We note finally that the *Carrier* standard requires a petitioner to show that it is more likely than not that "no reasonable juror" would have convicted him. The word "reasonable" in that formulation is not without meaning. It must be presumed that a reasonable juror would consider fairly all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt.[48]

330 [10, 11] Though the *Carrier* standard requires a substantial showing, it is by no means equivalent to the *Jackson* standard that governs review of claims of insufficient evidence. The *Jackson* standard, which focuses on whether any rational juror could have convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction. The *Jackson* standard thus differs in at least two important ways from the *Carrier* standard. First, under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review. In contrast, under the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments. Second, and more fundamentally, the focus of the inquiry is different under *Jackson* than under *Carrier*. Under *Jackson*, the use of the word "could" focuses the inquiry on the power of the trier of the fact to reach its conclusion. Under *Carrier*, the use of the word "would" focuses the inquiry on the likely behavior of the trier of fact.

[12] Indeed, our adoption of the phrase "more likely than not" reflects this distinction. Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: either the trier of fact has power as a matter of law or it does not. Under *Carrier*, in contrast, the habeas court must consider what reasonable triers of fact are likely to do. Under this probabilistic inquiry, it makes sense to

47. Actual innocence, of course, does not require innocence in the broad sense of having led an entirely blameless life. Indeed, Schlup's situation provides a good illustration. At the time of the crime at issue in this case, Schlup was incarcerated for an earlier offense, the sordid details of which he acknowledged in his testimony at the punishment phase of his trial. Such earlier criminal activity has no bearing on whether Schlup is actually innocent of Dade's murder.

As we have explained, *supra*, at 860–862, Schlup's claim of innocence is fundamentally different from the claim advanced in *Herrera*. The standard that we apply today, therefore, will not foreclose the application of factual innocence to the analysis of such claims.

48. THE CHIEF JUSTICE suggests that the *Carrier* standard is "a classic mixing of apples and oranges." *Post*, at 873. That standard, however, is no more a mixing of apples and oranges than is the standard adopted by the Court in *Sawyer*. See *Sawyer*, 505 U.S., at ——, 112 S.Ct., at 2515 (requiring that petitioner show "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty"). Though it is true that " '[m]ore likely than not' " is a "quintessential charge to a finder of fact," *post*, at 873, that is equally true of the "clear and convincing evidence" component of the *Sawyer* formulation. There is thus no reason to believe that the *Carrier* standard is any more likely than the *Sawyer* standard to be "a source of confusion." *Post*, at 873.

Nor do we accept THE CHIEF JUSTICE's description of the *Carrier* standard as a "hybrid." *Ibid.* Finders of fact are often called upon to make predictions about the likely actions of hypothetical "reasonable" actors. Thus, the application of "more likely than not" to the habeas court's assessment of the actions of reasonable jurors is neither illogical nor unusual.

The Court holds that, in order to have an abusive or successive habeas claim heard on the merits, a petitioner who cannot demonstrate cause and prejudice "must show that it is more likely than not that no reasonable juror would have convicted him" in light of newly discovered evidence of innocence. *Ante*, at ~~866~~-867. This standard is higher than that required for prejudice, which requires only "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt," *Strickland v. Washington*, 466 U.S. 668, 695, 104 S.Ct. 2052, 2068–2069, 80 L.Ed.2d 674 (1984). Instead, a petitioner does not pass through the gateway erected by *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), if the district court believes it more likely than not that there is any juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt. And the Court's standard, which focuses the inquiry on the likely behavior of jurors, is substantively different from the rationality standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Jackson*, which emphasizes the authority of the factfinder to make conclusions from the evidence, establishes a standard of review for the sufficiency of record evidence—a standard that would be ill-suited as a burden of proof, see *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. ——, ——, 113 S.Ct. 2264, ——, 124 L.Ed.2d 539 (1993). The Court today does not sow confusion in the law. Rather, it properly balances the dictates of justice with the need to ensure that the actual innocence exception remains only a " 'safety valve' for the 'extraordinary case,' " *Harris v. Reed*, 489 U.S. 255, 271, 109 S.Ct. 1038, 1048, 103 L.Ed.2d 308 (1989) (O'CONNOR, J., concurring).

Moreover, the Court does not, and need not, decide whether the fundamental miscarriage of justice exception is a discretionary remedy. It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2460–2461, 110 L.Ed.2d 359 (1990). Having decided that the district court committed legal error, and thus abused its discretion, by relying on *Sawyer v. Whitley*, 505 U.S. ——, 112 S.Ct. 2514, instead of *Murray v. Carrier*, *supra*, the Court need not decide the question—neither argued by the parties nor passed upon by the Court of Appeals—whether abuse of discretion is the proper standard of review. In reversing the judgment of the Court of Appeals, therefore, the Court does not disturb the traditional discretion of district courts in this area, nor does it speak to the standard of appellate review for such judgments.

With these observations, I join the Court's opinion.

Chief Justice REHNQUIST, with whom Justice KENNEDY and Justice THOMAS join, dissenting.

The Court decides that the threshold standard for a showing of "actual innocence" in a successive or abusive habeas petition is that set forth in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), rather than that set forth in *Sawyer v. Whitley*, 505 U.S. ——, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). For reasons which I later set out, I believe the *Sawyer* standard should be applied to claims of guilt or innocence as well as to challenges to a petitioner's sentence. But, more importantly, I believe the Court's exegesis of the *Carrier* standard both waters down the standard suggested in that case, and will inevitably create confusion in the lower courts.

On February 3, 1984, three white inmates attacked and killed a black inmate named Arthur Dade. At trial, testimony by Sergeant Roger Flowers and Officer John Maylee indicated that inmate Rodnie Stewart threw a container of steaming liquid into Dade's face, petitioner jumped on Dade's back rendering him defenseless, and inmate Robert O'Neal proceeded to stab Dade to death. Petitioner's trial counsel attempted to discredit both eyewitness identifications. As to Sergeant Flowers, counsel argued that Flowers had brought a visitor into petitioner's cell less than an hour before the stabbing, and therefore, Flowers had Schlup "on the brain." Trial counsel attempted to dis-

credit Officer Maylee's identification by arguing that Maylee was too far from the scene to properly view the incident. Through discovery, petitioner's trial counsel uncovered a videotape in which petitioner is the first inmate to enter the cafeteria. One minute and five seconds after petitioner enters the cafeteria, a group of guards run out in apparent response to a distress call. Twenty-six seconds later, O'Neal is seen entering the cafeteria. Petitioner's trial counsel argued that the videotape established that petitioner could not have committed the murder because there was insufficient time for him to commit the crime and arrive at the cafeteria one minute and five seconds prior to the distress call. Petitioner's trial counsel also presented two alibi witnesses who testified that petitioner had walked in front of them to the cafeteria without incident.

The jury considered this conflicting evidence, determined that petitioner's story was not credible, and convicted him of capital murder. During the sentencing component of trial, the prosecution presented evidence that there were two statutory aggravating factors that warranted imposition of the death penalty: petitioner committed the murder in a place of lawful confinement, and petitioner had a substantial history of serious assaultive criminal convictions. As to the second aggravating factor, the prosecution presented testimony that for two weeks, petitioner had brutally beaten, tortured, and sodomized a cellmate in a county jail. The prosecution also presented testimony that petitioner was convicted of aggravated assault for slitting a cellmate's throat. On cross-examination, petitioner presented his version of the prior incidents. The jury considered this evidence, rejected petitioner's story, and returned a sentence of death.

On appeal, the Missouri Supreme Court affirmed petitioner's conviction and death sentence. Petitioner then filed state collateral proceedings claiming, among other things, that his trial counsel was ineffective for failing to present additional alibi witnesses and for failing to investigate fully the circumstances of the murder. The Missouri Circuit Court determined that petitioner's counsel provided effective assistance of counsel. The Missouri Supreme Court affirmed the denial of postconviction relief.

Petitioner then filed his first federal habeas petition claiming that his trial counsel was ineffective at both the guilt and penalty phases of trial. Though he previously refused to identify Randy Jordan as the alleged third participant in the murder, petitioner faulted his trial counsel for failing to call Randy Jordan as a witness.[1] The District Court denied relief. A panel of the Eighth Circuit Court of Appeals concluded on the merits that petitioner's trial counsel had not been ineffective at the guilt or penalty phases of trial.[2] Petitioner sought review of the panel's decision by the en banc court. No Eighth Circuit judge questioned the panel's conclusion that petitioner's trial counsel provided effective assistance of counsel during the guilt phase of trial.

Petitioner filed a second federal habeas petition, again claiming that his trial counsel was ineffective at both the guilt and penalty phases of trial. Petitioner supplemented this filing with an affidavit from a former inmate, John Green. Green's affidavit related to the timing of the distress call. In his most recent statement, Green swore that Sergeant Flowers "was on his way to break up the fight when he told me to call base. I immediately went into the office, picked up the phone, and called base." App. 122.[3] Under

1. The Missouri Circuit Court found that "[d]efense counsel did not interview Randy Jordan, whom Petitioner now alleges was the third participant in the murder with which the Petitioner was charged, because the Petitioner while maintaining someone else committed the acts attributable to him, refused to give the name of that person to his counsel." *Schlup v. Delo*, Respondent's Exhibit J, pp. 49–50.

2. Senior Circuit Judge Heaney took issue only with the majority's conclusion that petitioner's trial counsel had rendered effective assistance at the penalty phase of trial. Cf. *Schlup v. Armontrout*, 941 F.2d 631, 642 (CA8 1991) ("I disagree with the court's conclusion that Schlup was not prejudiced by his counsel's ineffectiveness during the penalty phase") (Heaney, J., dissenting).

3. On the day of the incident Green told prison investigators that he had not observed the murder. At Stewart's trial, while under oath, Green testified that he saw no actual fight take place and made no mention of his call to base. App.

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this timing sequence, petitioner submitted that he "ha[d] produced proof, which could not have been fabricated, that the call to which the guards [in the cafeteria] responded came seconds after the stabbing." *Id.*, at 100–101. Further, petitioner claimed that "Green's testimony thus makes it impossible, under any view of the evidence, for Schlup to have participated in Dade's murder: for thirty seconds to a minute before the distress call, the videotape plainly shows Lloyd Schlup in the prison dining room, quietly getting his lunch." Brief for Petitioner 12. Thus, petitioner's claim of "actual innocence" depends, in part, on the assumption that the officers in the cafeteria responded to Green's distress call "within seconds" of Dade hitting the ground.[4]

The District Court denied petitioner's second habeas petition without conducting an evidentiary hearing. While on appeal, petitioner supplemented his habeas petition with an additional affidavit from Robert Faherty, a former prison guard who previously testified at petitioner's trial. A divided panel of the Eighth Circuit applied the *Sawyer* standard to petitioner's gateway claim of "actual innocence" and determined that petitioner failed to meet that standard. The Eighth Circuit denied rehearing en banc. We granted certiorari to determine when, absent a showing of cause and prejudice, a district court may consider the merits of an abusive or successive habeas petition. 511 U.S. ——, 114 S.Ct. 1368, 128 L.Ed.2d 45 (1994).

In *Kuhlmann v. Wilson*, the Court examined when a federal court could entertain a successive habeas petition. 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). A plurality of the Court determined that the " 'ends of justice' " required a district court to entertain the merits of an otherwise defaulted petition where the prisoner supplemented his constitutional claim with a showing of factual innocence. *Id.*, at 454, 106 S.Ct. at 2627. After citing Judge Friendly's definition of factual innocence, the plurality summarily determined that the District Court should not have entertained Wilson's petition because the evidence of guilt in his case had been " 'nearly overwhelming.' " *Id.*, at 455, 106 S.Ct., at 2627.

In *Carrier*, the Court determined that a federal court could not review a procedurally defaulted habeas petition unless the petitioner demonstrated both cause for the default as well as prejudice resulting from the constitutional error. 477 U.S., at 492, 106 S.Ct., at 2647–2650.[5] The *Carrier* Court, however, left open the possibility that in a truly extraordinary case, a federal habeas court might excuse a failure to establish cause and prejudice where " 'a constitutional violation has probably resulted in the conviction of one who is *actually innocent*.' " *Ante*, at 867, quoting 477 U.S., at 496, 106 S.Ct., at 2649 (emphasis added).

In *Sawyer*, we described in some detail the showing of actual innocence required when a habeas petitioner brings an otherwise abusive, successive, or procedurally defaulted claim challenging the imposition of his death sentence, rather than his guilt of the crime. 505 U.S., at ——, 112 S.Ct., at 2517. There

140. Green now also swears that he "called base ... within seconds of Dade hitting the ground." *Id.*, at 123.

4. One problem with this theory is that O'Neal, an undisputed participant in the murder, entered the cafeteria 26 seconds after the guards responded to the distress call. As respondent explained at oral argument: "[I]f you believe that [Green] radioed immediately upon the time of the body falling ... then you look at the videotape, and there is only 26 seconds between the time that that call was supposedly made by Green and the time that O'Neal comes into the cafeteria downstairs, and all of the evidence in this case shows it's impossible for O'Neal, the admitted murderer ... to have run down, ... broken a window, thrown the knife out the window, come back, washed his hands ... and go[ne] down to the cafeteria, *if you hold Green's present statement as controlling, the murder never occurred.*" Tr. of Oral Arg. 30–31 (emphasis added). Thus, as the Court acknowledges, *ante*, at ——, n. 17, there was a delay between the time of the murder and the time that the guards in the cafeteria responded to the distress call.

5. The Court explicitly rejected the contention that "cause need not be shown if actual prejudice is shown," even where the constitutional claims "call[ed] into question the reliability of an adjudication of *legal guilt*." 477 U.S., at 495, 106 S.Ct., at 2649 (emphasis added); see also *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572–1573, 71 L.Ed.2d 783 (1982).

the Court emphasized that innocence of the death penalty, like its "'actual innocence'" counterpart, is "a very narrow exception," and that in order to be "workable it must be subject to determination by relatively objective standards." *Id.*, at ——, 112 S.Ct., at 2520. Thus, we concluded that a habeas petitioner who challenged his sentence in an otherwise defaulted petition must show "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found [the petitioner] eligible for the death penalty." *Id.*, at ——, 112 S.Ct., at 2523.

We have never until today had to similarly flesh out the standard of "actual innocence" in the context of a habeas petitioner claiming innocence of the crime. Thus, I agree that the question of what threshold standard should govern is an open one. As I have said earlier, I disagree with the Court's conclusion that *Carrier*, and not *Sawyer*, provides the proper standard. But far more troubling than the choice of *Carrier* over *Sawyer* is the watered down and confusing version of *Carrier* which is served up by the Court.

As the Court notes, to satisfy *Carrier* a habeas petitioner must demonstrate that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Ante*, at 867 (quoting *Carrier*, 477 U.S., at 496, 106 S.Ct., at 2649). The Court informs us that a showing of "actual innocence" requires a habeas petitioner to "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Ante*, at 867. But this is a classic mixing of apples and oranges. "More likely than not" is a quintessential charge to a finder of fact, while "no reasonable juror would have convicted him in the light of the new evidence" is an equally quintessential conclusion of law similar to the standard that courts constantly employ in deciding motions for judgment of acquittal in criminal cases. The hybrid which the Court serves up is bound to be a source of confusion. Because new evidence not presented at trial will almost always be involved in these claims of actual innocence, the legal standard for judgment of acquittal cannot be bodily transposed for the determination of "actual innocence," but the sensible course would be to modify that familiar standard, see *infra*, at 873–874, rather than to create a confusing hybrid.

In the course of elaborating the *Carrier* standard, the Court takes pains to point out that it differs from the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), for review of the sufficiency of the evidence to meet the constitutional standard of proof beyond a reasonable doubt. Under *Jackson*, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*, at 319, 99 S.Ct., at 2789. This standard requires a solely retrospective analysis of the evidence considered by the jury and reflects a healthy respect for the trier of fact's "responsibility ... to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to the ultimate facts." *Ibid.*

The Court fails to acknowledge expressly the similarities between the standard it has adopted and the *Jackson* standard. A habeas court reviewing a claim of actual innocence does not write on a clean slate. Cf. *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3392, 77 L.Ed.2d 1090 (1983) ("Federal courts are not forums in which to relitigate state trials"); *Herrera v. Collins*, 506 U.S. ——, ——, 113 S.Ct. 853, 869, 122 L.Ed.2d 203 (1993) ("[I]n state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant"); *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977) ("Society's resources have been concentrated at [the state trial] in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens"). Therefore, as the Court acknowledges, a petitioner making a claim of actual innocence under *Carrier* falls short of satisfying his burden if the reviewing court determines that *any* juror reasonably would have found petitioner guilty of the crime. See *Ante*, at ——; cf. *Jackson*, *supra*, 443 U.S., at 318–319, 99 S.Ct., at 2788–2789.

341 The situation presented by a claim of actual innocence in a federal habeas petition is obviously different from that presented in *Jackson* because the habeas court analyzing an "actual innocence" claim is faced with a body of evidence that has been supplemented since the original trial. The reviewing court must somehow predict the effect that this new evidence would have had on the deliberations of reasonable jurors. It must necessarily weigh this new evidence in some manner, and may need to make credibility determinations as to witnesses who did not appear before the original jury. This new evidence, however, is not a license for the reviewing court to disregard the presumptively proper determination by the original trier of fact.

I think the standard enunciated in *Jackson*, properly modified because of the different body of evidence which must be considered, faithfully reflects the language used in *Carrier*. The habeas judge should initially consider the motion on the basis of the written submissions made by the parties. As the Court suggests, habeas courts will be able to resolve the great majority of "actual innocence" claims routinely without any evidentiary hearing. See *ante*, at 866. This fact is important because, as we noted in *Sawyer*: "In the every day context of capital penalty proceedings, a federal district judge typically will be presented with a successive or abusive habeas petition a few days before, or even on the day of, a scheduled execution, and will have only a limited time to determine whether a petitioner has shown that his case falls within the 'actual innocence' exception if such a claim is made." 505 U.S., at ——, 112 S.Ct., at 2520.

But in the highly unusual case where the district court believes on the basis of written submissions that the necessary showing of "actual innocence" may be made out, it should conduct a limited evidentiary hearing at which the affiants whose testimony the Court believes to be crucial to the showing of actual innocence are present and may be cross examined as to veracity, reliability, and all of the other elements ~~which~~ that affect the 342 weight to be given the testimony of a witness. After such a hearing, the district court would be in as good a position as possible to make the required determination as to the showing of actual innocence.

The present state of our habeas jurisprudence is less than ideal in its complexity, but today's decision needlessly adds to that complexity. I believe that by adopting the *Sawyer* standard both for attacks on the sentence and on the judgment of conviction, we would take a step in the direction of simplifying this jurisprudence. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, ——, 112 S.Ct. 1715, 1716, 118 L.Ed.2d 318 (1992) (noting the importance of uniformity in the law of habeas corpus). The *Sawyer* standard strikes the proper balance among the State's interest in finality, *McCleskey*, 499 U.S., at 491–492, 111 S.Ct., at 1468–1469, the federal courts' respect for principles of federalism, see, *e.g.*, *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 1074, 103 L.Ed.2d 334 (1989) (plurality opinion), and "the ultimate equity on the prisoner's side—a sufficient showing of actual innocence," *Withrow v. Williams*, 507 U.S. ——, ——, 113 S.Ct. 1745, 1757, 123 L.Ed.2d 407 (1993) (O'CONNOR, J., concurring in part and dissenting in part). The Court of Appeals fully analyzed petitioner's new evidence and determined that that petitioner fell way short of " 'show[ing] by clear and convincing evidence [that] no reasonable juror would find him [guilty of murder].' " 11 F.3d 738, 743 (CA8 1993) (quoting *Sawyer*, *supra*, 505 U.S., at ——, 112 S.Ct., at 2523). I agree and therefore would affirm.

But if we are to adopt the *Carrier* standard, it should not be the confusing exegesis of that standard contained in the Court's opinion. It should be based on a modified version of *Jackson v. Virginia*, with a clearly defined area in which the district court may exercise its discretion to hold an evidentiary hearing.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

A federal statute entitled "Finality of Determination"—to be found at § 2244 of Title 28 of the United States Code—specifically 343 addresses the problem of second and subsequent petitions for the writ of habeas corpus. The reader of today's opinion will be unen-

cumbered with knowledge of this law, since it is not there discussed or quoted, and indeed is only cited *en passant*. See *ante*, at 862–863. Rather than asking what the statute says, or even what we have said the statute says, the Court asks only what is the fairest standard to apply, and answers that question by looking to the various semi-consistent standards articulated in our most recent decisions—minutely parsing phrases, and seeking shades of meaning in the interstices of sentences and words, as though a discursive judicial opinion were a statute. I would proceed differently. Within the very broad limits set by the Suspension Clause, U.S. Const., Art. I, § 9, cl. 2, the federal writ of habeas corpus is governed by statute. Section 2244 controls this case; the disposition it announces is plain enough, and our decisions contain nothing that would justify departure from that plain meaning.

Section 2244(b) provides:

"When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

A long sentence, but not a difficult one. A federal district court that receives a second or subsequent petition for the writ of habeas corpus, when a prior petition has been denied on the merits, "need not . . . entertai[n]" (*i.e.* may dismiss) the petition unless it is neither (to use our shorthand terminology) successive nor abusive. See also Habeas Corpus Rule 9(b) ("A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief . . ."). Today, however, the Court obliquely but unmistakably pronounces that a successive or abusive petition *must* be entertained and may *not* be dismissed so long as the petitioner makes a sufficiently persuasive showing that a "fundamental miscarriage of justice" has occurred. *Ante*, at 861 ("if a petitioner such as Schlup presents [adequate] evidence of innocence . . . the petitioner should be allowed to pass through the gateway and argue the merits"), *ante*, at 863–864.[1] That conclusion flatly contradicts the statute, and is not required by our precedent.

Our earliest cases, from an era before Congress legislated rules to govern the finality of habeas adjudication, held that successive or abusive petitions were "to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought," and that when weighing those considerations the district court could give "controlling weight" to "a prior refusal to discharge on a like application." *Salinger v. Loisel*, 265 U.S. 224, 231, 44 S.Ct. 519, 521, 68 L.Ed. 989 (1924) (successive petition); see also *Wong Doo v. United States*, 265 U.S. 239, 240–241, 44 S.Ct. 524, 525, 68 L.Ed. 999 (1924) (abusive petition). In *Salinger* the Court particularly noted: "Here the prior refusal to discharge [the prisoner] was by a court of coordinate jurisdiction and was affirmed in a considered opinion by a Circuit Court of Appeals. Had the District Court disposed of the later applications on that ground, its discretion would have been well exercised and we should sus-

1. The claim that "the Court does not, and need not, decide whether the fundamental miscarriage of justice exception is a discretionary remedy," *ante*, at 870 (O'CONNOR, J., concurring), is not in my view an accurate description of what the Court's opinion says. Of course the concurrence's merely making the claim causes it to be an accurate description of what the Court today *holds*, since the narrower ground taken by one of the Justices comprising a five-Justice majority becomes the law. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977).

tain its action without saying more." 265 U.S., at 232, 44 S.Ct., at 522. Section 2244 is no more and no less than a codification of this approach. It is one of the disheartening ironies of today's decision that the Court not merely disregards a statute, but in doing so denies district judges the very discretion that the Court itself freely entrusted to them before Congress spoke.

In 1948 Congress for the first time addressed the problem of repetitive petitions by enacting the predecessor of the current § 2244, which provided as follows:

> "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, *and the judge or court is satisfied that the ends of justice will not be served by such inquiry.*" 28 U.S.C. § 2244 (1964 ed.) (emphasis added).

This provision was construed in *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), and (with unimpeachable logic) was held to mean that "[c]ontrolling weight may be given to a denial of a prior application for federal habeas corpus [under 28 U.S.C. § 2254] only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice 346 would not be served by reaching the merits of the subsequent application." *Id.*, at 15, 83 S.Ct., at 1077. Thus there appeared for the first time in our decisions the notion that a habeas court has "*the duty*" to reach the merits of a subsequent petition "if the ends of justice demand," *id.*, at 18–19, 83 S.Ct., at 1079—and it appeared for the perfectly good reason that the statute, as then written, imposed such a duty. And even as to that duty the *Sanders* Court added a "final qualification" that the Court today would do well to remember:

> "The principles governing ... denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits." *Id.*, at 18, 83 S.Ct., at 1079.

Three years after *Sanders*, however, Congress amended § 2244 to establish different finality rules for federal prisoner petitions (filed under § 2255) and state prisoner petitions (filed under § 2254). Section 2244(a), which addresses petitions by federal prisoners, retains the "ends of justice" proviso from the old statute; but § 2244(b) omits it, thus restricting the district courts' *obligation* to entertain petitions by state prisoners to cases where the petition is neither successive nor abusive. One might have expected that this not-so-subtle change in the statute would change our interpretation of it, and that we would modify *Sanders* by holding that a district court could exercise its discretion to give controlling weight to the prior denial—which was of course precisely what *Salinger* envisioned.

Yet when the new version of § 2244(b) was first construed, in *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), a plurality of the Court announced that it would "continue to rely on the reference in *Sanders* to the 'ends of justice,'" 347 477 U.S., at 451, 106 S.Ct., at 2626, and concluded that "the 'ends of justice' require federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Id.*, at 454, 106 S.Ct., at 2627. That conclusion contains two complementary propositions. The first is that a habeas court may *not* reach the merits of a barred claim *unless* actual innocence is shown; this was the actual judgment of the opinion (one cannot say the holding, since the opinion was a mere plurality). See *id.*, at 455, 106 S.Ct., at 2627–2628 (stating that the District Court and Court of Appeals should have dismissed the successive petition be-

cause the petitioner's claim of innocence was merit-less). The second is that a habeas court *must* hear a claim of actual innocence and reach the merits of the petition if the claim is sufficiently persuasive; this was the purest dictum. It is the Court's prerogative to adopt that dictum today, but to adopt it without analysis, as though it were binding precedent, will not do. The *Kuhlmann* plurality opinion lacks formal status as authority, and, as discussed below, no holding of this Court binds us to it. A decision to follow it must be justified by reason, not simply asserted by will.

And if reasons are to be given, justification of the *Kuhlmann* opinion will be found difficult indeed. The plurality's central theory is that "the permissive language of § 2244(b) gives federal courts discretion to entertain successive petitions under some circumstances," so that "[u]nless [the] 'rare instances' [in which successive petitions will be entertained] are to be identified by whim or caprice, district judges must be given guidance for determining when to exercise the limited discretion granted them by § 2244(b)." See 477 U.S., at 451, 106 S.Ct., at 2626. What the plurality then proceeds to do, however, is not to "guide" the discretion, but to eliminate it entirely, dividing the entire universe of successive and abusive petitions into those that *must not* be entertained (where there is no showing of innocence) and those that *must* be entertained (where there 348 is such a showing). This converts a statute redolent of permissiveness ("*need not* entertain") into a rigid command.[2]

The *Kuhlmann* plurality's concern about caprice is met—as it is met for all decisions committed by law to the discretion of lower courts—by applying traditional "abuse of discretion" standards. A judge who dismisses a successive petition because he misconceives some question of law, because he detests the petitioner's religion, or because he would rather play golf, may be reversed. A judge who dismisses a successive petition because it is the petitioner's twenty-second, rather than his second, because its "only purpose is to vex, harass, or delay," *Sanders*, 373 U.S., at 18, 83 S.Ct., at 1078, or because the constitutional claims can be seen to be frivolous on the face of the papers—for any of the numerous considerations that have "a *rational* bearing on the propriety of the discharge sought," *Salinger*, 265 U.S., at 231, 44 S.Ct., at 521 (emphasis added)—may not be commanded to reach the merits because "the ends of justice" require. Here as elsewhere in the law, to say that a district judge may not abuse his discretion is merely to say that the action in question (dismissing a successive petition) may not be done without considering relevant factors and giving a "justifying reason," *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). See also *American Dredging Co. v. Miller*, 510 U.S. ——, ——, 114 S.Ct. 981, ——, 127 L.Ed.2d 285 (1994). It is a failure of logic, and an arrogation of authority, to "guide" that discretion by holding that what Congress authorized the district court to do may not be done at all.

The Court's assumption that the requirement imposed by the *Kuhlmann* plurality should be taken as law can find no support in our subsequent decisions. To be sure, some cases restate the supposed duty in the course of historical surveys of the area. See, *e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 495, 111 S.Ct. 1454, 1471, 113 L.Ed.2d 517 (1991) 349 ("*Kuhlmann* ... required federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of factual innocence' "). But if we are to lavish upon the verbiage of our opinions the detailed attention more appropriately reserved for the statute itself, more of the cases (and some of the *same* cases) have described the miscarriage-of-justice doctrine as a rule of permission rather than a rule of obligation. See, *e.g.*, *Sawyer v. Whitley*, 505 U.S. ——, ——, 112 S.Ct. 2514, 2519, 120 L.Ed.2d 269 (1992) ("[*Kuhlmann* held that] the miscarriage of justice exception would *allow* successive claims to be heard"); *McCleskey*, 499 U.S., at 494, 111 S.Ct., at 1470 ("[f]ederal courts re-

2. The present case does not, of course, present the question whether the *Kuhlmann* plurality was wrong to identify a category of petitions that *must not* be entertained—a disposition that is at least compatible with the text of § 2244(b).